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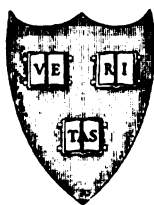
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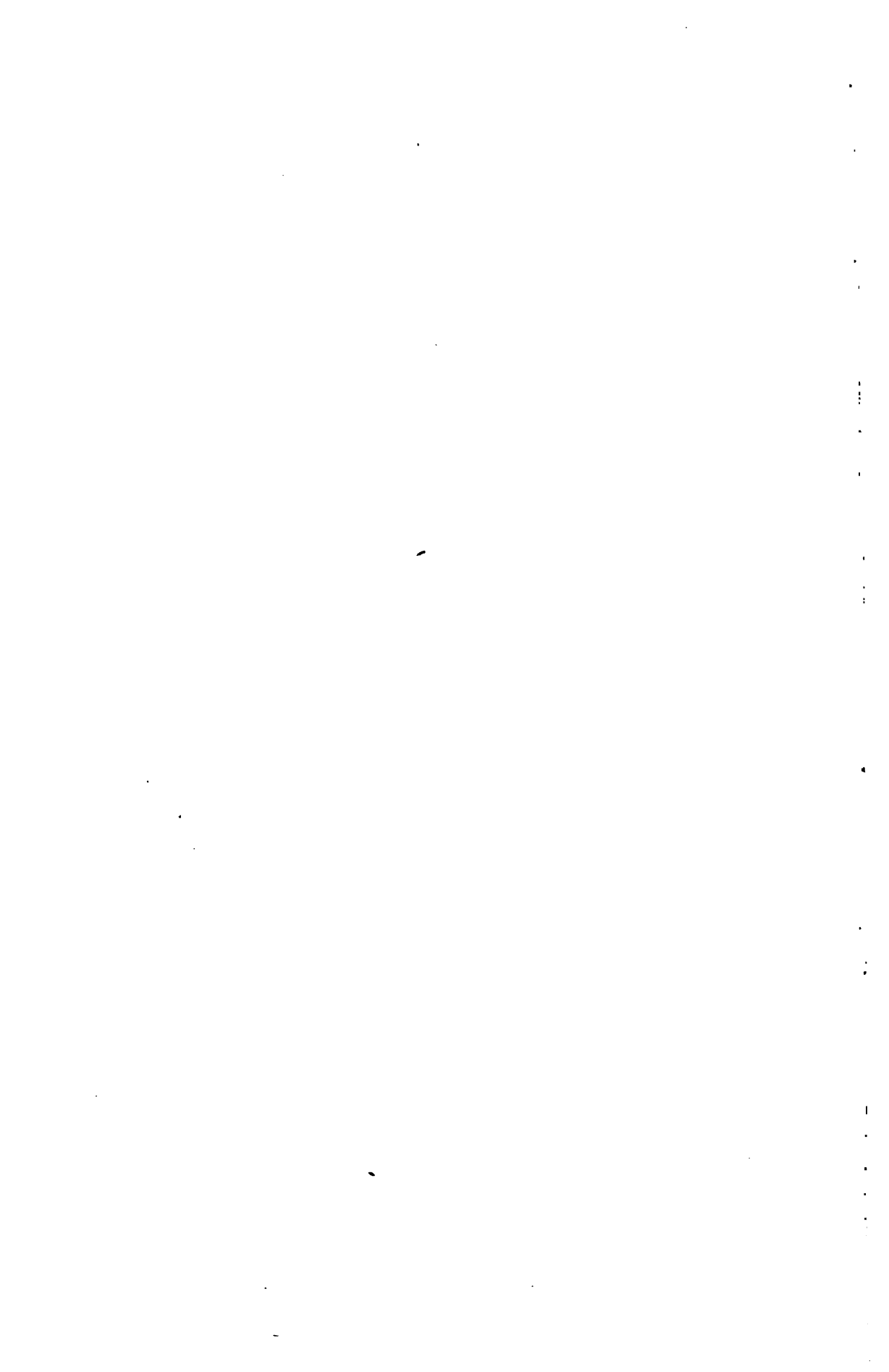


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# TABLE OF ABBREVIATIONS.

Abb. Adm.....Abbott's Admiralty (U. S.)  
 Abb. Dec.....Abbott's Decisions (N. Y.)  
 Abb. N. C.....Abbott's New Cases (N. Y.)  
 Abbott's Law Dict.....Abbott's Law Dictionary.  
 Abb. Prac.....Abbott's Practice (N. Y.)  
 Abb. Prac. (N. S.)...Abbott's Practice, New Series (N. Y.)  
 Abb. Shipp.....Abbott on Shipping.  
 Abb. (U. S.).....Abbott's United States.  
 Abr. ....Abridgment.  
 Adams .....Adams (N. H.)  
 Adams, Eq.....Adams' Equity.  
 Add. ....Addams' Ecclesiastical Reports.  
 Add. ....Addison (Pa.)  
 Add. Cont. ....Addison on Contracts.  
 Add. Ecc.....Addams' Ecclesiastical Reports.  
 Add. Torts .....Addison on Torts.  
 Adol. & E.....Adolphus and Ellis' English King's Bench Reports.  
 Adol. & E. (N. S.)...Adolphus and Ellis' English Queen's Bench Reports, New Series.  
 Aik. Dig.....Aikin's Digest of Laws (Ala.)  
 Aikens .....Aikens (Vt.)  
 A. K. Marsh.....A. K. Marshall (Ky.)  
 Ala. ....Alabama.  
 Alb. Law J.....Albany Law Journal.  
 Allen .....Allen (Mass.)  
 Allison's Am. Dict...Allison's American Dictionary.  
 Amb. ....Ambler's English Chancery Reports.  
 Am. Bankr. Reg....National Bankruptcy Register (U. S.)  
 Am. Bankr. Rep....American Bankruptcy Reports.  
 Am. Dec.....American Decisions.  
 Am. Ed.....American Edition.  
 Am. Enc. Dict.....American Encyclopedic Dictionary.  
 Amend. ....Amendment.  
 Am. Eng. Enc. Law..American and English Encyclopedia of Law.  
 Am. Ins.....Arnold on Marine Insurance.  
 Am. Law J.....American Law Journal.  
 Am. Law Rec.....American Law Record (Cin.)  
 Am. Law Reg. (N. S.) ..... American Law Register, New Series.  
 Am. Law Reg. (O. S.) ..... American Law Register, Old Series.  
 Am. Law Rev.....American Law Review.  
 Am. Law T. Rep...American Law Times Reports.  
 Am. Lead. Cas....American Leading Cases (Hare & Wallace's).  
 Amos & F. Fixt...Amos and Ferard on Fixtures.  
 Am. Reg.....American Law Register.  
 Am. Rep.....American Reports.  
 Am. St. Rep.....American State Reports.  
 Am. & Eng. Dec. Eq..American and English Decisions in Equity.  
 Am. & Eng. Enc. Law ..... American and English Encyclopedia of Law.

Am. & Eng. Ry. Cas.. American and English Railway Cases.  
 And. Law Dict.... Anderson's Law Dictionary.  
 Ang. Car.....Angell on Carriers.  
 Ang. Highw.....Angell & Durfee on Highways.  
 Ang. Ins.....Angell on Insurance.  
 Ang. Lim.....Angell on Limitation of Actions.  
 Ang. Tide Waters.. Angell on Tide Waters.  
 Ang. & A. Corp.... Angell and Ames on Corporations.  
 Ann. ....Queen Anne (as 8 Ann. c. 19).  
 Ann. Code.....Annotated Code.  
 Ann. Codes & St... Bellinger and Cotton's Annotated Codes and Statutes (Or.)  
 Ann. St.....Annotated Statutes.  
 Ann. St. Ind. T.... Annotated Statutes of Indian Territory.  
 Anstr. ....Anstruther's English Exchequer Reports.  
 Anth. N. P.....Anthon's Nisi Prius Reports (N. Y.)  
 App. ....Appleton (Me.)  
 App. Cas.....Appeal Cases, English Law Reports.  
 App. D. C.....Appeal Cases (D. C.)  
 App. Div.....Appellate Division (N. Y.)  
 Arch. Cr. Pl.....Archbold's Criminal Pleading.  
 Arch. N. P.....Archbold's Law of Nisi Prius.  
 Ariz. ....Arizona.  
 Ark. ....Arkansas.  
 Arn. Ins.....Arnold's Marine Insurance.  
 Ashm. ....Ashmead (Pa.)  
 Atk. ....Atkyns' English Chancery Reports.  
 Atl. ....Atlantic Reporter.

## B

Bac. Abr. ....Bacon's Abridgment.  
 Bac. Ins.....Bacon on Benefit Societies and Life Insurance.  
 Bac. Max.....Bacon's Maxims of the Law.  
 Bacon, Ben. Soc... Bacon on Benefit Societies and Life Insurance.  
 Bail. ....Bailey (S. C.)  
 Bailey .....Bailey (S. C.)  
 Bailey, Eq.....Bailey's Equity (S. C.)  
 Baldw. ....Baldwin (U. S.)  
 Ballinger's Ann. Codes & St.....Ballinger's Annotated Codes and Statutes (Wash.)  
 Bankr. Act.....Bankruptcy Act.  
 Bankr. Form.....Bankruptcy Forms.  
 Ban. & A.....Banning & Arden's Patent Cases (U. S.)  
 Barb. ....Barbour (N. Y.)  
 Barb. (Ark.).....Barber (Ark.)  
 Barb. Ch.....Barbour's Chancery (N. Y.)  
 Barb. Ch. Pr.....Barbour's Chancery Practice.  
 Barb. Cr. Law....Barbour's Criminal Law.  
 Barn. & Adol.....Barneswall and Adolphus' English King's Bench Reports.



Barn. & Ald.....	Barnewall and Alderson's English King's Bench Reports.	Black, Dict.....	Black's Law Dictionary.
Barn. & C.....	Barnewall and Cresswell's English King's Bench Reports.	Blackf. ....	Blackford (Ind.)
Barn. & S.....	Best and Smith's English Queen's Bench Reports.	Black, Interp. Laws..	Black on the Construction and Interpretation of Laws.
Barr .....	Barr (Pa.)	Black, Judg.....	Black on Judgments.
Bates' Ann. St.....	Bates' Annotated Revised Statutes (Ohio).	Black, Law Dict....	Black's Law Dictionary.
Bat. Rev. St.....	Battle's Revisal of the Public Statutes of North Carolina.	Bland .....	Bland (Md.)
Batts' Ann. Civ. St..	Batts Annotated Revised Civil Statutes (Tex.)	Blatchf. ....	Blatchford (U. S.)
Bart. ....	Baxter (Tenn.)	Blatchf. Prize Cas..	Blatchford's Prize Cases (U. S.)
Bay .....	Bay (S. C.)	Blatchf. & H.....	Blatchford & Howland (U. S.)
Bayley, Bills.....	Bayley on Bills.	Bl. Comm.....	Blackstone's Commentaries on the Laws of England.
Baylies, Sur.....	Baylies on Sureties and Guarantors.	Bliss, Code Pl....	Bliss on Code Pleading.
Beach, Contrib. Neg..	Beach on Contributory Negligence.	Bliss, Life Ins.....	Bliss on Life Insurance.
Beach, Inf.....	Beach on Injunctions.	B. Mon.....	B. Monroe (Ky.)
Beach, Mod. Eq. Jur..	Beach's Commentaries on Modern Equity Jurisprudence.	Bond .....	Bond (U. S.)
Beach, Priv. Corp...	Beach on Private Corporations.	Bosw. ....	Bosworth (N. Y.)
Beasl. ....	Beasley (N. J.)	Bos. & P.....	Bosanquet and Puller's English Common Pleas Reports.
Beav. ....	Beavan's English Rolls Court Reports.	Bos. & P. (N. R.)..	Bosanquet and Puller's New Reports, English Common Pleas.
Beavan, Ch.....	Beavan's English Rolls Court Reports.	Bouv. Inst.....	Bouvier's Institutes of American Law.
Bee .....	Bee (U. S.)	Bouv. Law Dict....	Bouvier's Law Dictionary.
Bell, Comm.....	Bell's Commentaries on the Law of Scotland.	Bradf. Sur. ....	Bradford's Surrogate (N. Y.)
Ben. ....	Benedict (U. S.)	Bradw. ....	Bradwell (Ill.)
Benj. Sales.....	Benjamin on Sales.	Branch .....	Branch (Fla.)
Benn. ....	Bennett (Cal.)	Brandt, Sur.....	Brandt on Suretyship and Guaranty.
Benth. Jud. Ev....	Bentham's Judicial Evidence.	Brayt. ....	Rayton (Vt.)
Best, Ev.....	Best on Evidence.	Breese .....	Breese (Ill.)
Best & S.....	Best and Smith's English Queen's Bench Reports.	Brev. ....	Brevard (S. C.)
Bibb .....	Bibb (Ky.)	Brewst. ....	Brewster (Pa.)
Bid. Ins.....	Biddle on Insurance.	Brick. Dig.....	Brickell's Digest (Ala.)
Bid. War. Sale Chat..	Biddle on Warranties in Sale of Chattels.	Brightly, Dig.....	Brightly's Analytical Digest of the Laws of the United States.
Big. ....	Bignell's Reports (India).	Brightly, Elect. Cas..	Brightly's Leading Election Cases (Pa.)
Bigelow, Estop....	Bigelow on Estoppel.	Brightly, N. P.....	Brightly's Nisi Prius Reports (Pa.)
Bigelow, Lead. Cas..	Bigelow's Leading Cases on Bills and Notes, Torts, or Wills.	Bro. C. C.....	Brown's English Chancery Cases or Reports.
Bin. ....	Binney (Pa.)	Bro. Civ. Law.....	Browne's Civil and Admiralty Law.
Bing. ....	Bingham's English Common Pleas Reports.	Brock. ....	Brockenbrough (U. S.)
Bing. N. C.....	Bingham's New Cases, English Common Pleas.	Brock. & H.....	Brockenbrough & Holmes (Va.)
Bish. Cont.....	Bishop on Contracts.	Brod. & B.....	Broderip & Bingham's English Common Pleas Reports.
Bish. Cr. Law.....	Bishop on Criminal Law.	Brooke, Abr.....	Brooke's Abridgment.
Bish. Cr. Proc.....	Bishop on Criminal Procedure.	Broom's Com. Law..	Broom's Commentaries on the Common Law.
Bish. Eq.....	Bispham's Principles of Equity.	Brown, Adm.....	Brown's Admiralty (U. S.)
Bish. Mar., Div. & Sep. ....	Bishop on Marriage, Divorce, and Separation.	Brown, Ch.....	Brown's English Chancery Reports.
Bish. Mar. & Div...	Bishop on Marriage and Divorce.	Browne .....	Browne (Pa.)
Bish. New Cr. Law..	Bishop's New Criminal Law.	Browne, Jud. Interp..	Browne's Judicial Interpretation of Common Words and Phrases.
Bish. New Cr. Prac..	Bishop's New Criminal Procedure.	Browne's Roman Law .....	Brown's Epitome and Analysis of Saligny's Treatise on Obligations in Roman Law.
Bish. St. Crimes....	Bishop on Statutory Crimes.	Browne, St. Frauds..	Browne on Statute of Frauds.
Bisp. Eq.....	Bispham's Principles of Equity.	Brunner, Col. Cas...	Brunner's Collected Cases (U. S.)
Biss. ....	Bissell (U. S.)	Bull. N. P.....	Buller's Law of Nisi Prius.
Bissett, Est.....	Bisset on Estates for Life.	Bulst. ....	Bulstrode's English King's Bench Reports.
Bl. ....	Henry Blackstone's English Common Pleas Reports.	Bump. Fraud. Conv..	Bump on Fraudulent Conveyances.
Black .....	Black (U. S.)	Burge, Sur.....	Burge on Suretyship.
Black. Com.....	Blackstone's Commentaries on the Laws of England.	Burn. ....	Burnett (Wis.)
Black, Const. Law..	Black on Constitutional Law.	Burn, J. P.....	Burn's Justice of the Peace.

# TABLE OF ABBREVIATIONS.

v

**Burns' Ann. St.**.... Burns' Annotated Statutes (Ind.)  
**Burns' Rev. St.**.... Burns' Annotated Statutes (Ind.)  
**Burr.** ..... Burrows' English King's Bench Reports.  
**Burrill, Assignm.**.... Burrill on Assignments.  
**Burrill, Circ. Ev.**.... Burrill on Circumstantial Evidence.  
**Burr. L. Dict.**.... Burrill's Law Dictionary.  
**Burr. Pr.**..... Burrill's New York Practice.  
**Burt. Real Prop.**.... Burton on Real Property.  
**Busb.** ..... Busbee (N. C.)  
**Busb. Eq.**..... Busbee's Equity (N. C.)  
**Busb.** ..... Bush (Ky.)  
**B. & Ald.**..... Barnewall and Alderson's English King's Bench Reports.  
**B. & C.**..... Barnewall and Cresswell's English King's Bench Reports.  
**B. & C. Comp.**.... Bellinger and Cotton's Annotated Codes and Statutes (Or.)  
**B. & P.**..... Bosanquet & Fuller's English Common Pleas Reports.

## C

**Cab. & El.**..... Cababé and Ellis' Queen's Bench Reports.  
**Caines** ..... Caiues (N. Y.)  
**Caines, Cas.**..... Caines' Cases (N. Y.)  
**Cal.** ..... California.  
**Call** ..... Call (Va.)  
**Calvin, Lex.**..... Calvin's Lexicon Juridicum.  
**Calv. Parties.**.... Calvert's Parties to Suits in Equity.  
**Camp.** ..... Campbell's English Nisi Prius Reports.  
**Cam. & N.**..... Cameron & Norwood's Conference (N. C.)  
**Car.** ..... Carolus (as 22 & 23 Car. II).  
**Car. Law Repos.**.... Carolina Law Repository (N. C.)  
**Carr. & M.**..... Carrington and Marshman's English Nisi Prius Reports.  
**Cart.** ..... Carter (Ind.)  
**Carv. Carr.**..... Carver's Treatise on the Law Relating to the Carriage of Goods by Sea.  
**Car. & K.**..... Carrington and Kirwan's English Nisi Prius Reports.  
**Car. & P.**..... Carrington & Payne's English Nisi Prius Reports.  
**Casey** ..... Casey (Pa.)  
**C. B.** ..... English Common Bench Reports (Manning, Granger & Scott).  
**C. B. (N. S.)**..... English Common Bench Reports, New Series, by John Scott.  
**C. C. A.**..... Circuit Court of Appeals (U. S.)  
**C. E. Green.**..... C. E. Green (N. J.)  
**Cent. Dict.**..... Century Dictionary.  
**Cent. Law J.**..... Central Law Journal, St. Louis, Mo.  
**Chand.** ..... Chandler (Wis.)  
**Chan. Sentinel** .... Chancery Sentinel (N. Y.)  
**Ch. App.**..... Chancery Appeal Cases, English Law Reports.  
**Charlt., R. M.**..... R. M. Charlton (Ga.)  
**Charlt., T. U. P.**.... T. U. P. Charlton (Ga.)  
**Chase** ..... Chase (U. S.)  
**Chase, Steph. Dig. Ev.** ..... Chase on Stephens' Digest of Evidence.

**Ch. Cas.**..... English Cases in Chancery.  
**Ch. Div.**..... Chancery Division, English Law Reports.  
**Chest. Co. Rep.**.... Chester County Reporter (Pa.)  
**Cheves** ..... Cheves (S. C.)  
**Cheves, Eq.**..... Cheves' Equity (S. C.)  
**Chl. Leg. N.**..... Chicago Legal News (Ill.)  
**Chip., D.**..... D. Chipman (Vt.)  
**Chip., N.**..... N. Chipman (Vt.)  
**Chit. Bills** ..... Chitty on Bills.  
**Chit. Bl. Comm.**.... Chitty's Edition of Blackstone's Commentaries.  
**Chit. Cont.**..... Chitty on Contracts.  
**Chit. Cr. Law** .... Chitty's Criminal Law.  
**Chit. Gen. Pr.**.... Chitty's General Practice.  
**Chit. Pl.**..... Chitty on Pleading.  
**Chit. Pr.**..... Chitty's General Practice.  
**Chitty** ..... Chitty on Bills.  
**Chitty, Bl. Comm.**.... Chitty's Edition of Blackstone's Commentaries..  
**Ch. Pl.** ..... Chitty on Pleading.  
**Cin. R.**..... Cincinnati Superior Court Reports (Ohio)  
**Cin. Super. Ct. Rep'r** ..... Cincinnati Superior Court Reporter (Ohio)  
**Cir. Ct. Dec.**..... Circuit Decisions (Ohio)  
**Cir. Ct. R.**..... Circuit Court Reports (Ohio)  
**City Ct. R.**..... City Court Reports (N. Y.)  
**City Ct. R. Supp.**.... City Court Reports, Supplement (N. Y.)  
**City H. Rec.**..... City Hall Recorder (N. Y.)  
**Civ. Code** ..... Civil Code.  
**Civ. Code Practice**.. Civil Code of Practice.  
**Civ. Prac. Act.**.... Civil Practice Act.  
**Civ. Proc. R.**..... Civil Procedure Reports (N. Y.)  
**C. L.**..... English Common Law Reports (American Reprint).  
**Clancy, Husb. & W.**.. Clancy on Husband and Wife.  
**Clark** ..... Clark (Pa.)  
**Clarke** ..... Clarke (Iowa)  
**Clarke, Ch.**..... Clarke's Chancery (N. Y.)  
**Clark & F.**..... Clark and Finnelly's House of Lords Reports.  
**Clay's Dig.**..... Clay's Digest of Laws of Alabama.  
**Cleve. Law Rec.**.... Cleveland Law Recorder (Ohio)  
**Cleve. Law Rep.**.... Cleveland Law Reporter (Ohio)  
**Cliff.** ..... Clifford (U. S.)  
**Co.** ..... Coke's English King's Bench Reports.  
**Cobbey's Ann. St.**.. Cobbey's Annotated Statutes (Neb.)  
**Code Civ. Proc.**.... Code of Civil Procedure.  
**Code Cr. Proc.**.... Code of Criminal Procedure.  
**Code Gen. Laws**.... Code of General Laws.  
**Code Prac.**..... Code of Practice.  
**Code Proc.**..... Code of Procedure.  
**Code Pub. Gen. Laws** ..... Code of Public General Laws.  
**Code Pub. Loc. Laws** ..... Code of Public Local Laws.  
**Code R. (N. S.)**.... Code Reports, New Series (N. Y.)  
**Code Rep.**..... Code Reporter (N. Y.)  
**Code Supp.**..... Supplement to the Code.  
**Co. Inst.**..... Coke's Institutes.  
**Coke** ..... Coke's English King's Bench Reports.  
**Cold.** ..... Coldwell (Tenn.)  
**Colem. Cas.**..... Coleman's Cases (N. Y.)  
**Colem. & C. Cas.**.. Coleman & Caines' Cases (N. Y.)  
**Co. Litt.**..... Coke on Littleton.  
**Collier, Partn.**.... Collyer on Partnership.  
**Colly.** ..... Collyer's English Chancery Cases.  
**Colo.** ..... Colorado.  
**Colo. App.**..... Colorado Appeals Reports.

Colo. Law Rep.....	Colorado Law Reporter.	Cro. Car.....	Croke's English King's Bench Reports Charles I (3 Cro.)
Colq. Rom. Civ. Law .....	Colquhoun's Roman Civil Law.	Cro. Cas.....	Croke's English King's Bench Reports Charles I (3 Cro.)
Com. Dig.....	Comyn's Digest of the Laws of England.	Cro. Eliz.....	Croke's English King's Bench Reports Elizabeth (1 Cro.)
Comm. ....	Commentaries.	Cro. Jac.....	Croke's English King's Bench Reports James (Jacobus) I (2 Cro.)
Com. on Con.....	Comyn's Law of Contracts.	Crompt. Just.....	Crompton's Office of Justice of the Peace.
Comp. Laws.....	Compiled Laws.	Crompt., M. & R....	Crompton, Meeson, and Roscoe's English Exchequer Reports.
Comp. St.....	Compiled Statutes.	Crompt. ....	Star Chamber Cases by Crompton.
Const. ....	Comstock (N. Y.)	Crompt. & J.....	Crompton & Jarvis' English Exchequer Reports.
Comyn .....	Comyn's English King's Bench Reports.	Cr. Prac. Act ....	Criminal Practice Act.
Conf. R.....	Conference Reports (N. O.)	Cr. Proc. Act ....	Criminal Procedure Act.
Cong. ....	Congress.	Cr. St.....	Criminal Statutes.
Conn. ....	Connecticut.	Cruise's Dig.....	Cruise's Digest of the Law of Real Property.
Consol. St.....	Consolidated Statutes.	Ct. Cl.....	Court of Claims (U. S.)
Const. ....	Constitution.	Curt. ....	Curteis English Ecclesiastical Reports.
Const. Amend.....	Amendment to Constitution.	Curt. ....	Curtis (U. S.)
Const. U. S. Amend..	Amendment to the Constitution of the United States.	Cush. ....	Cushing (Mass.)
Con. Sur.....	Connolly's Surrogate (N. Y.)	Cush. Law & Prac. Leg. Assem.....	Cushing's Law and Practice of Legislative Assemblies.
Cooke .....	Cooke (Tenn.)	Cushm. ....	Cushman (Miss.)
Cooke, Ins.....	Cooke on Life Insurance.	Cyc. ....	Cyclopedia of Law and Procedure.
Cook's Pen. Code..	Cook's Penal Code (N. Y.)	Cyc. Law & Proc...	Cyclopedia of Law and Procedure.
Cook Stock, Stockh. & Corp. Law.....	Cook on Stock, Stockholders, and General Corporation Law.	Cyclop. Dict.....	Shumaker & Longsdorf's Cyclopedic Dictionary.
Cooley, Const. Law..	Cooley's Constitutional Law.	C. & K.....	Carrington & Kirwan's English Nisi Prius Reports.
Cooley, Const. Lim..	Cooley's Constitutional Limitations.	C. & P.....	Carrington and Payne's English Nisi Prius Reports.
Cooley, Tax'n ....	Cooley on Taxation.	D	
Coolie, Torts.....	Cooley on Torts.	Dak. ....	Dakota.
Coop. Eq. Pl.....	Cooper's Equity Pleading.	Dall. (Pa.).....	Dallas (Pa.)
Copp, Pub. Land Laws .....	Copp's United States Public Land Laws.	Dall. (U. S.).....	Dallas (U. S.)
Co. Rep.....	Coke's English King's Bench Reports.	Dall. Dig.....	Dallam's Digest and Opinions (Tex.)
Corn. Deeds .....	Cornish on Purchase Deeds.	Dall. Laws.....	Dallas' Laws (Pa.)
Cornish, Purch. Deeds .....	Cornish on Purchase Deeds.	Daly .....	Daly (N. Y.)
Cow. ....	Cowen (N. Y.)	Dana .....	Dana (Ky.)
Cow. Cr. Rep.....	Cowen's Criminal Reports (N. Y.)	Dane's Abr.....	Dane's Abridgment of American Law.
Cowp. ....	Cowper's English King's Bench Reports.	Daniell, Ch. Pl. & Prac. ....	Daniell's Chancery Pleading and Practice.
Cox .....	Cox (Ark.)	Daniell, Ch. Prac...	Daniell's Chancery Pleading and Practice.
Cox .....	Cox's English Chancery Cases.	Daniel, Neg. Inst...	Daniel's Negotiable Instruments.
Cox, C. C.....	Cox's English Criminal Cases.	Davis, Cr. Law....	Davis' Criminal Law.
Cox, Cr. Cas.....	Cox's English Criminal Cases.	Dawson's Code.....	Dawson's Code of Civil Procedure (Colo.)
Coxe .....	Coxe (N. J.)	Day .....	Day (Conn.)
C. P. Div.....	Common Pleas Division, English Law Reports.	D. C.....	District of Columbia.
C. P. Rep.....	Common Pleas Reporter (Pa.)	D. Chip.....	D. Chipman (Vt.)
Crabbe .....	Crabbe (U. S.)	Deac. Cr. Law....	Deacon on Criminal Law of England.
Crabb, Eng. Synonyms .....	Crabb's English Synonyms.	Deadly .....	Deadly (U. S.)
Cr. Act.....	Criminal Act.	Dears. & B. Crown Cas. ....	Dearsly and Bell's English Crown Cases.
Craig, Dict.....	Craig's Etymological, Technical, and Pronouncing Dictionary.	De Gex, F. & J....	De Gex, Fisher & Jones' English Chancery Reports.
Craig & P.....	Craig and Phillips' English Chancery Reports.		
Cranch .....	Cranch (U. S.)		
Cranch, C. C.....	Cranch's Circuit Court (U. S.)		
Cranch, Pat. Dec..	Cranch's Patent Decisions (U. S.)		
Cr. Cir. Comp.....	Crown Circuit Companion (Irish).		
Cr. Code.....	Criminal Code.		
Cr. Law Mag.....	Criminal Law Magazine (N. J.)		
C. Rob. Adm.....	Charles Robinson's English Admiralty Reports.		

De Gex, J. & S.....	De Gex, Jones, and Smith's English Chancery Reports.	Edm. Sel. Cas.....	Edmonds' Select Cases (N. Y.)
De Gex, M. & G....	De Gex, Macnaghten, and Gordon's English Chancery Reports.	E. D. Smith.....	E. D. Smith (N. Y.)
Del. ....	Delaware.	Edw. ....	King Edward (as 4 Edw. I.)
Del. Ch.....	Delaware Chancery.	Edw. Bailm.....	Edwards on the Law of Bailments.
Del. Co. R.....	Delaware County Reports (Pa.)	Edw. Bills & N....	Edwards on Bills and Notes.
Del. Term R.....	Delaware Term Reports.	Edw. Brok. & F....	Edwards on Factors and Brokers.
Dem. Sur.....	Demarest's Surrogate (N. Y.)	Edw. Ch.....	Edwards' Chancery (N. Y.)
Denio .....	Denio (N. Y.)	El., Bl. & El.....	Ellis, Blackburn, and Ellis' English Queen's Bench Reports.
Denison, Cr. Cas....	Denison's English Crown Cases.	Elia. ....	Queen Elizabeth (as 13 Elia.).
Desaus. ....	Desaussure's Equity (S. C.)	Elliot, Deb.....	Elliot's Debates on the Federal Constitution.
Desty, Tax'n.....	Desty on Taxation.	Elliot, Supp.....	Elliot Supplement to the Indiana Revised Statutes.
Dev. ....	Devereux (N. C.)	Elliot, Roads & S..	Elliot on Roads and Streets.
Dev. Ct. Cl.....	Devereux's Court of Claims (U. S.)	Elliot, R. R.....	Elliot on Railroads.
Dev. Eq.....	Devereux's Equity (N. C.)	Ellis & B.....	Ellis and Blackburn's English Queen's Bench Reports.
Devl. Deeds.....	Devlin on Deeds.	Elm. Dig.....	Elmer's Digest of Laws (N. J.)
Dev. & B.....	Devereux & Battle (N. C.)	Elph. Interp. Deeds..	Elphinstone's Rules for Interpretation of Deeds.
Dev. & B. Eq.....	Devereux & Battle's Equity (N. C.)	El. & Bl.....	Ellis and Blackburn's English Queen's Bench Reports.
Dicey, Dom.....	Dicey's Law of Domicil.	E. L. & Eq.....	English Law and Equity (American Reprint).
Dick. ....	Dickinson (N. J.)	Emerig. Ins.....	Emerigon on Insurance.
Dickens .....	Dickens' English Chancery Reports.	Enc. Amer.....	Encyclopædia Americana.
Dict. ....	Dictionary.	Enc. Brit.....	Encyclopædia Britannica.
Dig. ....	Digest.	Enc. Ins. U. S....	Insurance Year-Book.
Dig. ....	English's Digest of the Statutes (Ark.)	Enc. Law.....	American and English Encyclopædia of Law.
Dig. Fla.....	Thompson's Digest of Laws (Fla.)	Enc. Pl. & Prac..	Encyclopedia of Pleading and Practice.
Dig. L. K.....	Littell and Swigert's Digest of Statute Law (Ky.)	End. Interp. St....	Endlich's Commentaries on the Interpretation of Statutes.
Dig. St.....	English's Digest of the Statutes (Ark.)	Endlich, Bldg. Ass'ns .....	Endlich on Building Associations.
Dill. ....	Dillon (U. S.)	Eng. ....	English (Ark.)
Dillon, Mun. Corp...	Dillon on Municipal Corporations.	Eng. C. L.....	English Common Law Reports (American Reprint).
Disn. ....	Disney (Ohio)	Eng. Ecc. R.....	English Ecclesiastical Reports (American Reprint).
Dom. Civ. Law.....	Domat's Civil Law.	Eng. Law & Eq....	English Law and Equity Reports (American Reprint).
Doug. ....	Douglas' English King's Bench Reports.	Eq. ....	Equity.
Doug. ....	Douglass (Mich.)	Eq. Cas. Abr.....	English Equity Cases Abridged.
Dowl. ....	Dowling's English Bail Court Cases.	Erak. Inst.....	Erskine's Institutes of the Law of Scotland.
Dowl. & L.....	Dowling & Lowndes' English Bail Court Reports.	Erak. Speeches....	Erskine's Speeches.
Dowl. & R.....	Dowling and Ryland's English King's Bench Reports.	Escrache, Dict.....	Escrache's Dictionary of Jurisprudence.
Drake, Attachm....	Drake on Attachment.	Ev. ....	Evidence.
Dud. ....	Dudley (Ga.)	Ex. ....	English Exchequer Reports (Welsby, Hurlstone & Gordon).
Dud. Eq.....	Dudley's Equity (S. C.)	Exch. ....	English Exchequer Reports (Welsby, Hurlstone & Gordon).
Dud. Law.....	Dudley's Law (S. C.)	Ex. Sess. ....	Extra Session.
Duer .....	Duer's Superior Court (N. Y.)	E. & B.....	Ellis and Blackburn's English Queen's Bench Reports.
Dup. Jur.....	Duponceau on Jurisdiction of United States Courts.		
Dutch. ....	Dutcher (N. J.)		
Duv. ....	Duvall (Ky.)		
Dyer .....	Dyer's English King's Bench Reports.		

## E

East .....	East's English King's Bench Reports.
East, P. O.....	East's Pleas of the Crown.
Ecc. R.....	English Ecclesiastical Reports.
E. C. L.....	English Common Law Reports (American Reprint).
Ed. ....	Edition.
Eden, Pen. Law....	Eden's Principles of Penal Law.
Eden's Prin. P. L...	Eden's Principles of Penal Law.
Edm. Rev. St.....	Edmonds' Statutes at Large (N. Y.)

## F

Fairf. ....	Fairfield (Me.)
Fearne, Rem.....	Fearne on Contingent Remainders.



Fed. .... Federal Reporter (U. S.)  
 Fed. Cas. .... Federal Cases (U. S.)  
 Fernald, Eng. Synonyms ..... Fernald's English Synonyms.  
 Finch, Law. .... Finch, Sir Henry; a Discourse of Law (1759).  
 Fish. Pat. Cas. .... Fisher's Patent Cases (U. S.)  
 Fish. Pat. Rep. .... Fisher's Patent Reports (U. S.)  
 Fish. Prize Cas. .... Fisher's Prize Cases (U. S.)  
 Fla. .... Florida.  
 Flipp. .... Flippin (U. S.)  
 Fost. .... Foster (N. H.)  
 Foster ..... Foster's English Crown Law or Crown Cases.  
 Fost. & F. .... Foster and Finlason's English Nisi Prius Reports.  
 Freem. .... Freeman (Ill.)  
 Freem. Ch. .... Freeman's Chancery (Miss.)  
 Freem. Judgm. .... Freeman on Judgments.

## G

G. .... King George (as 15 Geo. II).  
 Ga. .... Georgia.  
 Gabb. Cr. Law. .... Gabbett's Criminal Law.  
 Ga. Dec. .... Georgia Decisions.  
 Gale & Whatley Easem. .... Gale and Whatley (afterwards Gale) on Easements.  
 Gall. .... Gallison (U. S.)  
 Gantt's Dig. .... Gantt's (& Caldwell's) Digest of Statutes (Ark.)  
 Gav. & H. Rev. St. .... Gavin and Hord's Revised Statutes (Ind.)  
 Gen. Assem. .... General Assembly.  
 Gen. Laws. .... General Laws.  
 Gen. St. .... General Statutes.  
 Geo. .... King George (as 15 Geo. II).  
 George .... George (Miss.)  
 Gil. .... Gillfillan (Minn.)  
 Gilbert, Ev. .... Gilbert's Law of Evidence.  
 Gild. .... Gildersleeve Reports (N. M.)  
 Gilbert, Tenures. .... Gilbert on Tenures.  
 Gill. .... Gill (Md.)  
 Gillet, Cr. Law. .... Gillett's Treatise on Criminal Law and Procedure in Criminal Cases.  
 Gill & J. .... Gill & Johnson (Md.)  
 Gilman .... Gilman (Ill.)  
 Gilmer .... Gilmer (Va.)  
 Gilp. .... Gilpin (U. S.)  
 Godd. Easem. .... Goddard on Easements.  
 Gould, Pl. .... Gould on the Principles of Pleading in Civil Actions.  
 Gould's Dig. .... Gould's Digest of Laws (Ark.)  
 Gould, Wat. .... Gould on Waters.  
 Grant, Cas. .... Grant's Cases (Pa.)  
 Grant's Dig. .... Gantt's (& Caldwell's) Digest of Statutes (Ark.)  
 Grat. .... Grattan (Va.)  
 Gray. .... Gray (Mass.)  
 Green, C. E. .... C. E. Green (N. J.)  
 Green, Cr. Law R. .... Green's Criminal Law Reports (N. Y.)  
 Green, H. W. .... H. W. Green (N. J.)  
 Green, J. S. .... J. S. Green (N. J.)  
 Greene, G. .... G. Greene (Iowa)  
 Greenl. .... Greenleaf (Me.)  
 Greenl. Cruise, Real Prop. .... Greenleaf's Edition of Cruise's Digest of Real Property.  
 Greenl. Ev. .... Greenleaf on Evidence.  
 Gross, St. .... Gross' Illinois Compiled Laws (or Statutes).

## H

Hagg. .... Haggard's English Admiralty Reports.  
 Hagg. Cons. .... Haggard's English Consistory Reports.  
 Hagg. Ecc. .... Haggard's English Ecclesiastical Reports.  
 Hale, P. C. .... Hale's Pleas of the Crown.  
 Hall ..... Hall's Superior Court (N. Y.)  
 Halleck, Int. Law. .... Halleck's International Law.  
 Hall, Mex. Law. .... Hall's Mexican Law.  
 Halst. .... Halsted (N. J.)  
 Halst. Ch. .... Halsted's Chancery (N. J.)  
 Ham. .... Hammond (Ohio)  
 Ham. Cont. .... Hammon on Contracts.  
 Hand ..... Hand (N. Y.)  
 Handy ..... Handy (Ohio)  
 Har. (Del.) .... Harrington (Del.)  
 Har. (Mich.) .... Harrington (Mich.)  
 Har. (N. J.) .... Harrison (N. J.)  
 Hardin ..... Hardin (Ky.)  
 Hardw. Cas. Temp. .... Cases temp. Hardwicks, by Lee and Hardwicke.  
 Hare ..... Hare's English Vice Chancellors' Reports.  
 Harg. Co. Litt. .... Hargrave's Notes to Coke on Littleton.  
 Harp. .... Harper (S. C.)  
 Harp. Eq. .... Harper's Equity (S. C.)  
 Harris ..... Harris (Pa.)  
 Harrison, Ch. .... Harrison's Chancery Practice.  
 Hart, Dig. .... Hartley's Digest of Laws (Tex.)  
 Har. & G. .... Harris & Gill (Md.)  
 Har. & J. .... Harris & Johnson (Md.)  
 Har. & McH. .... Harris & McHenry (Md.)  
 Hasb. .... Hasbrouck's Reports (Idaho)  
 Hask. .... Haskell (U. S.)  
 Hata. .... Hatsell's Parliamentary Precedents.  
 Haw. .... Hawaiian Reports.  
 Hawes, Jur. .... Hawes on Jurisdiction of Courts.  
 Hawk. .... Hawkins' Pleas of the Crown.  
 Hawkins' Wills. .... Hawkins' Construction of Wills.  
 Hawk. P. C. .... Hawkins' Pleas of the Crown.  
 Hawks ..... Hawks (N. C.)  
 Hayes ..... Hayes' Irish Exchequer Reports.  
 Hayw. (N. C.) .... Haywood (N. C.)  
 Hayw. (Tenn.) .... Haywood (Tenn.)  
 Hayw. & H. .... Hayward & Hazelton (U. S.)  
 Haz. Reg. .... Hazard's Register (Pa.)  
 H. Bl. .... Henry Blackstone's English Common Pleas Reports.  
 Head ..... Head (Tenn.)  
 Heisk. .... Heiskell (Tenn.)  
 Hemp. .... Hempstead (U. S.)  
 Hen. .... King Henry (as 8 Hen. VI).  
 Hen. St. .... Hening's Statutes (Va.)  
 Hen. & M. .... Hening & Munford (Va.)  
 Herm. Chat. Mortg. .... Herman on Chattel Mortgages.  
 Herm. Estop. .... Herman's Law of Estoppel.  
 Hill ..... Hill (N. Y.)  
 Hill. Cont. .... Hilliard on Contracts.  
 Hill. Elem. Law. .... Hilliard's Elements of Law.  
 Hill, Eq. .... Hill's Equity (S. C.)  
 Hilliard, R. R. .... Hilliard on Real Property.  
 Hill, Law. .... Hill's Law (S. C.)  
 Hill's Ann. Codes & Laws ..... Hill's Annotated Codes and General Laws (Or.)

Hill's Ann. St. & Codes ..... Hill's Annotated General Statutes and Codes (Wash.)  
 Hill's Code..... Hill's Annotated General Statutes and Codes (Wash.)  
 Hill & D. Supp..... Hill & Denio, Lator's Supplement (N. Y.)  
 Hilt. .... Hilton (N. Y.)  
 Hil. Term 4, Will. IV. .... Hilary Term 4, William IV.  
 Hil. Torts..... Hilliard on the Law of Torts.  
 H. L. Cas. .... House of Lords' Cases, English.  
 Hobart ..... Hobart's English King's Bench Reports.  
 Hodge, Presb. Law..... Hodge on Presbyterian Law.  
 Hoff. Ch. .... Hoffman's Chancery (N. Y.)  
 Hoff. Land Cas..... Hoffman's Land Cases (U. S.)  
 Holmes ..... Holmes (U. S.)  
 Holt, N. P..... Holt's English Nisi Prius Reports.  
 Holt, Shipp..... Holt on Shipping.  
 Hopk. Ch..... Hopkins' Chancery (N. Y.)  
 Horner's Ann. St... Horner's Annotated Revised Statutes (Ind.)  
 Horner's Rev. St... Horner's Annotated Revised Statutes (Ind.)  
 Horr. & T. Cas. Self-Def. .... Horrihan and Thompson's Cases on Self-Defence.  
 Houst. .... Houston (Del.)  
 Houst. Cr. Cas..... Houston's Criminal Cases (Del.)  
 How. (Miss.)..... Howard (Miss.)  
 How. .... Howard (U. S.)  
 How. Ann. St..... Howell's Annotated Statutes (Mich.)  
 How. Prac..... Howard's Practice (N. Y.)  
 How. Prac. (N. S.).. Howard's Practice, New Series (N. Y.)  
 How. St..... Howell's Annotated Statutes (Mich.)  
 How. & H. St..... Howard and Hutchinson's Statutes (Miss.)  
 Howell, N. P..... Howell's Nisi Prius Reports (Mich.)  
 Howell, St. Tr..... Howell's English State Trials.  
 Hughes (Ky.)..... Hughes (Ky.)  
 Hughes ..... Hughes (U. S.)  
 Hume's Hist. Eng.. Hume's History of England.  
 Humph. .... Humphrey (Tenn.)  
 Hun ..... Hun (N. Y.)  
 Hurd's Rev. St..... Hurd's Revised Statutes (Ill.)  
 Hurl. Bonds..... Hurlstone on Bonds.  
 Hurl. & C..... Hurlstone & Coltman's English Exchequer Reports.  
 Hurl. & G..... Hurlstone and Gordon's Reports (10, 11, English Exchequer Reports).  
 Hurl. & N..... Hurlstone and Norman's English Exchequer Reports.  
 Hutch. Carr..... Hutchinson on Carriers.  
 Hutch. Code..... Hutchinson's Code (Miss.)  
 Hutch. Dig. St..... Hutchinson's Code (Miss.)

## I

Idaho ..... Idaho.  
 Ill. .... Illinois.  
 Ill. App..... Illinois Appellate Court Reports.  
 Imp. Dict..... Imperial Dictionary.  
 Ind. .... Indiana.

Ind. App..... Indiana Appellate Court Reports.  
 Ind. T. .... Indian Territory.  
 Ins. Law J..... Insurance Law Journal (Pa.)  
 Inst. .... Coke's Institutes.  
 Internat. Dict. .... Webster's International Dictionary.  
 Interst. Com. R.... Interstate Commerce Reports.  
 Iowa ..... Iowa.  
 Ired. .... Iredell's Law (N. C.)  
 Ired. Eq. .... Iredell's Equity (N. C.)

## J

Jac. .... King James (as 21 Jac. I).  
 Jac. Law Dict..... Jacob's Law Dictionary.  
 Jagg. Torts..... Jaggard on Torts.  
 Jarm. Wills..... Jarman on Wills.  
 Jeff. .... Jefferson (Va.)  
 Jellett, Cr. Law.... Jellett's Treatise on Criminal Law and Procedure in Criminal Cases.  
 Jeremy, Eq..... Jeremy's Equity Jurisdiction.  
 J. J. Marsh. .... J. J. Marshall (Ky.)  
 John. .... Johnson (N. M.)  
 John. Eng. Ch..... Johnson's English Vice-Chancellors' Reports.  
 Johns. .... Johnson (N. Y.)  
 Johns. Cas. .... Johnson's Cases (N. Y.)  
 Johns. Ch. .... Johnson's Chancery (N. Y.)  
 Johnson's Quarto Dict. .... Johnson's Quarto Dictionary.  
 Jones ..... Jones (Pa.)  
 Jones, Bailm..... Jones on Bailments.  
 Jones, Chat. Mortg... Jones on Chattel Mortgages.  
 Jones, Eq..... Jones' Equity (N. C.)  
 Jones, Law..... Jones' Law (N. C.)  
 Jones, Mortg..... Jones on Mortgages.  
 Jones, Securities.... Jones on Railroad Securities.  
 Jones & S..... Jones & Spencer (N. Y.)  
 Jour. Juris. .... Journal of Jurisprudence.  
 Joyce, Ins..... Joyce on Insurance.  
 J. P. Smith..... J. P. Smith's English King's Bench Reports.  
 J. Scott (N. S.).... English Common Bench Reports, New Series by John Scott.  
 Jud. Repos. .... Judicial Repository (N. Y.)  
 Jur. .... The Jurist, London.  
 Jur. (N. S.)..... The Jurist, New Series, London.  
 Just. Inst..... Institutes of Justinian.

## K

Kan. .... Kansas.  
 Kan. App..... Kansas Appeals.  
 Kay & J..... Kay and Johnson's English Vice Chancellors' Reports.  
 Keb. .... Keble's English King's Bench Reports.  
 Keen ..... Keen's English Rolls Court Reports.  
 Keene, Ch..... Keen's English Rolls Court Reports.  
 Keener, Quasi Cont.. Keener on Quasi Contracts.  
 Kel. .... Sir John Kelyng's English Crown Cases.  
 Kelly ..... Kelly (Ga.)  
 Kent, Comm. .... Kent's Commentaries on American Law.  
 Kern. .... Kernan (N. Y.)  
 Kerr, Inj..... Kerr on Injunctions.  
 Keyes ..... Keyes (N. Y.)  
 Kielway ..... Keliway's English King's Bench Reports.

TABLE OF ABBREVIATIONS.

Kirby ..... Kirby (Conn.)  
 Knight, Mech. Dict. .... Knight's American Mechan-  
 ical Dictionary.  
 Kulp ..... Kulp (Pa.)  
 Ky. .... Kentucky.  
 Kyd ..... Kyd on Bills of Exchange.  
 Kyd, Corp. .... Kyd on Corporations.  
 Ky. Dec. .... Kentucky Decisions.  
 Ky. Law Rep. .... Kentucky Law Reporter.  
 K. & R. .... Kent and Radcliff's Law of  
 New York (Revision of  
 1801).

L

La. .... Louisiana.  
 La. Ann. .... Louisiana Annual.  
 Lack Jur. .... Lackawanna Jurist (Pa.)  
 Lack Leg. N. .... Lackawanna Legal News  
 (Pa.)  
 Lalor, Supp. .... Lalor's Supplement to Hill  
 & Denio's Reports (N. Y.)  
 Lamb. Eir. .... Lambard's Eiranarcha.  
 Lanc. Bar .... Lancaster Bar.  
 Lanc. Law Rev. .... Lancaster Law Review.  
 Lana. .... Lansing (N. Y.)  
 Lana. Ch. .... Lansing's Chancery (N. Y.)  
 Law J. Ch. .... Law Journal, New Series,  
 Chancery.  
 Law J. Q. B. .... Law Journal, New Series,  
 Queen's Bench (English).  
 Law of Trusts (Tiff.  
 & Bul.) .... Tiffany and Bullard on  
 Trusts and Trustees.  
 Law Rep. .... Monthly Law Reporter,  
 Boston, Mass.  
 Lawson, Exp. Ev. .... Lawson on Expert and  
 Opinion Evidence.  
 Lawson, Rights,  
 Rem. & Pr. .... Lawson on Rights, Rem-  
 edies and Practice.  
 Law T. .... English Law Times Re-  
 ports.  
 Law T. (N. S.) .... English Law Times Re-  
 ports, New Series.  
 Ld. Raym. .... Lord Raymond's English  
 King's Bench Reports.  
 Lea ..... Lea (Tenn.)  
 Leach, Cr. Cas. .... Leach's English Crown  
 Cases.  
 Leach's C. L. .... Leach's Club Cases, Lon-  
 don.  
 L. Ed. .... Lawyers' Edition Supreme  
 Court Reports.  
 Lee ..... Lee (Cal.)  
 Leg. Chron. .... Legal Chronicle.  
 Leg. Gaz. .... Legal Gazette (Pa.)  
 Leg. Gaz. R. .... Legal Gazette Reports  
 (Pa.)  
 Leg. Int. .... Legal Intelligencer (Pa.)  
 Leg. News. .... Legal News, Chicago.  
 Leg. Op. .... Legal Opinions.  
 Leg. Rec. Rep. .... Legal Record Reports.  
 Leg. Rep. .... Legal Reporter (Tenn.)  
 Leg. & Ins. Rep. .... Legal & Insurance Re-  
 porter.  
 Lehigh Val. Law  
 Rep. .... Lehigh Valley Law Re-  
 porter.  
 Leigh ..... Leigh (Va.)  
 Leigh & C. .... Leigh and Cave's English  
 Crown Cases.  
 Leon. .... Leonard's English King's  
 Bench Reports.  
 Lev. .... Levin's English King's  
 Bench Reports.  
 Lewin, Cr. Cas. .... Lewin's English Crown  
 Cases Reserved.  
 Lewis, Em. Dom. .... Lewis on Eminent Domain.  
 Lieb. Herm. .... Lieber's Hermeneutica.  
 Lil. Conv. .... Lilly's Conveyancer.  
 Lil. Ab. .... Lilly's Abridgment, or  
 Practical Register.  
 Lindl. Partn. .... Lindley's Law of Partner-  
 ship.

Litt. .... Coke on Littleton.  
 Litt. .... Littell (Ky.)  
 Litt. Comp. Laws. .... Littell's Statute Law (Ky.)  
 Litt. Sel. Cas. .... Littell's Select Cases (Ky.)  
 Liv. Law Mag. .... Livingston's Law Maga-  
 zine (N. Y.)  
 L. J. Ch. .... Law Journal, New Series,  
 Chancery, English.  
 L. J. M. Cas. .... Law Journal, New Series,  
 Magistrates' Cases.  
 Loc. Acts. .... Local Acts.  
 Loc. Laws. .... Local Laws.  
 Lomax, Ex'rs. .... Lomax on Executors.  
 Long, Irr. .... Long on Irrigation.  
 Low. .... Lowell (U. S.)  
 Lower Ct. Dec. .... Lower Court Decisions  
 (Ohio)  
 L. R. A. .... Lawyers' Reports Annotat-  
 ed.  
 L. R. App. Cas. .... English Law Reports, Ap-  
 peal Cases, House of  
 Lords.  
 L. R. C. P. .... English Law Reports,  
 Common Pleas.  
 L. R. Eq. .... English Law Reports, Eq-  
 uity.  
 L. R. Ex. Cas. .... English Law Reports, Ex-  
 chequer.  
 L. R. Exch. .... English Law Reports, Ex-  
 chequer.  
 L. R. H. L. .... English Law Reports,  
 English and Irish Appeal  
 Cases.  
 L. R. H. L. Sc. .... English Law Reports,  
 Scotch and Divorce Ap-  
 peal Cases.  
 L. R. Prob. & Div. .... English Law Reports, Pro-  
 bate and Divorce.  
 L. R. Prov. & Div. .... See L. R. Prob. & Div.  
 L. R. Q. B. .... English Law Reports,  
 Queen's Bench.  
 Lut. .... Lutwyche's English Com-  
 mon Pleas Reports.  
 Luz. Law T. .... Luzerne Law Times (Pa.)  
 Luz. Leg. Obs. .... Luzerne Legal Observer  
 (Pa.)  
 Luz. Leg. Reg. .... Luzerne Legal Register  
 (Pa.)

M

McAdam, Landl. &  
 T. .... McAdam on Landlord and  
 Tenant.  
 McAll. .... McAllister (U. S.)  
 MacArthur .... MacArthur (D. C.)  
 MacArthur, Pat. Cas. .... MacArthur's Patent Cases  
 (U. S.)  
 MacArthur & M. .... MacArthur & Mackey (D.  
 C.)  
 Macaulay, Hist. Eng. .... Macaulay's History of  
 England.  
 McCahon .... McCahon (Kan.)  
 McCart. .... McCarter (N. J.)  
 McCarty, Civ. Proc. .... McCarty's Civil Proce-  
 dure Reports (N. Y.)  
 McClain, Cr. Law. .... McClain's Criminal Law.  
 McClell. Dig. .... McClellan's Digest of Laws  
 (Fla.)  
 McCord .... McCord's Law (S. C.)  
 McCord, Eq. .... McCord's Equity (S. C.)  
 McCrary .... McCrary (U. S.)  
 McCul. Dict. .... McCulloch's Commercial  
 Dictionary.  
 McGloin .... McGloin (La.)  
 McKelvey, Ev. .... McKelvey on Evidence.  
 Mackey .... Mackey (D. C.)  
 McLean .... McLean (U. S.)  
 McMull. .... McMullan (S. C.)  
 McMull. Eq. .... McMullan's Equity (S. C.)  
 Macn. & G. .... Macnaghten and Gordon's  
 English Chancery Re-  
 ports.  
 Macq. .... Macqueen's Scotch Appeal  
 Cases.

**Madd.** ..... Maddock's Reports, English Chancery.  
**Maine, Anc. Law.**... Maine's Ancient Law.  
**Man.** ..... Manning (Mich.)  
**Mansf. Dig.**..... Mansfield's Digest of Statutes (Ark.)  
**Man., G. & S.**..... Manning, Granger, and Scott's English Common Pleas Reports.  
**Man. Unrep. Cas.**... Manning's Unreported Cases (La.)  
**Man. & G.**..... Manning & Granger's English Common Pleas Reports.  
**Man. & R.**..... Manning & Ryland's English Magistrates' Cases.  
**Marsh.** ..... Marshall's English Common Pleas Reports.  
**Marsh., A. K.**..... A. K. Marshall (Ky.)  
**Marsh., J. J.**..... J. J. Marshall (Ky.)  
**Mart. (N. C.)**..... Martin (N. C.)  
**Mart. (N. S.)**..... Martin's New Series (La.)  
**Mart. (O. S.)**..... Martin's Old Series (La.)  
**Mart. & Y.**..... Martin & Yerger (Tenn.)  
**Mart.** ..... Marvel's Reports (Del.)  
**Mason** ..... Mason (U. S.)  
**Mass.** ..... Massachusetts.  
**Maule & S.**..... Maule and Selwyn's English King's Bench Reports.  
**Maxw. Adv. Gram.**.. W. H. Maxwell's Advanced Lessons in English Grammar.  
**Maxw. Cr. Proc.**.... Maxwell's Treatise on Criminal Procedure.  
**May, Ins.**..... May on Insurance.  
**Md.** ..... Maryland.  
**Md. Ch.** ..... Maryland Chancery.  
**Me.** ..... Maine.  
**Mechem, Ag.**..... Mechem on Agency.  
**Mees. & W.**..... Meeson and Welsby's English Exchequer Reports.  
**Meigs** ..... Meigs (Tenn.)  
**Mer.** ..... Merivale's English Chancery Reports.  
**Metc. (Ky.)** ..... Metcalfe (Ky.)  
**Metc. (Mass.)** ..... Metcalf (Mass.)  
**Mich.** ..... Michigan.  
**Mich. N. P.**..... Michigan Nisi Prius.  
**Miles** ..... Miles (Pa.)  
**Mill, Const.** ..... Mill's Constitutional Reports (S. C.)  
**Miller, Const.** ..... Miller on the Constitution of the United States.  
**Miller's Code**..... Miller's Revised and Annotated Code (Iowa)  
**Mills' Ann. St.**..... Mills' Annotated Statutes (Colo.)  
**Mill & V. Code**.... Milliken & Vertrees' Code (Tenn.)  
**Minn.** ..... Minnesota.  
**Minor** ..... Minor (Ala.)  
**Minor, Inst.** ..... Minor's Institutes of Common and Statute Law.  
**Misc. Laws**..... Miscellaneous Laws (Or.)  
**Misc. Rep.** ..... Miscellaneous Reports (N. Y.)  
**Miss.** ..... Mississippi.  
**Mitch. Mod. Geog.**.. Mitchell's Modern Geography.  
**Mitt. Eq. Pl.**..... Mitford's Equity Pleading.  
**Mo.** ..... Missouri.  
**Moak, Eng. R.**..... Moak's English Reports.  
**Mo. App.** ..... Missouri Appeal Reports.  
**Mo. App. Rep'r** ... Missouri Appellate Reporter.  
**Mod.** ..... Modern Reports, English King's Bench.  
**Monag.** ..... Monaghan (Pa.)  
**Mon., B.** ..... B. Monroe (Ky.)  
**Mon., T. B.**..... T. B. Monroe (Ky.)  
**Mont.** ..... Montana.  
**Montg. Co. Law Rep'r** ..... Montgomery County Law Reporter (Pa.)  
**Month. Law Bul.**... Monthly Law Bulletin (N. Y.)

**Mont. & B.**..... Montagu & Bligh's English Bankruptcy Reports.  
**Mont. & M.**..... Montagu and MacArthur's English Bankruptcy Reports.  
**Moody, Cr. Cas.**.... Moody's Crown Cases, English Courts.  
**Moody & M.**..... Moody and Malkin's English Nisi Prius Reports.  
**Moody & R.**..... Moody and Robinson's English Nisi Prius Reports.  
**Moore** ..... Moore (Ark.)  
**Moore, Cr. Law**.... Moore's Criminal Law and Procedure.  
**Moore, P. C.**..... Moore's Privy Council Reports.  
**Moore, Presb. Dig.**.. Moore's Presbyterian Digest.  
**Moreau & Carleton's Partidas** ..... Moreau and Carleton's Laws of Las Sièts Partidas in force in Louisiana.  
**Mor. Priv. Corp.**... Morawetz on Private Corporations.  
**Morrell, Bankr. Cas.**.. Morrell's English Bankruptcy Cases.  
**Morris** ..... Morris (Iowa)  
**Morse, Banks** ..... Morse on the Law of Banks and Banking.  
**Mun. Code**..... Municipal Code.  
**Munf.** ..... Munford (Va.)  
**Murfree, Off. Bonds**.. Murfree on Official Bonds.  
**Murph.** ..... Murphey (N. C.)  
**Murray's Eng. Dict.**.. Murray's English Dictionary.  
**Myl. & C.**..... Mylne & Craig's English Chancery Reports.  
**Myl. & K.**..... Mylne and Keen's English Chancery Reports.  
**Myr. Prob.** ..... Myrick's Probate Court Reports (Cal.)  
**M. & W.**..... Meeson and Welsby's English Exchequer Reports.

**N**

**Nat. Bankr. Law**.. National Bankruptcy Law.  
**Nat. Bankr. R.**..... National Bankruptcy Register (U. S.)  
**N. B. R.**..... National Bankruptcy Register (U. S.)  
**N. C.** ..... North Carolina.  
**N. C. Term R.**..... North Carolina Term Reports.  
**N. Chip.**..... N. Chipman (Vt.)  
**N. D.** ..... North Dakota.  
**N. E.** ..... Northeastern Reporter.  
**Neb.** ..... Nebraska.  
**Nev.** ..... Nevada.  
**Newb. Adm.** ..... Newberry's Admiralty (U. S.)  
**Newell, Defam.** .... Newell on Defamation, Slander and Libel.  
**N. H.** ..... New Hampshire.  
**Nix. Dig.** ..... Nixon's Digest of Laws (N. J.)  
**N. J. Eq.** ..... New Jersey Equity.  
**N. J. Law** ..... New Jersey Law.  
**N. J. Law J.**..... New Jersey Law Journal.  
**N. M.** ..... New Mexico.  
**Nisi Prius & Gen. T. Rep.** ..... Nisi Prius & General Term Reports (Ohio)  
**Norris** ..... Norris (Pa.)  
**Northam. Law Rep.**.. Northampton County Law Reporter (Pa.)  
**Northumb. Co. Leg. N.** ..... Northumberland County Legal News (Pa.)  
**Nott & McC.** ..... Nott & McCord (S. C.)  
**N. R. L.** ..... Revised Laws 1813 (N. Y.)  
**N. S.** ..... New Series.  
**N. W.** ..... Northwestern Reporter.  
**N. Y.** ..... New York.



N. Y. Ann. Cas. ... New York Annotated Cases.  
 N. Y. Cr. R. .... New York Criminal Reports.  
 N. Y. Daily Reg. .... New York Daily Register.  
 N. Y. Law J. .... New York Law Journal.  
 N. Y. Leg. Obs. .... New York Legal Observer.  
 N. Y. St. Rep. .... New York State Reporter.  
 N. Y. Super. Ct. .... New York Superior Court.  
 N. Y. Supp. .... New York Supplement.

## O

O. C. D. .... Ohio Circuit Decisions.  
 Ohio .... Ohio.  
 Ohio Cir. Ct. R. .... Ohio Circuit Court Reports.  
 Ohio Dec. .... Ohio Decisions.  
 Ohio Law J. .... Ohio Law Journal.  
 Ohio Leg. N. .... Ohio Legal News.  
 O. L. D. .... Ohio Lower Court Decisions.  
 Ohio N. P. .... Ohio Nisi Prius.  
 Ohio St. .... Ohio State.  
 Ohio S. & C. F. .... Ohio Superior and Common Pleas Decisions.  
 Okl. .... Oklahoma.  
 Olcott .... Olcott (U. S.)  
 Ont. .... Ontario Reports.  
 Op. Attys. Gen. .... Opinions of the United States Attorneys General.  
 Or. .... Oregon.  
 O. S. .... Old Series.  
 Outerbridge .... Outerbridge (Pa.)  
 Overt. .... Overton (Tenn.)

## P

Pac. .... Pacific Reporter.  
 Pa. Co. Ct. R. .... Pennsylvania County Court Reports.  
 Pa. Com. Pl. .... Pennsylvania Common Pleas Reporter.  
 Pa. Dist. R. .... Pennsylvania District Reports.  
 Pa. .... Pennsylvania State.  
 Paige .... Paige's Chancery (N. Y.)  
 Paine .... Paine (U. S.)  
 Paine, Elect. .... Paine on Elections.  
 Pa. Law J. .... Pennsylvania Law Journal.  
 Paley, Ag. .... Paley on Principal and Agent (or Agency).  
 Pamphl. Laws .... Pamphlet Laws (Acts).  
 Park, Ins. .... Park on Marine Insurance.  
 Parker, Cr. R. .... Parker's Criminal Reports (N. Y.)  
 Pars. Bills & N. .... Parsons on Bills and Notes.  
 Pars. Cont. .... Parsons on Contracts.  
 Pars. Eq. Cas. .... Parsons' Select Equity Cases (Pa.)  
 Pars. Mar. Law .... Parsons on Maritime Law.  
 Partidas .... Moreau and Carleton's Laws of Las Sièts Partidas in force in Louisiana.  
 Pasch. Dig. .... Paschal's Texas Digest of Decisions.  
 Pa. Super. Ct. .... Pennsylvania Superior Court Reports.  
 Pat. .... Paterson's Laws.  
 Pat. & H. .... Patton & Heath (Va.)  
 Pears. .... Pearson (Pa.)  
 Peck (Ill.) .... Peck (Ill.)  
 Peck (Tenn.) .... Peck (Tenn.)  
 Pen. Code. .... Penal Code.  
 Pen. Laws. .... Penal Laws.  
 Pennewill .... Pennewill Reports (Del.)  
 Penning. .... Pennington (N. J.)  
 Penny. .... Pennypacker (Pa.)  
 Pen. & W. .... Penrose & Watts (Pa.)

Pepper & L. Dig. .... Pepper and Lewis' Digest of Laws (Pa.)  
 Perry, Trusts. .... Perry on Trusts.  
 Pet. .... Peters (U. S.)  
 Pet. Ab. .... Petersdorff's Abridgment.  
 Pet. Adm. .... Peters' Admiralty (U. S.)  
 Pet. O. C. .... Peters' Circuit Court (U. S.)  
 Petersd. Ab. .... Petersdorff's Abridgment.  
 P. F. Smith .... P. F. Smith (Pa.)  
 Phil. .... Phillips' Treatise on Insurance.  
 Phila. .... Philadelphia (Pa.)  
 Phil. .... Phillips' Law (N. O.)  
 Phil. Ch. .... Phillips' English Chancery Reports.  
 Phil. Eq. .... Phillips' Equity (N. O.)  
 Phil. Ev. .... Phillips on Evidence.  
 Phil. Ins. .... Phillips' Law of Insurance.  
 Pick. .... Pickering (Mass.)  
 Pickle .... Pickle (Tenn.)  
 Pierce & King's Revisory Legislation. .... Pierce, Taylor and King's Revised Statutes (La.)  
 Pike .... Pike (Ark.)  
 Pin. .... Pinney (Wis.)  
 Pittsb. Leg. J. .... Pittsburgh Legal Journal (Pa.)  
 Pittsb. R. .... Pittsburgh Reports (Pa.)  
 P. L. .... Public Laws.  
 Ploud. .... Plowden's English King's Bench Reports.  
 Plow. .... Plowden's English King's Bench Reports.  
 Poe, Pl. .... Poe on Pleading and Practice.  
 Pol. Code .... Political Code.  
 Pol. Cont. .... Pollock on Principles of Contract at Law and Equity.  
 Pom. Eq. Jur. .... Pomeroy's Equity Jurisprudence.  
 Pom. Rem. .... Pomeroy on Civil Remedies.  
 Pom. Rem. & Rem. Rights .... Pomeroy on Civil Remedies & Remedial Rights.  
 Pom. Spec. Perf. .... Pomeroy on Specific Performance of Contracts.  
 Port. (Ala.) .... Porter (Ala.)  
 Posey, Unrep. Cas. .... Posey's Unreported Cases (Tex.)  
 Poth. Oblig. .... Pothier on Obligations.  
 Pow. Cont. .... Powell on Contracts.  
 Prac. Act. .... Practice Act.  
 Pr. Ch. .... Precedents in Chancery, by Finch.  
 Prest. Est. .... Preston on Estates.  
 Priv. Laws. .... Private Laws.  
 Priv. St. .... Private Statutes.  
 Prob. Div. .... Probate Division, English Law Reports.  
 Prob. R. .... Probate Reports (Ohio)  
 Prov. St. .... Statutes (Laws) of the Province of Massachusetts.  
 Pub. Acts .... Public Acts.  
 Pub. Gen. Laws. .... Public General Laws.  
 Pub. Laws. .... Public Laws.  
 Pub. Loc. Laws. .... Public Local Laws.  
 Pub. St. .... Public Statutes.  
 Pub. & Loc. Laws. .... Public and Local Laws.  
 Puffendorf .... Puffendorf's Law of Nature and Nations.  
 Purd. Dig. Laws .... Purdon's Digest of Laws (Pa.)  
 P. Wms. .... Peere Williams' English Chancery Reports.  
 P. & L. Dig. Laws. .... Pepper & Lewis' Digest of Laws (Pa.)

## Q

Q. B. .... Queen's Bench Reports, Adolphus & Ellis, N. S. (English)

Q. B. Div..... Queen's Bench Division  
(English Law Reports)  
Quincy ..... Quincy (Mass.)

## R

Rand. .... Randolph (Va.)  
Rand. Com. Paper.. Randolph on Commercial  
Paper.  
Rand. Em. Dom.... Randolph on Eminent Do-  
main.  
Rap. Contempt .... Rapalje on Contempt.  
Rap. & L. Law Dict.. Rapalje and Lawrence  
Law Dictionary.  
Rawle ..... Rawle (Pa.)  
Rawle, Cov. .... Rawle on Covenants for  
Title.  
Raym. .... Lord Raymond's English  
King's Bench Reports.  
R. C. .... Revised Statutes 1855  
(Mo.)  
Redf. Carr. .... Redfield on Carriers and  
Bailments.  
Redf. Railways.... Redfield on Railways.  
Redf. Sur. .... Redfield's Surrogate (N.  
Y.)  
Redf. Wills. .... Redfield on the Law of  
Wills.  
Reeves, Dom. Rel.. Reeve on Domestic Rela-  
tions.  
Rep. .... Coke's English King's  
Bench Reports.  
Rev. .... Revision of the Statutes.  
Rev. Civ. Code.... Revised Civil Code.  
Rev. Civ. St. .... Revised Civil Statutes.  
Rev. Code. .... Revised Code.  
Rev. Code Cr. Proc.. Revised Code of Criminal  
Procedure.  
Rev. Laws. .... Revised Laws.  
Rev. Ord. .... Revised Ordinances.  
Rev. Pen. Code.... Revised Penal Code.  
Rev. St. .... Revised Statutes.  
R. I. .... Rhode Island.  
Rice ..... Rice's Law (S. C.)  
Rice, Eq. .... Rice's Equity (S. C.)  
Rich. Dict. .... Richardson's New Diction-  
ary of the English Lan-  
guage.  
Rich. Eq. .... Richardson's Equity (S. C.)  
Rich. Eq. Cas.... Richardson's Equity Cases  
(S. C.)  
Rich. Law. .... Richardson's Law (S. C.)  
Rich. (S. C.).... Richardson (S. C.)  
Riley ..... Riley's Law (S. C.)  
Riley, Eq. .... Riley's Equity (S. C.)  
R. L. .... Revised Laws.  
R. M. Charl't. .... R. M. Charlton (Ga.)  
Rob. .... Charles Robinson's English  
Admiralty Reports.  
Rob. (N. Y.).... Robertson (N. Y.)  
Rob. (La.) ..... Roblusion (La.)  
Rob. (Va.) ..... Robinson (Va.)  
Robb, Pat. Cas.... Robb's Patent Cases (U.  
S.)  
Rob. Pat. .... Robinson on Patents.  
Rolle ..... Rolle's English King's  
Bench Reports.  
Rolle, Abr. .... Rolle's Abridgment of the  
Common Law.  
Roll. Rep. .... Rolle's English King's  
Bench Reports.  
Root ..... Root (Conn.)  
Roper, Leg. .... Roper on Legacies.  
Rorer, Jud. Sales... Rorer on Void Judicial  
Sales.  
Rorer, R. R. .... Rorer on Railways.  
Roscoe, Cr. Ev.... Roscoe on Criminal Evi-  
dence.  
R. S. .... Revised Statutes.  
Russ. .... Russell's English Chancery  
Reports.  
Russ. Crimes. .... Russell on Crimes and Mis-  
demaneors.  
Russ. Fact. .... Russell on Factors and  
Brokers.

Russ. & R. .... Russell and Ryan's English  
Crown Cases Reserved.  
Rutherford (Inst.).. Rutherford's Institutes of  
Natural Law.  
Ry. & Corp. Law J.. Railway and Corporation  
Law Journal.  
R. & Ry. C. C. .... Russell and Ryan's English  
Crown Cases.

## S

Salk. .... Salkeld's English King's  
Bench Reports.  
Sanb. & B. Ann. St.. Sanborn and Berryman's  
Annotated Statutes (Wis.)  
Sanders, Pl. & Ev... Saunders' Pleading and  
Evidence.  
Sandf. .... Sandford (N. Y.)  
Sandf. Ch. .... Sandford's Chancery (N.  
Y.)  
Sand. Inst. Just. In-  
trod. .... Sandars' Edition of Jus-  
tinian's Institutes.  
Sand. & H. Dig.... Sandels and Hill's Digest  
of Statutes (Ark.)  
Saund. .... Saunders' English King's  
Bench Reports.  
Saund. Pl. & Ev.... Saunders' Pleading and  
Evidence.  
Sawv. .... Sawyer (U. S.)  
Saxt. Ch. .... Saxton's Chancery (N. J.)  
Sayles' Ann. Civ.  
St. .... Sayles' Annotated Civil  
Statutes (Tex.)  
Sayles' Civ. St.... Sayles' Revised Civil Stat-  
utes (Tex.)  
Sayles' St. .... Sayles' Revised Civil Stat-  
utes (Tex.)  
Sayles' Supp. .... Supplement to Sayles' An-  
notated Civil Statutes  
(Tex.)  
S. C. .... South Carolina.  
Scam. .... Scammon (Ill.)  
Scates' Comp. St.... Treat, Scates & Blackwell  
Compiled Statutes (Ill.)  
Schmidt, Civ. Law.. Schmidt on the Civil Law  
of Spain and Mexico.  
Schoales & L. .... Schoales and Lefroy's Irish  
Chancery Reports.  
Schouler, Ballim.. Schouler on Bailments.  
Schouler, Pers.  
Prop. .... Schouler on the Law of  
Personal Property.  
S. D. .... South Dakota.  
S. E. .... Southeastern Reporter.  
Sedg. St. & Const.  
Law .... Sedgwick on Statutory and  
Constitutional Law.  
Sedg. & W. Tr. Ti-  
tle Land. .... Sedgwick and Wait on the  
Trial of Title to Land.  
Seld. .... Selden (N. Y.)  
Seld. Notes. .... Selden's Notes (N. Y.)  
Serg. & R. .... Sergeant & Rawle (Pa.)  
Sess. .... Session.  
Sess. Acts. .... Session Acts.  
Sess. Laws. .... Session Laws.  
Shannon's Code.... Shannon's Annotated Code  
(Tenn.)  
Shars. Bl. Comm... Sharswood's Edition of  
Blackstone's Commenta-  
ries.  
Shars. & B. Lead.  
Cas. Real Prop.... Sharswood and Budd's  
Leading Cases of Real  
Property.  
Sheld. .... Sheldon (N. Y.)  
Shep. .... Shepley (Me.)  
Shep. Abr. .... Sheppard's Abridgment.  
Shep. Touch. .... Sheppard's Touchstone of  
Common Assurances.  
Show. .... Shower's English King's  
Bench Reports.  
Silvernail ..... Silvernail (N. Y.)



T. B. Mon.....T. B. Monroe (Ky.)  
 Tenn. ....Tennessee.  
 Tenn. Cas. ....Shannon's Tennessee Cases.  
 Tenn. Ch.....Tennessee Chancery.  
 Term R. ....Term Reports, English King's Bench (Durnford and East's Reports).  
 Ter. Laws.....Territorial Laws.  
 Termes de la Ley...Terms of the Common Laws and Statutes Expounded and Explained by John Rastell.  
 Tex. ....Texas.  
 Tex. App. ....Texas Appeals Reports.  
 Tex. Civ. App.....Texas Civil Appeals Reports.  
 Tex. Cr. R.....Texas Criminal Reports.  
 Tex. Supp.....Texas Supplement.  
 Thacher, Cr. Cas...Thacher's Criminal Cases (Mass.)  
 Thayer, Prelim. Treatise Ev.....Thayer's Preliminary Treatise on Evidence.  
 Theob. on Wills...Theobald on Wills.  
 Thom. Co. Litt....Thomas' Edition of Coke upon Littleton.  
 Thomp. Neg.....Thompson on Negligence.  
 Thomp. Tenn. Cas..Thompson's Unreported Tennessee Cases.  
 Thomp. & C.....Thompson & Cook (N. Y.)  
 Thomp. & St. Code..Thompson and Steger's Code (Tenn.)  
 Thornton, Gifts....Thornton on Gifts and Advancements.  
 Tidd, Prac.....Tidd's Practice.  
 Tied. Lim.....Tiedeman's Treatise on the Limitations of Police Power in the United States.  
 Tiedman, Real Prop..Tiedeman on Real Property.  
 Tiffany .....Tiffany (N. Y.)  
 Times L. Rep.....Times Law Reports.  
 Toller .....Toller on Executors.  
 Toml. Law Dict....Tomlins' Law Dictionary.  
 T. R.....Term Reports, English King's Bench (Durnford and East's Reports).  
 Tread. Const.....Treadway's Constitutional Reports (S. C.)  
 Troub. & H. Prac...Troubat & Haly's Practice (Pa.)  
 Tuck .....Tucker's Surrogate (N. Y.)  
 Tucker's Blackstone..Tucker's Blackstone's Commentaries.  
 T. U. P. Charit....T. U. P. Charlton (Ga.)  
 Turn. ....Turner (Ark.)  
 Turn. & R. Ch.....Turner and Russell's English Chancery Reports.  
 Tyler .....Tyler (Vt.)  
 Tyler, Ej.....Tyler on Ejectment and Adverse Enjoyment.  
 Tyler, Steph. Pl....Tyler's Edition of Stephen on Principles of Pleading.  
 T. & H. Prac.....Troubat and Haly's Pennsylvania Practice.

## U

Underhill, Ev.....Underhill on Evidence.  
 Unof. ....Unofficial (Reports).  
 U. S.....United States.  
 U. S. App.....United States Appeals.  
 U. S. Comp. St. 1901..United States Compiled Statutes 1901.  
 U. S. Comp. St. Supp. 1903.....Supplement 1903 to the United States Compiled Statutes of 1901.  
 U. S. Law Mag....United States Law Magazine (N. Y.)  
 U. S. Month. Law Mag. ....United States Monthly Law Magazine.  
 Utah .....Utah.

## V

Va. ....Virginia.  
 Va. Cas. ....Virginia Cases.  
 Va. Law J.....Virginia Law Journal, Richmond.  
 Van Fleet, Coll. Attack .....Van Fleet on Collateral Attack.  
 Van Ness, Prize Cas..Van Ness' Prize Cases (U. S.)  
 Vattel, Law Nat...Vattel's Law of Nations.  
 Vern. ....Vernon's English Chancery Reports.  
 Ves. ....Vesey, Junior, English Chancery Reports.  
 Ves. Jr.....Vesey, Junior, English Chancery Reports.  
 Ves. Sr.....Vesey, Senior, English Chancery Reports.  
 Ves. & B.....Vesey and Beames' English Chancery Reports.  
 Vict. ....Queen Victoria (as 5 & 6 Vict.)  
 Vin. Abr.....Viner's Abridgment.  
 Vroom .....Vroom (N. J.)  
 V. S.....Vermont Statutes.  
 Vt. ....Vermont.

## W

W. ....William (as Wm. IV).  
 Wade, Attachm....Wade on Attachment and Garnishment.  
 Wag. St. ....Wagner's Statutes (Mo.)  
 Wait, Act. & Def...Wait's Actions and Defenses.  
 Wait's Prac.....Wait's New York Practice.  
 Walk. ....Walker (Miss.)  
 Walk. (Pa.) .....Walker (Pa.)  
 Walk. Ch.....Walker's Chancery (Mich.)  
 Walk. Pat.....Walker on Patents.  
 Wall. ....Wallace (U. S.)  
 Wall. Jr.....Wallace, Junior (U. S.)  
 Wall. Sr. ....Wallace, Senior (U. S.)  
 Ware .....Ware (U. S.)  
 Warv. Abst.....Warville on Abstracts of Title.  
 Wash. ....Washington.  
 Wash. (Va.).....Washington (Va.)  
 Washb. Easem....Washburn on Easements and Servitudes.  
 Washb. Real Estate..Washburn on Real Property.  
 Washb. Real Prop..Washburn on Real Property.  
 Wash. C. C.....Washington Circuit Court (U. S.)  
 Wash. Law Rep....Washington Law Reporter (D. C.)  
 Wash. T. ....Washington Territory.  
 Watts .....Watts (Pa.)  
 Watts & S.....Watts & Sergeant (Pa.)  
 W. Bl. ....Sir William Blackstone's English King's Bench Reports.  
 Webst. Dict.....Webster's Dictionary.  
 Webster in Sen. Doc. ....Webster in Senate Documents.  
 Webst. Int. Dict....Webster's International Dictionary.  
 Wedgw. Dict. Eng. Etymology .....Wedgwood's Dictionary of English Etymology.  
 Wel., Hurl. & G....Welsby, Hurlstone, and Gordon's Reports (1-9 English Exchequer Reports).  
 Wend. ....Wendell (N. Y.)  
 West Coast Rep....West Coast Reporter.  
 West. Law J.....Western Law Journal, Cincinnati (Ohio)  
 West. Law Month..Western Law Monthly (Ohio)

West. L. M.....	Western Law Monthly (Ohio)	Winch .....	Winch's Entries.
Whart. ....	Wharton (Pa.)	Winfield, Words & Phrases .....	Winfield's Adjudged Words and Phrases, with Notes.
Whart. Ag.....	Wharton on Agency.	Winst. ....	Winston (N. C.)
Whart. Am. Cr. Law..	Wharton's American Criminal Law.	Winst. Eq. ....	Winston's Equity (N. C.)
Whart. Cr. Ev.....	Wharton on Criminal Evidence.	Wis. ....	Wisconsin.
Whart. Cr. Law....	Wharton's American Criminal Law.	Wkly. Dig.....	Weekly Digest (N. Y.)
Whart. Cr. Pl. & Prac. ....	Wharton's Criminal Pleading & Practice.	Wkly. Law Bul....	Weekly Law Bulletin (Ohio)
Whart. Ev.....	Wharton on Evidence in Civil Issues.	Wkly. Law Gaz....	Weekly Law Gazette (Ohio)
Whart. Law Dict...	Wharton's Law Dictionary (or Law Lexicon).	Wkly. Notes Cas....	Weekly Notes Cases (Pa.)
Whart. Law Lexicon .....	Wharton's Law Dictionary (or Law Lexicon).	Wkly. Rep.....	Weekly Reporter, London (English).
Whart. Neg.....	Wharton on Negligence.	Wm. ....	William (as 9 Wm. III).
Whart. St. Tr.....	Wharton's State Trials (U. S.)	Wm. Bl.....	Sir William Blackstone's English King's Bench Reports.
Whart. & S. Med. Jur. ....	Wharton and Stille's Medical Jurisprudence.	Wm. Rob.....	William Robinson's English Admiralty Reports.
Wheat. ....	Wheaton (U. S.)	Wms. Ex'rs .....	Williams on Executors.
Wheat. Int. Law...	Wheaton's International Law.	Wm. & Mary.....	William and Mary (as 2 Wm. & Mary, c. 1).
Wheeler, Am. Cr. Law .....	Wheeler's Abridgment of American Common Law Cases.	Woodb. & M.....	Woodbury & Minot (U. S.)
Wheeler, Cr. Cas...	Wheeler's Criminal Cases (N. Y.)	Wood, Inst.....	Wood's Institutes of the (Common) Laws of England.
White's Recop.....	White's Recopilacion (Laws of Spain and Mexico).	Wood, Landl. & Ten..	Wood on Landlord and Tenant.
White & T. Lead. Cas. Eq.....	White and Tudor's Leading Cases in Equity.	Wood, Lim.....	Wood on Limitation of Actions.
White & W. Civ. Cas. Ct. App.....	White & Willson's Civil Cases Court of Appeals (Tex.)	Wood, Nuis.....	Wood on Nuisances.
Wilcox .....	Wilcox (Pa.)	Woods .....	Woods (U. S.)
Will. ....	William (as 1 Will. IV).	Wood's Civ. Law...	Wood's Institutes of the Civil Law of England.
Will. Eq. Jur.....	Willard's Equity Jurisprudence.	Woodw. Dec.....	Woodward's Decisions (Pa.)
Willes .....	Willes' English Common Pleas Reports.	Woolw. ....	Woolworth (U. S.)
Williams (Vt.) ....	Williams (Vt.)	Worcester, Dict.....	Worcester's Dictionary.
Williams, Ex'rs ...	Williams on Executors.	Wor. Dict. ....	Worcester's Dictionary.
Wills, Cir. Ev.....	Wills on Circumstantial Evidence.	Works, Courts ....	Works on Courts and Their Jurisdiction.
Willson, Civ. Cas. Ct. App. ....	Willson's Civil Cases Court of Appeals (Tex.)	Works, Pr.....	Works' Practice, Pleading, and Forms.
Willson, Tex. Cr. Law .....	Willson's Revised Penal Code, Code of Criminal Procedure, and Penal Laws of Texas.	Wright .....	Wright (Ohio)
Wills. ....	Wilson (Ind.)	Wright (Pa.) ....	Wright (Pa.)
Wils. ....	Wilson's English Common Pleas Reports.	W. Rob.....	W. Robinson's English Admiralty Reports.
Winch .....	Winch's English Common Pleas Reports.	W. S. ....	Wagner's Statutes (Mo.)
		W. Va. ....	West Virginia.
		Wyo. ....	Wyoming.
		Wythe .....	Wythe's Chancery (Va.)

## Y

Yeates .....	Yeates (Pa.)
Yerg. ....	Yerger (Tenn.)
York. Leg. Rec.....	York Legal Record (Pa.)
Younge & Col. Ch..	Younge & Collyer's English Chancery Reports.

## Z

Zab. ....	Zabriskie (N. J.)
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# JUDICIAL AND STATUTORY DEFINITIONS

## OF

# WORDS AND PHRASES.

### VOLUME 4.

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#### **FREEZE.**

"Freezing," as used in a bill of lading of a cargo of potatoes, exempting the carrier from liability from freezing, should be construed to mean freezing while the potatoes are being forwarded with reasonable dispatch, and hence does not include a freezing resulting from a delay in transportation. *Read v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 199, 201.

#### **FREEZER.**

A "freezer," as used in the cold storage trade, is a place for the preservation of meat or poultry, where the temperature is kept below freezing—from zero up to 32 deg. *Allen v. Somers*, 47 Atl. 653, 654, 73 Conn. 356, 52 L. R. A. 106, 84 Am. St. Rep. 158.

#### **FREIGHT.**

See "Dead Freight"; "Local Freight"; "Through Freight."

See "On Account of Freight"; "On Freight."

In mercantile law, freight is understood to be the hire or compensation which the owner of the ship is entitled to receive for the carriage of the goods of another. *Clark v. Ocean Ins. Co.*, 33 Mass. (16 Pick.) 289, 293; *Wolcott v. Eagle Ins. Co.*, 21 Mass. (4 Pick.) 429, 435; *Hagar v. Donaldson*, 25 Atl. 824, 825, 153 Pa. 242.

"Freight signifies the earnings or profit gained by the shipowner or hirer by the carriage of goods." *Micheal v. Prussian Nat. Ins. Co.*, 63 N. E. 810, 813, 171 N. Y. 25.

"The word 'freight,' when not used in a sense to imply the burden or load of the ship,

or the cargo which it has on board, is the hire agreed upon between the owner or master for the carriage of goods from one port or place to another." *Brittan v. Barnaby*, 62 U. S. (21 How.) 527, 533, 16 L. Ed. 177; *Lord v. Neptune Ins. Co.*, 76 Mass. (10 Gray) 109, 112.

"Freight" is defined as the price or compensation due to a carrier for the actual transportation of goods. *Ascherson v. Bethlehem Iron Co.*, 2 Pa. Dist. R. 597, 598 (citing 3 Kent, Comm. 219); *Watson v. Duykinck* (N. Y.) 3 Johns. 335, 337; *Ogden v. New York Mut. Ins. Co.*, 35 N. Y. 418, 421; *Lake Superior & M. Ry. Co. v. United States*, 93 U. S. 442, 454, 23 L. Ed. 985; *Griggs v. Austin*, 20 Mass. (3 Pick.) 20, 23, 15 Am. Dec. 175. And such is its meaning by the established law of the maritime countries on the continent of Europe. *Reina v. Cross*, 6 Cal. 29, 31; *Palmer v. Gracie* (U. S.) 18 Fed. Cas. 1033, 1039; *Pennsylvania R. Co. v. Sly*, 65 Pa. (15 P. F. Smith) 205, 211.

Property carried is called "freight." The reward, if any, to be paid for the carriage of freight, is called "freightage." *Civ. Code Cal.* 1903, § 2110; *Rev. St. Okl.* 1903, § 662; *Civ. Code Mont.* 1895, § 2800; *Rev. Codes N. D.* § 4186; *Civ. Code S. D.* 1903, § 1539.

Freight is a compensation for the carriage of goods. *Watson v. Duykinck* (N. Y.) 3 Johns. 335, 339.

"Freightage," in the sense of a policy of marine insurance, signifies all the benefit derived by the owner either from the charter of the ship, or its employment for the carriage of his own goods or those of others. *Civ. Code Cal.* 1903, § 2661; *Rev. Codes N. D.* 1899, § 4540.

The word, "in its original and elementary signification, means the hire which is earn-

ed by the transportation of goods." *Poland v. Spartan* (U. S.) 19 Fed. Cas. 912, 914.

The original and exclusive legal meaning of the term "freight" is compensation to the owners of a vessel for its use in the transportation of merchandise, as "rent" is the like for the use of land, paid to its owners. The reasons given why the meaning of the word should not be enlarged are that an insurance of freight amounts to a representation, if not to a warranty, that the insured was owner, and such a representation is material, because the owner has a stronger interest in the equipment and management than a stranger having no such stake in the voyage. *Huth v. New York Mut. Ins. Co.*, 20 N. Y. Super. Ct. (8 Bosw.) 538, 552.

In discussing the admissibility of evidence to explain an ambiguity, the court said: "For instance, the word 'freight' has several meanings in common parlance. It may refer to goods carried by a common carrier, or it may refer to the charge for the carrying of such goods, so that parol evidence would be admissible to explain its meaning." *Felsch v. Dickson* (U. S.) 19 Fed. Cas. 123, 124.

#### **Advance of freight money.**

The term "freight," in a policy of marine insurance, would seem to include an advance of freight money; but, to enable the party to recover the amount of the underwriter, he must prove the fact of the advance. *Robbins v. New York Ins. Co.*, 1 N. Y. Super. Ct. (1 Hall) 863.

#### **As cargo or goods carried.**

"Freight is that with which anything is brought or laden for transportation, and, by a figure of speech, the price paid for the transportation." *Pennsylvania R. Co. v. Sly*, 65 Pa. 205, 211.

The term "freight," in a policy of insurance, does not include cargo or goods laden on board. *Minturn v. Warren Ins. Co.*, 84 Mass. (2 Allen) 88, 91.

In an action on a policy covering the cargo of a vessel, issued to the owner, it appeared that the insured was to take a cargo of lumber on board, and transport it to Porto Rico, for which he was to have, in lieu of freight, three-fifths of the lumber. The court said: "We agree that freight cannot be insured under the name of 'property,' but we think the contract by which the insured undertook to carry the cargo gave them an interest in that cargo different from freight, and well coming within the term 'property.'" *Wiggin v. Mercantile Ins. Co.*, 24 Mass. (7 Pick.) 271, 273.

The term "cargo and freight," in a policy of marine insurance on cargo and freight,

does not include live animals and the freight of them, but they must be made the subject of particular insurance, nor does it include goods laden on deck, nor food for the subsistence of live animals; but it includes coin, and the freight of it, put on board by the owner of the ship to be invested by the master in merchandise. *Wolcott v. Eagle Ins. Co.*, 21 Mass. (4 Pick.) 429, 432.

#### **As compensation for use of ship.**

In the strict sense, freight is the price of the carriage and delivery of goods by a ship according to the agreement of the parties. Citing *Kirchner v. Venus*, 12 Moore, P. C. 390. In a wider sense, in the insurance law, it includes compensation for any use of the ship. *Christie v. Davis Coal & Coke Co.* (U. S.) 95 Fed. 837, 838 (citing *Carv. Carr. by Sea*, § 542; 1 Arn. Ins. 81).

The term "freight" is a technical expression. "It does not always imply that it is the naulum, merces, or fare for the transportation of goods. It is applied to all rewards, hire, or compensation paid for the use of ships, either for an entire voyage, one divided into sections, or engaged by the month or any period. In Saxon, from which much of the English law is derived, it is called 'fracht,' whether it be a compensation for transportation in ships by sea, or a carriage by land, either of goods or persons, in gross or detail. There can be no distinction, in reason and law, whether this "freight" or "hire" be actually paid by one for the use or chartering of a vessel of another, or whether he sends his own vessel for or with a cargo to a designated port, which cargo is to be obtained by funds or credit there, or goods, money, or bills, sent in and with the ship." *Giles v. Cynthia* (U. S.) 10 Fed. Cas. 369, 370.

#### **Compensation to charterer.**

Where a plaintiff chartered a ship for a voyage, for which he was to pay a fixed sum to the owner on the termination of the outward voyage, and a similar sum at the termination of the return voyage, and entered into a contract with the owners of goods to be transported on the outward voyage for a freight to be paid by them, and assume the risk of the dangers of the sea, as between the plaintiff and the owner of such goods the plaintiff was the owner of the ship, and they were the freighters. As between these parties, freight, *eo nomine*, was payable by them to plaintiff, and was properly described as such in an insurance policy issued to plaintiff on such freight. *Clark v. Ocean Ins. Co.*, 83 Mass. (16 Pick.) 289, 298.

#### **Due at end of voyage.**

Freight is a compensation received for the transportation of goods and merchandise from port to port, and is never claimable

by the owner of the vessel until the voyage has been performed and terminated. Under a policy of insurance of freights on a vessel from Baltimore to Auxcayes, and thence back to Baltimore, where the vessel was lost on the return voyage, after discharging the cargo taken on the outward voyage, and the freight therefor had been fully paid, and the cargo received for the return voyage, the contract was one of indemnity for the freight of each voyage, terminating in its operation upon the freight of the first voyage upon the safe arrival of the vessel at Auxcayes, and attaching upon the freight of the return cargo so soon as the assured had acquired an insurable interest therein. *Patapsco Ins. Co. v. Biscoe (Md.)* 7 Gill & J. 293, 300, 28 Am. Dec. 319.

"Freight is the price to be paid for the actual transportation of goods by sea from one place to another. The delivery of the goods at the place of destination according to the charter party is a condition precedent to entitle the owner to freight. Hence, if any accident befalls the ship, so that the goods are never delivered, no freight is admissible. This has been from the remotest time the maritime law of the world." *Hagar v. Donaldson*, 25 Atl. 824, 825, 154 Pa. 242.

Freight, in general, is not due unless the voyage be performed. Where a ship and cargo never arrived at their port of destination, neither the whole freight nor a pro rata freight was due. *Caze v. Baltimore Ins. Co.*, 11 U. S. (7 Cranch) 858, 862, 3 L. Ed. 370.

"Freight does not accrue until the vessel is loaded and bill of lading is signed by the master, and it is payable when the vessel finishes her voyage and discharges her cargo." *Ascherson v. Bethlehem Iron Co.*, 2 Pa. Dist. R. 597, 598.

Freight is the compensation for the carriage of goods, and, if it be paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be repaid, unless there be a special agreement to the contrary. *Griggs v. Austin*, 20 Mass. (8 Pick.) 20, 23, 15 Am. Dec. 175.

Freight is a compensation for the carriage of goods, and, if paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it then forms the ordinary case of money paid on a consideration which happens to fail. *Watson v. Duykinck (N. Y.)* 3 Johns. 335, 337.

#### Fare of passengers included.

The words "cargo" and "freight," *prima facie*, and in their ordinary and natural meaning, refer to goods only; and, where the words "cabin passengers" and "passage money" appear in the same charter party with the words "cargo" and "freight," the latter

do not include passengers and passage money of any description. *Lewis v. Marshall*, 7 Man. & G. 729, 745.

"Freight," in its most extensive sense, is applied to all compensation for the use of ships, including transportation of passengers, and for all purposes except lien. Lord Ellenborough says they seem to be the same thing. *Mulloy v. Backer*, 5 East, 321. Passage money and freight are governed by the same rules. And therefore passage money paid in advance may be recovered back on the breaking up of the voyage by a peril of the sea, and the failure of the owner of the ship to send the passenger to his destination. *Brown v. Harris*, 68 Mass. (2 Gray) 359, 360.

In Rev. St. § 4283 [U. S. Comp. St. 1901, p. 2943], limiting the liability of shipowners to the value of the ship and their freight then pending, freight includes fare for passengers. The term "freight" is a technical expression, and does not always imply that it is the fare for the transportation of goods. *Giles v. Cynthia (U. S.)* 10 Fed. Cas. 369, 370 (cited and approved in *Main v. Williams*, 14 Sup. Ct. 486, 487, 152 U. S. 122, 38 L. Ed. 831).

#### As founded on contract.

"Freight is a compensation for the carriage of goods, and is in all cases bottomed upon contract, either express or implied. The former happens when the charter party or bill of lading stipulates for the payment of freight generally, or fixes the sum to be paid, or the rate by which it is to be computed. If there be no express stipulation on the subject, then the law raises an implied contract to pay such freight as is reasonable and usual for similar services." *Palmer v. Gracie (U. S.)* 18 Fed. Cas. 1033, 1039.

#### As freight for whole voyage.

"Freight," as used in a bottomry bond pledging the freight for the voyage, means the freight of the whole voyage, and not the freight for that part of the voyage unperformed at the time of giving the bond. *The Zephyr*, 80 Fed. Cas. 928.

#### As profit on cargo.

"Freight," as used in a policy of insurance for a certain amount on prepaid freight on board a certain vessel, signifies the earnings or profits derived by the shipowner for the hire of a ship, from the use of it himself, or by letting it to others, or by carrying goods for others, and does not comprehend the profit which the owner of a cargo, having no interest in the vessel or earnings, as such, expects to derive from the transportation of his goods to their port of destination. *Minturn v. Warren Ins. Co.*, 84 Mass. (2 Allen) 86, 91.



**As property.**

See "Property."

**Towage and salvage.**

The compensation earned by towage and salvage services is not freight. *The Battler* (U. S.) 58 Fed. 704.

**Value of carriage of vessel owner's goods.**

Freight is the price of the carriage of the cargo, and is the shipowner's compensation for the employment of the ship—his return for the labor and capital which he employs in the purposes of commerce. If he carries a cargo belonging to another person, he receives his compensation in the price paid by that person for the carriage. If he carries his own cargo, he may be fairly considered as charging the price of the carriage to the goods, and crediting the ship in account, expecting the goods to reimburse their outlay upon their sale at the port of destination. "The term 'freight,'" said Lord Tenderden, "as used in policies of insurance, means the benefit derived by the shipowner from the employment of the ship. It is the same thing," he observed, "to the shipowner, whether he receives the benefit of his ship by a money payment from one person, who chartered the whole ship, or from various persons, who put specific quantities of goods on board, or from persons who pay him the value of his own goods at the port of delivery, increased by their carriage in his own ship. The assured may fairly consider that additional value as the freight, and so term it in the policy." *Flint v. Fleming*, 1 Barn. & Adol. 45. Mr. Arnold, in his very valuable treatise, after citing this opinion of Lord Tenderden, adds: "Accordingly it is now established law in this country that the assured, under a general insurance on freight, may recover the profits he expects to make by carrying his own goods in his own ship on the voyage insured." *Arn. Ins.* p. 221. And Mr. Phillips uses the following language: "Where the owner of a ship is also the owner of the cargo, a policy of freight will cover the interest received on the transportation of the cargo. In such case the profits of the voyage, says the Supreme Court of Massachusetts, may be insured under the denomination of freight." *Paradise v. Sun Mut. Ins. Co.*, 6 La. Ann. 596, 602, 603 (quoting 1 Phil. 197).

**FREIGHT BILL.**

"An insurance declared to be upon the freight bill of a steamboat is an insurance that the boat shall earn freight, and the insurer is responsible if the boat fail to earn freight by an accident to the boat, as by any damage to the cargo." *Field v. Citizens' Ins. Co.*, 11 Mo. 50.

**FREIGHT CAR.**

As house, see "House."

A freight car is defined by the *Century Dictionary* to be a railroad car for carrying freight, commonly called a "box car." *State v. Green*, 15 Mont. 424, 426, 39 Pac. 322.

Under Rev. St. § 4410, punishing any person who shall break and enter in the daytime any railroad freight car, an express car is included. *Nicholls v. State*, 32 N. W. 543, 545, 68 Wis. 416, 60 Am. Rep. 870.

The term "freight car," as used in defining the offense of placing or running any freight car in the rear of passenger cars, does not include a baggage, express, or mail car. *Pen. Code Cal.* 1903, § 392.

**FREIGHT DEPOT.**

Where a covenant in a deed of a right of way to a railroad required the railroad to establish and maintain a depot for freight and passengers, evidence is admissible to explain what was intended by the term "freight and passenger depot," as there are freight and passenger depots all the way from mere flag stations, where there are no buildings at all, to the most modern depot, with all its equipments and conveniences. *Murray v. Northwestern Ry. Co.*, 42 S. E. 617, 622, 64 S. C. 520.

**FREIGHT MONEY.**

Where the owner of property in possession of a carrier contracts for a cash sale thereof to defendant, and the latter procures possession of the goods without paying therefor by the mere payment of freight and storage charges, the words "freight money," as used in a finding in a replevin suit that the payment of freight money by the defendant was not a payment made in good faith, in accordance with the terms of the sale, includes the money paid for both freight and storage. *Adams v. O'Connor*, 100 Mass. 515, 517, 1 Am. Rep. 137.

**FREIGHT ON BOARD.**

See "On Board."

**FREIGHT PENDING.**

"Freight pending" means the amount which the charterers of a ship have agreed to pay to the shipowners for the prolonged use of the vessel after the time limited. Though not technically freight, it partakes so much of the same character that it must be held subject to the same rule. "It represents the earning of the vessel during the voyage or charter in the performance of which losses were caused by the misconduct

of the owners' agent, the master, for which, but for the limitation of law, the owners would have been fully liable. 'Freight' signifies the earnings or profit derived by the shipowner or the hirer from the use of it himself, or by letting it to others, or by carrying goods for others. All hire or reward for the use of the vessels is freight." *The Giles Loring* (U. S.) 48 Fed. 463, 473.

The words "freight pending," in the statutes relating to the limitation of the liability of shipowners, "represent the earnings of the voyage, whether from the carriage of passengers or merchandise. *Main v. Williams*, 14 Sup. Ct. 486, 152 U. S. 122, 38 L. Ed. 881. But they do not include salvage, for that is paid as a reward to the vessel, its officers and crew, in their efforts to save life and property, and is personal to the salvors, irrespective of any relation they bear to others." *In re Meyer* (U. S.) 74 Fed. 881, 897.

"Freight then pending," as used in Rev. St. § 4283 [U. S. Comp. St. 1901, p. 2943], limiting the liability of the owners of a vessel and her freight then pending in certain cases, includes freight prepaid for the carriage of merchandise and the passage money, and is not to be taken in a narrow sense, as meaning only freight to be earned by a successful conclusion of the voyage. *The Jane Gray* (U. S.) 99 Fed. 582, 591 (citing *Main v. Williams*, 152 U. S. 122, 133, 14 Sup. Ct. 486, 38 L. Ed. 381).

"Freight," as used in Rev. St. § 4283 [U. S. Comp. St. 1901, p. 2943], limiting the liability of shipowners for damages in a collision to the value of the vessel and freight then pending, is used in a broad sense, and is even broader than that of the English statute, which was, "freight due, or to grow due." It may properly be held to mean the earnings of the vessel in transporting the goods on board, and also to be the increased value of goods conferred on them by their carriage, so that the fact that part of the goods carried were the goods of the owner of the vessel did not the less exempt the owner from liability for freight thereon, in determining what share of a loss should be apportioned to the freight in general average. *Allen v. Mackay* (U. S.) 1 Fed. Cas. 487.

#### FREIGHT RECEIPTS.

The gross receipts received from passengers and freight, within the meaning of Act June 1, 1889, which provides that a railroad company owning, operating, or leasing any railroad shall pay a tax upon the gross receipts received from passengers and freight, do not include tolls received by one railroad company from another for the joint use of the track of the former, computed not upon the amount of the gross receipts, but at a

certain specified sum per ton or per passenger. *Commonwealth v. New York, L. E. & W. R. Co.*, 22 Atl. 806, 145 Pa. 200.

#### FREIGHT SOLICITOR.

A freight solicitor in charge of a railway business office is "an officer or agent of such corporation," within Rev. St. 1889, § 2017, providing for service on the corporation by delivering a copy of the summons or complaint to such officer or agent. *Davis v. Jacksonville South Eastern Line*, 126 Mo. 69, 28 S. W. 965, 967.

#### FREIGHT TRAIN.

A locomotive and cab, when not run for carrying freight, nor intended to be presently used for such carriage, is not a freight train, and an indictment charging the running of a freight train on Sunday is not supported by evidence of the operation of an engine and cab. *McNealy v. State*, 21 S. E. 581, 94 Ga. 592.

The term "freight train," in a city ordinance prohibiting the running of freight trains faster than six miles per hour, or passenger trains faster than ten miles, within the corporate limits, includes what is called a "wrecking train," consisting of an engine, way car, three freight cars, and a dirt car. *Chicago, B. & Q. R. Co. v. Johnson*, 53 Ill. App. 478.

#### FRENCH.

The word "French," in the trade-name of an article, is broadly geographic, and indicates its origin, so that it cannot be appropriated as a trade-mark. *Draper v. Skerrett* (U. S.) 116 Fed. 206, 208.

#### FRENCH CHALK.

French chalk is steatite or soapstone. *Jenkins v. Johnson* (U. S.) 18 Fed. Cas. 525, 527.

#### FRENCH POOL.

"French pool," also called "Paris Mutual," is described to be a small machine, containing the name of each horse to be run in the particular race, written or printed on the side, and printed numbers placed on the inside of a machine, which can be seen through holes in it. It is used by the owner or person operating it, and by those engaged in betting on horse racing, in this way: The owner or operator sells the tickets for \$5 each. They bear numbers corresponding with the number given the horse on the machine, and, by turning a crank or screw attached to the machine, the bettor is shown at once the number of tickets sold on each

horse, as each of said tickets is sold, so as to enable him to bet more intelligently and safely, and lessen the chance of disaster to himself. *Commonwealth v. Simonds*, 79 Ky. 618, 619.

"French pool" is a contrivance used to make wagers on horse races. *Elias v. Gill*, 18 Ky. Law Rep. 798, 800, 92 Ky. 569, 18 S. W. 454.

## FREQUENT.

Sp. Laws 1885, § 4, p. 89, declares that it shall be unlawful for any person to frequent an opium den for the purpose of smoking opium, etc. Held, that the word "frequent" undoubtedly requires more than one visit, to constitute the offense—how many, the court cannot, as a matter of law, determine. *State v. Ah Sam*, 13 Pac. 303, 304, 14 Or. 347.

"Frequenting," as used in Rev. St. 1881, § 2088, making the act of frequenting a gambling house criminal, means something akin to, or in the nature of, a habit of going to such place. Evidence of a single or even an occasional visit is not sufficient. *Green v. State*, 9 N. E. 781, 109 Ind. 175.

"Frequenting," as used in 47 Geo. III, c. 14, § 12, providing that any person having any debt or balance of account or otherwise, not exceeding the value of £5, owing to him by any person "using or frequenting the markets" of Birmingham, may sue for it in the court of requests, means for the purpose of substantially obtaining thereby the party's livelihood. *Jenks v. Taylor*, 1 Mee. & W. 578, 580.

### Visit distinguished.

The word "frequents," as employed in Burns' Rev. St. 1894, § 2089 (*Horne's Rev. St. 1897*, § 2002), providing that whoever, being a male person, frequents or visits a gambling house or houses, shall be fined, etc., is not synonymous with "visits." "Frequent" means to visit often; to resort to often or habitually, etc. (*Webst. Dict.*); while "visits" is satisfied by a single visit. *Roberts v. State*, 58 N. E. 203, 204, 25 Ind. App. 366.

## FRESH.

In a declaration alleging that defendant sold the plaintiff 16 pounds of onion seed for a certain price, and that the defendant warranted the seed to be "fresh, genuine, and the product of the preceding year," proof was that the seed was "good, fresh, and such seed as would grow." Held, that the terms "fresh, genuine, and the product of the preceding year," and the terms "good, fresh, and such seed as would grow," are all terms

of similar import, having reference to the reproductive quality of the seed—that is, its quality to germinate and grow—and that such was the meaning of the term "fresh seed," and hence there was no variance between the declaration and the proof. *Ferris v. Comstock*, 33 Conn. 513, 515.

## FRESH FISH.

The term "fresh fish," in *Tariff Act Index*, cl. 699, authorizing the admission of fresh fish free of duty, means "fish which have not been salted or subject to any of the known processes for curing them, such as pickling, smoking, or drying; but these words do not exclude fish which have been frozen, either naturally or artificially, as all persons living in the cold latitudes know, as a matter of common knowledge, that meats and fish are kept fresh by freezing." *Cross v. Seeberger* (U. S.) 30 Fed. 427, 428.

## FRESH IN HIS RECOLLECTION.

See "While Fresh in His Recollection."

## FRESH PURSUIT.

The term "fresh pursuit," in criminal law, was frequently used in the common law, and has the same meaning as the term "immediate pursuit." "The interval which may elapse between one event and another may in a particular instance be sufficient to destroy their relation as immediate in time, while, as to two other events, the same interval shall not have such effect." *People v. Pool*, 27 Cal. 572, 578.

"Fresh pursuit," as used in Code, § 3026, providing that, in the case of a fresh pursuit of a felon after a felony had been committed, he may be arrested without a warrant, would include the pursuit of a felon; a felony having been committed at night, and not being discovered till morning, the officer then immediately following and overtaking the felon. *White v. State*, 11 South. 632, 70 Miss. 253.

## FRESH-WATER RIVERS.

By "fresh-water rivers" is understood rivers where the tide does not ebb and flow, and which are therefore said to be not navigable. *Shrunk v. Schuylkill Nav. Co. (Pa.)* 14 Serg. & R. 71, 78.

## FRESHET.

A freshet is defined by Webster as being a flood or overflowing of a river by means of rains or melted snow—an inundation—and is essentially different from a storm or tempest. *Stover v. Insurance Co. (Pa.)* 3 Phila. 38, 42.

Where a controversy as to the height at which a dam might be maintained was submitted to arbitrators, who determined that the dam might be maintained to a specified height, "with the right to keep thereon flashboards twelve inches wide at all times, except in times of freshet," but did not specify what was meant by a "freshet," the award was indefinite, uncertain, and void. The word "freshet" varies in its meaning in various rivers, in various years, and in various seasons of the year. *Harris v. Social Mfg. Co.*, 9 R. I. 99, 100, 101, 11 Am. Rep. 224.

## FRIABLE.

"Friable" is defined by Webster as easily crumbled, pulverized, or reduced to powder. *Atlantic Dynamite Co. v. Climax Powder Mfg. Co.* (U. S.) 72 Fed. 925, 934.

## FRIEND.

Under Rev. St. c. 9, § 11, providing for the appointment of a guardian to take charge of the person and property of an insane person by the judge of probate, and (section 16) that the parent, guardian, or friend of any insane person may cause him to be sent to the asylum, etc., the wife may properly be regarded as the friend of the husband. *Davis v. Merrill*, 47 N. H. 208, 210.

## FRIENDLY FIRE.

The term "friendly fire," in reference to insurance law, is a fire built in a stove, which did not spread from the stove, but which caused damage by smoke and soot escaping from a defective stovepipe, and an insurance company is not liable for such damage under a policy insuring against all direct loss or damage by fire. *Cannon v. Phoenix Ins. Co.*, 35 S. E. 775, 776, 110 Ga. 568, 78 Am. St. Rep. 124.

## FRIGHT.

"Fright" is included in the term "mental agony." *San Antonio & A. P. R. Co. v. Corley* (Tex.) 26 S. W. 903, 904.

## FRIVOLOUS PLEADING.

A frivolous pleading is one interposed for delay, and indicating by its character bad faith in pleading. *Lerdall v. Charter Oak Life Ins. Co.*, 8 N. W. 280, 282, 51 Wis. 428.

"Frivolous," as used in Code Civ. Proc. § 587, providing that if a demurrer, answer, or reply is frivolous, the party prejudiced thereby may apply for judgment thereupon,

and judgment may be given accordingly, is equivalent to "irrelevant." *Colt v. Davis*, 3 N. Y. Supp. 354, 355, 50 Hun. 366.

A frivolous pleading is one so clearly untenable, or the insufficiency of which is so manifest upon a bare inspection of the pleadings, that the court or judge is able to determine its character without argument or research. *Farmers' & Millers' Bank v. Sawyer*, 7 Wis. 379, 383; *Oahoon v. Wisconsin Cent. R. Co.*, 10 Wis. 290, 293; *Cottrill v. Cramer*, 40 Wis. 555, 558; *Morton v. Jackson*, 2 Minn. 219, 222 (Gil. 180, 182); *Peacock, Hunt & West Co. v. Williams* (U. S.) 110 Fed. 915, 916; *Rosenberg v. Hyman*, 84 N. Y. Supp. 171, 172.

The fact that a pleading is bad, and so adjudged on hearing, does not show that it is frivolous. After a frivolous answer, demurrer, or reply is stricken off, the party is then in default, his time for pleading having gone by; the frivolous plea being merely regarded as no plea at all. *Farmers' & Millers' Bank v. Sawyer*, 7 Wis. 379, 383.

An answer can be said to be frivolous only when it is so clearly bad as to require no argument to show its character, and which would be said to be so manifestly defective as to be indicative of bad faith upon a mere inspection. *Gruenstein v. Biersack*, 37 N. Y. Supp. 538, 539, 1 App. Div. 580; *Trumbull v. Ashley*, 49 N. Y. Supp. 786, 788, 26 App. Div. 356; *Bedlow v. Stillwell*, 61 N. Y. Supp. 371, 45 App. Div. 557; *Stronge v. Sproul*, 53 N. Y. 497, 499; *Nichols v. Jones* (N. Y.) 6 How. Prac. 355, 358; *Hill v. Warner*, 57 N. Y. Supp. 353, 356, 39 App. Div. 355. If an argument is required to show that the pleading is bad, it is not frivolous. *Maccarone v. Hayes*, 82 N. Y. Supp. 1005, 1006, 85 App. Div. 41 (citing *Youngs v. Kent*, 46 N. Y. 672).

A frivolous answer is one which is manifestly impertinent, as alleging matters which, whether true or not, do not affect the plaintiff's right to recover. *Erwin v. Lowery*, 64 N. C. 321, 322.

To justify a decision that a pleading is frivolous, it must not only be without adequate reason, but so clearly and plainly without foundation that the defect appears upon mere inspection. If any argument is required to show that the pleading is bad, it is not frivolous. *Cook v. Warren*, 88 N. Y. 87. That only may be regarded as frivolous which is made to appear so incontrovertibly by a bare statement of it, and without argument. *Youngs v. Kent*, 46 N. Y. 672, 674. Under such rule, a pleading cannot be regarded as frivolous where counsel making the objection found it necessary to submit a brief of 7,000 words. *Lloyd v. Ballantine*, 45 N. Y. Supp. 809, 810, 20 Misc. Rep. 141. See

also, *Chatham Nat. Bank v. Pratt*, 32 N. E. 236, 237, 135 N. Y. 423.

A frivolous plea is described to be such as is unimportant—a nonsensical trifling with the dignity of the court and the majesty of the law, on which no serious question of law or fact can arise. Such a plea is perhaps better described to be where, taking every fact stated in it to be true, still it is plain, without reference to reason or authority, that no defense to the action is made, and, if issue be taken on it, that would be immaterial. *Gray v. Gidliere* (S. C.) 4 Strob. 438, 442.

An answer which fixes the complaint, and alleges immaterial and irrelevant matters, that in no way ratify or affect the rights sought, is a frivolous answer. *Weill v. Uzzell*, 92 N. C. 515, 517.

#### **As pleading setting up no defense.**

A frivolous answer is one that has no substantial relation to the controversy. *Howell v. Ferguson*, 87 N. C. 113, 114.

A frivolous pleading is one which on inspection is inherently bad; that is, it contains no defense. *Hill v. Warner*, 57 N. Y. Supp. 355, 356, 39 App. Div. 424; *Bedlow v. Stillwell*, 61 N. Y. Supp. 371, 45 App. Div. 557.

"A frivolous answer is one which denies no material averment in the complaint, and which, if admitted to be true, does not constitute any defense to the plaintiff's cause of action." *Goldstein v. Krause*, 13 Pac. 232, 233, 2 Idaho (Hasb.) 294; *Morton v. Jackson*, 2 Minn. 219, 222 (Gil. 180, 184); *Howell v. Ferguson*, 87 N. C. 113, 114; *Brown v. Jenison*, 5 N. Y. Super. Ct. (3 Sandf.) 732, 1 Code R. (N. S.) 156, 159; *Hull v. Smith*, 8 N. Y. Super. Ct. (1 Duer) 649, 650; *Lefferts v. Sneider* (N. Y.) 1 Abb. Prac. 41, 42; *Struver v. Ocean Ins. Co.* (N. Y.) 2 Hilt. 475, 476; *Nichols v. Jones* (N. Y.) 6 How. Prac. 355, 356; *Soper v. St. Regis Paper Co.*, 78 N. Y. Supp. 782, 784, 76 App. Div. 409; *Nolan v. Breed*, 1 N. Y. Law Rec. 112; *Hecker v. Mitchell* (N. Y.) 5 Abb. Prac. 453, 455; *Perkins v. Squier* (N. Y.) 1 Thomp. & C. 620, 621; *Hemme v. Hays*, 55 Cal. 337, 339.

A pleading is frivolous only where there is clearly no defense set up in it. If a defense can be spelled out from the pleading, or any part of it, it is not frivolous. *Moody v. Belden*, 15 N. Y. Supp. 119, 60 Hun, 582.

Where it cannot be said of an answer that it controverts no material allegation in the complaint, or that it is manifestly insufficient, or that it fails to deny the allegations of the complaint, it cannot be said to be frivolous. To make an answer frivolous, the objection must extend to and embrace the whole answer, so that nothing is left of

it. *Peacock, Hunt & West Co. v. Williams* (U. S.) 110 Fed. 915, 916.

A frivolous answer has been defined to be one which, if true, does not contain any defense to any part of the plaintiff's cause of action. An answer that merely controverts allegations of the complaint is frivolous, unless it contains a denial of some material allegation of the complaint. An answer that only controverts the allegations of the complaint is frivolous, if it does not put in issue some allegation which the plaintiff must establish to entitle him to a verdict. *Gilbert v. Rounds* (N. Y.) 14 How. Prac. 46, 50.

Unless it appears by inspection of the pleading that it raises no issue upon any fact which plaintiff must prove, it is not frivolous, however objectionable it may be in other respects. *Gruenstein v. Biersack*, 37 N. Y. Supp. 538, 539, 1 App. Div. 580.

A denial of allegations of a complaint on information and belief will not be stricken out as frivolous, though it appears improbable that the defendant should not have been aware of the exact facts. *Trumbull v. Ashley*, 49 N. Y. Supp. 786, 788, 26 App. Div. 356.

An answer which is so framed that it does not set up a valid defense, but which states facts that might, by being properly averred, constitute a defense, cannot be regarded as sham, irrelevant, or frivolous. *Struver v. Ocean Ins. Co.* (N. Y.) 9 Abb. Prac. 23, 27.

Where an answer sets up facts which, if proven, would present a serious question as to whether they did not constitute a good defense to the action, it cannot be held frivolous. *Moyer v. Strahl*, 10 Wis. 83, 85.

An answer which puts in issue its material allegations as to the defendant cannot be called frivolous, though the defense stated therein is an unreasonable one. *West End Savings & Loan Ass'n v. Degan*, 39 N. Y. Supp. 414, 415, 4 App. Div. 618.

While it may be quite apparent the pleading is interposed to gain time the court cannot say, on a bare examination of it, that a denial of a material allegation in the complaint is made for that purpose. The issues raised in a permissible manner cannot be disposed of in that summary way. *Bedlow v. Stillwell*, 61 N. Y. Supp. 371, 45 App. Div. 557. See, also, *Andreae v. Bandler*, 58 N. Y. Supp. 614.

#### **Sham distinguished.**

There is a well-defined distinction between a sham and a frivolous answer. The former is good upon its face, but false in fact, while the latter denies no material averment in the complaint, and sets up no

defense. *Andreae v. Bandler*, 56 N. Y. Supp. 614; *Hull v. Smith* (N. Y.) 8 How. Prac. 149, 150; *Lefferts v. Snediker* (N. Y.) 1 Abb. Prac. 41, 42.

A sham answer and defense is one that is false in fact, and not pleaded in good faith. It may be perfectly good in form, and to all appearances a perfect defense. A frivolous answer is one that shows no defense, conceding all that it alleges to be true. Each may be stricken out on motion, but it is under different provisions of the Code. *Brown v. Jenison* (N. Y.) 1 Code R. (N. S.) 156, 157.

#### Vagueness.

Vagueness in pleading, it is well settled, is not frivolousness. It is to be corrected by amendment, and not visited by judgment. It is enough on the application for judgment on the ground that the answer is frivolous that a good defense is set forth. Where the defense set up, if true, is good, judgment should not be granted on a summary application. *Kelly v. Barnett* (N. Y.) 16 How. Prac. 135, 137.

#### FRM.

Frm., as used in the various tax-title proceedings in describing the premises, is well understood to mean the word "from," and nobody could be misled thereby. *Blakey v. Bestor*, 18 Ill. (3 Peck) 708, 714.

#### FROG.

A frog, in railroad parlance, is a section of a rail, or of several rails combined at a point where two railways cross, or at the point of a switch from a line to a siding or to another line, and its function is to enable a car or train to be turned from one track to another. In a block frog, the point of space between the rails at the point where the car is switched from one track to another is filled with wood or other material, so that the foot will not be held. *Southern Pac. Co. v. Seley*, 152 U. S. 145, 150, 14 Sup. Ct. 530, 531, 38 L. Ed. 391.

The space between the main and guard rails in a railway track is usually designated as a "frog." *Craver v. Christian*, 38 Minn. 413, 415, 31 N. W. 457, 1 Am. St. Rep. 675.

#### FROM.

See "At and From."

The words "to or from," in the reservation in a deed to lay railroad tracks to or from limekilns reserved by the grantor, means to or from the locality where they are situated, in such a manner and to such an

extent as to enable the grantor to enjoy their use and possession for the purpose named in the reservation. *James v. Fonda*, 3 Atl. 195, 58 Vt. 453.

When used in a devise of a remainder, limited upon a particular state and terminable on an event which may necessarily happen, "from" will be construed to relate merely to the time of the enjoyment of the estate, and not to the time of its vesting. *Canfield v. Fallon*, 57 N. Y. Supp. 149, 154, 26 Misc. Rep. 345 (citing *Moore v. Lyons* [N. Y.] 25 Wend. 119, 144; *Sheridan v. House*, \*43 N. Y. [4 Keyes] 569; *Livingston v. Greene*, 52 N. Y. 118, 123; *Ackerman v. Gorton*, 67 N. Y. 63, 66; *Nelson v. Russell*, 135 N. Y. 137, 31 N. E. 1008); *Poor v. Considine*, 73 U. S. (6 Wall.) 458, 474, 18 L. Ed. 869, 874.

The words "in," "to," or "from" the ocean shore mean a point three miles from shore. *Pol. Code Cal.* 1903, § 3907.

#### As according to.

In a contract that such first party agrees to furnish scales made from patterns now in use by such party, and to make no change from such patterns on the scales furnished to such said second party, the word "from" will not be used in its ordinary sense to mean that the scales must be made from the same wooden patterns originally used, but in the sense of "according to," so that the scales made from other patterns which were made to replace the original patterns sufficiently comply with the contract. *Kimball Bros. v. Deere, Wells & Co.*, 77 N. W. 1041, 1043, 108 Iowa, 676.

#### As away from.

The clause "from the place of his abode," as used in St. 25 Geo. II, c. 29, § 1, providing that the coroner shall be allowed a certain sum per mile for every mile he is compelled to travel from the place of his abode to take an inquisition, excludes the miles traveled in returning from the place where the inquisition was taken. *King v. Justices of Oxfordshire*, 2 Barn. & Ald. 203, 204.

#### Continuity imported.

Rev. St. § 4347, making it unlawful to "transport goods from one domestic port to another," means to carry goods in one continuous voyage, either directly from the one port to the other or by the customary voyage pursued in commerce between two ports. It does not mean to carry them in two distinct and separate voyages, or in two distinct vessels. *United States v. 250 Kegs of Nails*, 61 Fed. 410, 411, 9 C. C. A. 558.

The word "from," in a condition on a railroad ticket that it is good for one continuous passage on and from the date stamped on the back, makes the ticket cover the

whole time to be consumed in the continuous trip, commencing on the day of the date of the ticket. *Texas & N. O. R. Co. v. Powell*, 35 S. W. 841, 842, 13 Tex. Civ. App. 212.

In a railroad ticket containing a statement that it was good for one continuous passage on and from a date stamped on the back, the word "from" indicates that the time in which the passage must be made, other than the day on which it is begun, is that which immediately and without intermission follows the day on which the ticket is issued. *Texas & N. O. R. Co. v. Demille* (Tex.) 41 S. W. 147, 148.

#### **As directly from.**

A town ordinance, prohibiting a person from a place infected with smallpox from entering such town, was held to only embrace persons leaving the infected place after the passage of the ordinance and coming immediately into the town. The language may have several meanings, but only one applicable to the connection in which it is used. "A citizen of S. will say of a citizen of G., whom he sees in S., that he is from G., signifying his residence there. On the other hand, when one at S. speaks of a person coming from G., without any words referring to the time, he means coming immediately or directly from it, and the same language in the law can only mean the same thing, with the addition that the coming must be from the place after the law forbidding it was passed. *Salisbury Com'rs v. Pawe*, 51 N. C. 134, 136.

#### **As exclusive or inclusive according to intent.**

The word "from," in the habendum clause in a lease, providing that the lessee is to have and to hold the premises demised from a certain day, will be construed as exclusive or inclusive of the day named in the habendum clause, as will best express the intention of the parties, to be gathered from the whole instrument. The old rule, doubtless, was to exclude the day of the date in all cases where the holding was from a given date; but since the decision of *Pugh v. Duke of Leeds*, Cowp. 714, the word has been construed to express the intention of the parties. *McGlynn v. Moore*, 25 Cal. 384-390.

The word "from," like the words "after," "succeeding," "subsequent," and other similar words in a devise of property to a beneficiary on condition that he shall pay to another a certain sum within one year after the testator's decease, or after, succeeding, or subsequent to his decease, where it is not expressly declared to be exclusive or inclusive, is susceptible of different significations and is used in different senses, and with an exclusive or inclusive meaning, according to the subject to which it is applied; and, as it would deprive it of some of its proper signifi-

cations to affix one invariable meaning to it in all cases, it would, of course, in many of them, pervert it from the sense of the writer or speaker. Its true meaning, therefore, in any particular case, must be collected from its context and subject-matter, which are the only means by which the intention is ascertained. *Sands v. Lyons*, 18 Conn. 18, 27.

#### **As exclusive as to place.**

"From" is a term of exclusion, unless by necessary implication it is used in a different sense. "From an object" excludes the terminus referred to. *State v. Bushey*, 24 Atl. 940, 84 Me. 459.

The words "to," "from," and "by," when used to express boundaries, are ordinarily terms of exclusion, and are always to be understood in that way, unless there is something in the connection that makes it manifest that they were used in a different sense. *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491, 538.

"From," as contained in a description in a deed prescribing that the boundary shall run from a given monument, means that it begins at the exterior part, and not the center, of such monument or location, and this applies to a location which contemplates a square formed from a common center. *Clark v. Reeves* (N. Y.) 3 Caines, 293, 298.

A franchise granted to a fuel company to supply heat to the public within a certain city by means of natural gas conveyed from such adjoining counties as may be convenient is to be construed as authorizing the company to use such natural gas, and only such natural gas, as is brought from adjoining counties, and not gas found within the limits of the city. *Emmerson v. Commonwealth*, 15 Pittsb. Leg. J. 273, 275.

A railroad charter, authorizing it to build a line of roads "from one town to another," does not require the railroad to come within the corporate limits of either town, but is satisfied by a road extending from the boundary of one town to that of the other. *People v. Louisville & N. B. Co.* (Ill.) 5 N. E. 379.

12 St. at Large, p. 129, § 5, providing that a railroad should be constructed from Charleston to a certain point, restricts the Charleston terminus to the corporate boundary of the city. The word "from" is exclusive, and does not authorize the company to commence its road at any point within the city. *North Eastern R. Co. v. Payne* (S. C.) 8 Rich. Law, 177, 178.

The word "from," in a policy of marine insurance from a certain port, operates to prevent the policy from attaching until the vessel weighs anchor and breaks ground for the voyage, with all the preparations completely made. *Mosher v. Providence-Wash-*

ington Ins. Co., 33 N. Y. Supp. 85, 86, 12 Misc. Rep. 104; *Bradley v. Nashville Ins. Co.*, 3 La. Ann. 708, 709, 48 Am. Dec. 465.

The word "from," used alone, is held to exclude the risks while lying in port before sailing. An examination of the cases from which this rule is deduced shows that the use of the word "from" in this exclusive sense is confined to the commencement of the voyage insured, and that those cases which depend upon the meaning of the words "at," "at and from," and "to," relate to the beginning and end of risks, and are not applicable, in that exclusive sense, to ports at which the vessel may stop during a voyage described in the policy. The word "thence" is frequently used in reference to the intermediate ports of a voyage, and never recognized by courts as a term of exclusion; and insurance to the port, thence to another, thence to a third, is the same as from the first to the last, with liberty to stop at the intermediate ports. So a policy on a vessel "at and from New Orleans to Habana, from thence to Burita, and back to New Orleans," covers the vessel while lying at the port of Habana. *Bradley v. Nashville Ins. Co.*, 3 La. Ann. 708, 709, 48 Am. Dec. 465.

The use of the word "from," in a marine policy on a voyage from Amsterdam, entered into after the underwriters had refused to insure "at and from" Amsterdam, was construed to cover damages to the vessel while lying in the Texel waiting for cargo, although it was the custom for vessels of the size of the insured vessel to take part of their cargo to Amsterdam and part to the Texel. *Mey v. South Carolina Ins. Co.* (S. C.) 8 Brev. 329.

#### As exclusive as to time.

The word "from," in speaking of the time from a certain day, generally excludes the day to which it relates. *People v. Hornbeck*, 61 N. Y. Supp. 978, 80 Misc. Rep. 212; *Bigelow v. Willson*, 18 Mass. (1 Pick.) 485, 495; *Kendall v. Kingsley*, 120 Mass. 94, 95; *Rand v. Rand*, 4 N. H. 267, 276.

Lord Mansfield, in *Pugh v. Duke of Leeds*, Cowp. 714, 717, after an extensive review of the authorities, says "Courts of justice ought to construe the words of parties so as to effectuate their deeds and not destroy them," and that "'from the date' may in vulgar use, and even in strict propriety of language, mean either inclusive or exclusive." He says that the cases "for 200 years had only served to embarrass a point which a plain man of common sense and understanding would have no difficulty in construing." Thus the term "from," in a statute allowing the lands of the deceased debtor to be sold under execution, but prohibiting it from being done after the expiration of 18 months from the date of the letters of ad-

ministration upon his estate, was construed to include the terminus a quo, and therefore a sale on the 1st day of May, 1821, was held valid, though the letters of administration were dated on the 1st of November, 1819. *Griffith v. Bogert*, 59 U. S. (18 How.) 158, 163, 15 L. Ed. 307; *Price v. Whitman*, 8 Cal. 412, 415; *Wilcox v. Wood* (N. Y.) 9 Wend. 346, 348.

"It is now well settled as a general rule that when an act is to be done within a given number of days from the date or day of the date or act done, the day of the date is excluded; otherwise, an act to be done in one day must be done on the same day, and, as there is no fraction of a day, such stipulation must create an obligation to do it instantaneously." Per Shaw, C. J., in *Inhabitants of Seekonk v. Inhabitants of Rehoboth*, 62 Mass. (8 Cush.) 371, 373.

2 Rev. St. §§ 24-28, providing, in proceedings upon a distress for rent, that five days from the time of making the distress and serving the notice thereof must elapse before an appraisal of the goods can be made or notice of sale given, should be construed to mean five full days from the time of making the distress and serving the notice thereof; and hence, where a warrant was dated March 9th, the five days did not expire until after the 14th of March, and not on the 14th day of March, and therefore the earliest day for the appraisal and for giving notice of sale was the 15th of March. *Butts v. Edwards* (N. Y.) 2 Denio, 164, 167.

Where a statute provides that a brook on which a mill has been erected shall be kept open and free for the passage of fish from the 5th day of May to the 5th day of July in each year, the word "from" will be construed to be exclusive; and hence the owner of the mill will be entitled to the full use of water until the 6th day of May. *Peables v. Hannaford*, 18 Me. 106, 108.

The word "from," when used in a lease for a term of years "from the 1st day of" a month, will operate, when there is nothing to show a contrary intention of the parties, to exclude such 1st day in computing the time of the duration of the lease. *Ordway v. Remington*, 12 R. I. 319, 34 Am. Rep. 646; *Goode v. Webb*, 52 Ala. 452, 453; *Atkins v. Sleeper*, 89 Mass. (7 Allen) 487, 488.

Under a lease for the term of six years from the 1st of April, 1807, ending on the 1st of April, 1813, the rent to be payable on the 1st day of April during the six years, no rent was due or payable until the 1st day of April, 1808. The term being for six years from the 1st day of April, 1807, such day was excluded, and not a part of the term. *Thornton v. Payne* (N. Y.) 5 Johns. 74, 76.

An officer's commission to hold office during the term of four years from the 2d



of March, 1845, means that the day of date—that is, the 2d of March, 1845—should be excluded; and hence such officer is in office on the 2d of March, 1849. *Best v. Polk*, 85 U. S. (18 Wall.) 112, 119, 21 L. Ed. 805.

The use of the word “from,” in a policy of insurance requiring the payment of an assessment within 30 days from the notice thereof, is to be construed as showing that the time is to be computed by excluding the day on which the notice is received and including the thirtieth day thereafter. *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88, 95.

The word “from,” in Act March 26, 1827, giving five years from the day of entry of a judgment for its revival by scire facias, is to be construed as exclusive of the day on which the judgment is entered. Where the word is used by the Legislature, there seems to be equal reason for rejecting minute verbal criticisms and resorting to something more reasonable and solid; and we think that, where an act of assembly requires a thing to be done within a certain time from a prior date, and perhaps also from a prior act, and the party by not doing it loses his right, as in limitation laws, by which the right is to be taken away, there, in relief of the party and to preserve him from loss, the most liberal construction ought to be chosen, and the furthest time given from which the reckoning is to be made. *Appeal of Green* (Pa.) 6 Watts & S. 327, 328.

Under St. 1844, c. 123, providing that, when no person shall appear to discharge the taxes duly assessed on lands owned by nonresidents within nine months from the date of the assessment, the collector shall certify the same to the treasurer of the town, the owner of the land has the full period of nine months, excluding the day of the assessment, in which to discharge the tax, and a certificate made within such period of nine months is void. When a statute requires an act to be performed in a certain time from the date of some transaction, the day of such date is excluded in the computation of the time. *Flint v. Sawyer*, 30 Me. (17 Shep.) 226, 228, 229.

The use of the word “from,” in a contract providing that merchants shall have 20 days to load a vessel, counting from the day of readiness until the day of dispatch, operates to exclude the day of readiness. *Merritt v. Ona*, 44 Fed. 369, 370, 11 L. R. A. 724.

A marine policy was issued on a vessel upon a voyage from Santa Martha to New York, with liberty to use two additional ports, and thereafter an additional clause was added to the policy, by which it was agreed for an additional premium that the vessel should have the privilege of using three additional ports on the voyage from

the Spanish Main to New York. In an action on the policy it was held that the word “from,” in the additional clause, did not necessarily exclude ports upon the Main, but that the policy, as modified by the additional clause, gave the vessel the right of stopping at ports upon the Main. *De Peyster v. Sun Mut. Ins. Co.*, 19 N. Y. 272, 277, 75 Am. Dec. 331.

Under a contract giving an option to purchase land, if the vendee shall so elect after investigation, he to “have three months to satisfy himself, and after that time this agreement is to be null and void,” the contract is to be understood and construed as if it had been said that the vendee is to have three months from the date of the instrument, and, where the instrument was dated April 8th, a tender made on July 8th was within time. *Blake v. Crowninshield*, 9 N. H. 804, 307.

#### As inclusive as to place.

The words “from,” “to,” and “at” are taken inclusively, according to the subject-matter. Thus authority to construct a railroad or turnpike from A. to B., or beginning at A. and running to B., is held to confer authority to commence the road at some point within A. and to end it at some point within B. *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 346, 23 L. Ed. 423.

The act relating to the construction and alteration of the highway between the villages of H. and M., the first section of which appointed commissioners to improve the public road leading from the village of H. to the bank of a creek within the village of H., and thence, along or near the bank of said creek, to the village of M., must be reasonably construed with reference to the subject-matter; and it appearing that, unless it was adjudged to include some part of the village of H., the object of the grant could not be accomplished, nor the entire road be made, the word “from” is to be taken inclusively, and so construed that the commissioners will be allowed to enter upon lands within the limits of the village of H. *Smith v. Helmer* (N. Y.) 7 Barb. 416, 420.

In the charter to a railroad company granting the privilege of constructing a road from a certain city to a certain place, “from” should be construed inclusively, and to mean that in the construction of the road they have the right to enter the corporate limits of such town or city. *Tennessee & A. R. Co. v. Adams*, 40 Tenn. (3 Head) 596; *Appeal of Western Pennsylvania R. Co.*, 99 Pa. 153, 161.

A charter giving a railroad company power to construct and operate a railroad “from the city of Chicago to any point in the town of Evanston,” and prohibiting the

railroad from using certain streets in the city of Chicago, cannot be construed as meaning that the terminus of the road was to be the boundary of the city of Chicago, but it should be construed to mean that the road may run from any point in the city of Chicago. The words "from" and "to" a place, in the charter of a railroad company, have been frequently construed to mean "from" and "to" a point within the place from and to which the corporation was authorized to construct its road. *McCartney v. Chicago & E. R. R. Co.*, 112 Ill. 611, 626; *Chicago & N. W. Ry. Co. v. Chicago & E. Ry. Co.*, 112 Ill. 589, 598.

The word "from," in the charter of a railroad company, requiring it to build a railroad from the borough of Erie at a time when the borough is within certain limits, requires the railroad to be constructed within such limits, although the borough is enlarged before the road is constructed, and therefore the mere building of the road to the enlarged portion of the borough is not a sufficient compliance with the charter. *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. (3 Casey) 339-352, 67 Am. Dec. 471.

In an ordinance authorizing the grading, etc., of C. avenue from D. street to K. street, C. avenue having been graded to about the middle of D. street, would authorize the grading of C. avenue from the center of D. street; that is, from the part of the street which had been previously graded. The word as used, when saying "from" a street, does not necessarily mean from its nearest line, but may mean from any part of the street, according to existing circumstances. *City of Pittsburg v. Cluley*, 74 Pa. (24 P. F. Smith) 259, 261.

When used in a conveyance "from" is generally a term of exclusion; but, where the land conveyed is bounded on a river or stream where the tide does not ebb or flow, the boundaries by construction of law extend to the center or thread of a stream. *Bradley v. Rice*, 13 Me. (1 Shep.) 198, 201, 29 Am. Dec. 501.

Where an indictment for burglary charged that defendant feloniously took and carried away certain chattels "from a dwelling," instead of "in a dwelling," as the offense is described in Code, § 3170, the words "from a dwelling" do not have the same import as "in a dwelling," but might be treated as surplusage, or at least as a matter of description. *Moore v. State*, 40 Ala. 49, 51.

#### As inclusive as to time.

The words "from," "to," and "at" are taken inclusively, according to the subject-matter. *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 346, 23 L. Ed. 428.

Where a computation of time is to be made from any particular act or time, the

word "from" means that the day on which the act is done, or the day of the date, is to be included. *Swift v. Tousey*, 5 Ind. 198, 198.

The word "from," in the computation of a date, is not necessarily exclusive, and in computing the time of a contract of service from a certain date, if it appears that plaintiff entered into the service under the contract on the day of its date, such day will be included. *Wilkinson v. Gaston*, 9 Q. B. \*137, 145.

In a lease of premises from a certain day, such day is included in the term. *Reg. v. St. Mary, Warwick*, 18 Eng. Law & Eq. 309, 314; *Hopkins v. Helmore*, 8 Adol. & E. 463; *Deyo v. Bleakley* (N. Y.) 24 Barb. 9, 11; *Meeks v. Ring*, 4 N. Y. Supp. 117; *Mallory v. Hiles*, 61 Ky. (4 Metc.) 53; *People v. Clark*, 1 Cal. 406.

The word "from," in a lease of land for one year from the 1st day of April, does not show that the lessee is entitled to the term until the expiration of the 1st day of April on the succeeding year; but the term includes the 1st day of April of the year when the term commenced, and expires on the last day of March of the succeeding year. "It is undeniably true that there has not been entire uniformity in the rules laid down by courts in reference to the computation of time, but the diversity in the rule appears to have been caused by a desire so to apply it as not to work injustice. The parties to this transaction doubtless had in view the universal understanding of the country that, where one rents lands or tenements for a year from the 1st day of April, the tenant has the right to enter on the day named, and that term ceases on the last day of March ensuing." *Marys v. Anderson*, 24 Pa. (12 Harris) 272, 276.

A note for a certain sum, with interest "from 1835," means from the beginning of the year 1835, and not from or after its expiration. *Evans v. Sanders* (Ala.) 8 Port. 497, 499.

"From," as used in the by-laws of an association providing that a suspended member, to become reinstated, must pay all sums called for before the date of reinstatement within 60 days from the date of suspension, includes the day of date. *Supreme Council A. L. H. v. Gootee*, 89 Fed. 941, 946, 32 C. C. A. 436 (citing *Best v. Polk*, 85 U. S. [18 Wall.] 112, 21 L. Ed. 805).

Act Feb. 13, 1867, declaring that there is "levied a uniform levy tax in a certain district, payable annually on or before May 1st in each year from May 1, 1868," means that the first payment should be on May 1, 1868, and not on May 1, 1869. *Carlisle v. Yoder*, 12 South. 255, 69 Miss. 334.

A statute relative to the title to Indian land provided that it should be inalienable for five years "from the day of the date" of the patent therefor. Held, that the land could

be alienated on the fifth anniversary of the date. *Taylor v. Brown*, 40 N. W. 525, 526, 5 Dak. 335.

In Rev. St. § 3331, providing that, where labor or services are continuous from the 1st day of November, or the day prior thereto, to a date beyond the 1st day of May following, the claim for a lien shall be filed, etc., "from" is used inclusively. *McGinley v. Laycock*, 68 N. W. 871, 872, 94 Wis. 205.

#### Separation implied.

A grant to take, use, and appropriate water from a pond does not vest title to all the water in the pond, but the language implies a separation, and requires the act of taking or appropriating, and hence such grant did not constitute a surrender of the right to grant similar franchises. *Rockland Water Co. v. Camden & R. Water Co.*, 15 Atl. 785, 790, 80 Me. 544, 1 L. R. A. 388.

The word "from," in an agreement to deliver at a certain place a quantity of water through and from a pipe, flume, or conduit, simply expresses the general idea of separation, and would not change the meaning of the contract if omitted, as no water running in the obligor's pipe could possibly be delivered in any manner whatever without being taken from said pipe. Some of the definitions of "from" given by Webster are "out of the neighborhood of; leaving behind; out of; the antithesis and correlative of to." *Sefton v. Prentice*, 37 Pac. 641, 642, 103 Cal. 670.

### FROM AND AFTER.

#### In devise of remainder

"From and after," as used in a bequest to a person from and after his attaining a given age, makes the bequest prima facie contingent. *Post v. Herbert's Ex'rs*, 27 N. J. Eq. (12 C. E. Green) 540, 543.

The words "from and after," or like expressions used in wills as relating to the termination of the life estate, do not postpone the vesting of the estates in remainder until the death of the life tenant, but rather refer to the period when the remaindermen would become entitled to the estates in possession. *Corse v. Chapman*, 47 N. E. 812, 813, 153 N. Y. 466; *Hersee v. Simpson*, 48 N. E. 890, 891, 154 N. Y. 496; *McGillis v. McGillis*, 49 N. E. 145, 147, 154 N. Y. 532; *Moore v. Lyons* (N. Y.) 25 Wend. 119, 144; *Ackerman v. Gorton*, 67 N. Y. 63, 66; *Taggart v. Murray*, 53 N. Y. 233; *Gibson v. Walker*, 20 N. Y. 476, 484; *In re Crossman*, 1 N. Y. Supp. 103, 104, 48 Hun. 617; *Nelson v. Russell*, 31 N. E. 1008, 1009, 135 N. Y. 137; *Livingston v. Greene*, 52 N. Y. 118, 123; *Haug v. Schumacher*, 64 N. Y. Supp. 310, 313, 50 App. Div. 562; *Lyons v. Weeks*, 61 N. Y. Supp. 441, 443, 29 Misc. Rep. 714; *Bailey v. Love*, 11 Atl. 280, 283, 67 Md. 592.

In *Corse v. Chapman*, 153 N. Y. 466, 47 N. E. 812, the words "from and after," as relating to the termination of a life estate, were considered, and it was held that an absolute estate in remainder vested at the time of testator's death, subject to open and let in any grandchild or grandchildren born after the death of the testator. *Manhattan Real Estate & Building Ass'n v. Cudlipp*, 80 N. Y. Supp. 993, 995, 80 App. Div. 532.

"The cases are common which hold that adverbs of time, such as 'when,' 'then,' 'after,' 'from and after,' etc., in the devise of a remainder limited upon a life estate, are to be construed merely as relating to the time of the enjoyment of the estate, and not to the time of its vesting in interest, and that the law favors such a construction of a will as will avoid the disinheritance of remaindermen who may happen to die before the determination of the precedent estates." *In Connelly v. O'Brien*, 60 N. E. 20, 166 N. Y. 406, the Court of Appeals carried this doctrine so far as to hold that where testator gave his property to his widow during her life, and to such of her children that may then be alive, the adverb was intended by him to refer to the time of his own death, and not to that of his widow, and that consequently a daughter who survived him, but died before the widow, took a vested share. *Ackerman v. Ackerman*, 71 N. Y. Supp. 780, 781, 63 App. Div. 370.

#### As exclusive as to time.

"From and after" have no certain or legal meaning that can be accepted as a guide under all circumstances, but it is generally accepted as a rule that they exclude the day from which the reckoning is to be made, and in order to avoid the application of it as a rule of construction there must be something in the act, or the result of a literal application of the words to the subject treated by it, to indicate a contrary intent; and they are so used in an act providing that it shall "take effect and be in force from and after its passage and publication." *O'Connor v. City of Fond du Lac*, 85 N. W. 327, 330, 109 Wis. 253, 53 L. R. A. 831 (citing *Stewart v. McSweeney*, 14 Wis. 468; *McGinley v. Laycock*, 94 Wis. 205, 68 N. W. 871); *Parkinson v. Brandenburgh*, 28 N. W. 919, 920, 35 Minn. 294, 59 Am. Rep. 326; *State v. Messmore*, 14 Wis. 163; *Duncan v. Cobb*, 32 Minn. 460, 21 N. W. 714; *Arnold v. United States*, 13 U. S. (9 Cranch) 104, 107, 3 L. Ed. 671; *Leavenworth Coal Co. v. Barber*, 27 Pac. 114, 115, 47 Kan. 29.

A statute providing that it shall take effect from and after the passing thereof does not mean that it shall take effect immediately, without waiting for the expiration of the day on which it passed, though it is a general rule that, where the computation is to be made from an act done, the day on which

it is done is to be included; but to apply such a rule in computing the time when a statutory enactment shall take effect would include the whole of the day on which it was enacted, and thereby give the statute a retroactive effect, which cannot be allowed. *Bemis v. Leonard*, 118 Mass. 502, 505, 19 Am. Rep. 470.

Act Sept. 1, 1871, regulating interest, provides "this act shall take effect and be in force from and after" the 1st day of September, 1871. Held, that the words "from and after," used in such connection, fixed the date named as a point or period of time, after which the rule prescribed by the act is to prevail, and that the 1st day of September, 1871, was to be excluded, since, if the intention had been to include that day, the language would have been "on and after." "The rule in regard to the computation of time is that, when the computation is to be made from an act done, the day on which the act was done must be included, but when the computation is to be from the day itself, and not from the act done, then the day on which the act was done must be excluded." *Handley v. Cunningham's Trustee*, 75 Ky. (12 Bush) 401, 403; *Wood v. Commonwealth*, 74 Ky. (11 Bush) 220, 221; *Chiles v. Smith's Heirs*, 52 Ky. (13 B. Mon.) 461; *Bellasis v. Hester*, 1 Ld. Raym. 280.

The Pennsylvania act of assembly, directing that from and after the passing of the act no person should be subject to prosecution for libel by indictment, refers to indictments found after the law was enacted; the expressions of the Legislature being in the future sense and not retrospective. *Commonwealth v. Duane* (Pa.) 1 Bin. 600, 609.

A statute providing that from and after the year 1900 certain property should be liable to a city tax rate can only be interpreted as excluding the year 1900. A point of time cannot be within the year 1900 when its beginning is fixed as from and after the year 1900. No moment of time can be said to be after a given year until that year has elapsed and passed. In its grammatical sense the word "from," when referring to a certain point as a terminus a quo, always excludes that point. *Sindall v. City of Baltimore*, 49 Atl. 645, 647, 93 Md. 526.

#### As inclusive as to time.

"From and after," if used in reference to an act done, is inclusive of the day, but, if "from" a day, it is exclusive, so that, if it is from and after an act done, the time commences immediately upon the act being done. *Chicago Title & Trust Co. v. Smyth*, 62 N. W. 792, 793, 94 Iowa, 401 (citing *Wadsworth v. Smith*, 43 Iowa, 439).

Where a statute provides that it shall take effect from and after the passing of the act, it takes effect immediately. *Arnold v.*

*United States*, 13 U. S. (9 Cranch) 104, 120, 3 L. Ed. 671. It is a general rule that, when computation of time is to be made from an act done, the day on which the act is done is to be included. *Taylor v. Brown*, 13 Sup. Ct. 549, 551, 147 U. S. 640, 37 L. Ed. 813. Act April 18, 1883 (80 Ohio Laws, p. 169), amending Rev. St. § 6710, providing that it should "take effect and be in force from and after its passage," should be construed to include the date on which it was enacted. When the computation is to be made from an act, the day on which it is done is included. *Arrowsmith v. Hemmering*, 39 Ohio St. 573, 578. A statute providing that it should take effect from and after the passage of the act means that it shall go into operation on the day on which it is approved, and has relation to the first moment of that day, and, so far as it concerns the commencement or termination of public laws, a day is an indivisible portion of time. *In re Welman*, 20 Vt. 654, 658, 29 Fed. Cas. 681; *In re Howes*, 21 Vt. 619, 12 Fed. Cas. 715; *The Ann*, 1 Fed. Cas. 927; *Lapeyre v. United States*, 84 U. S. (17 Wall.) 191, 198, 21 L. Ed. 606.

An act of Parliament which is to take effect "from and after the passing of the act" operates by legal relation from the first day of the session. *Latless v. Patten*, 4 Term R. 660.

An act laying duties on goods imported "from and after the passage of the act" takes effect the beginning of the day on which it is passed, and not from the time of its being signed by the President. *United States v. Williams*, 28 Fed. Cas. 677.

#### FROM AND THROUGH THE MOTHER.

"From and through the mother," as used in Rev. St. Tex. art. 1657, providing that illegitimate children shall be capable of inheriting from and through the mother, confines the general right of inheritance to the mother and her lineal ascendants, so that it will not go to the mother's brothers and sisters. *Blair v. Adams* (U. S.) 59 Fed. 243, 246.

#### FROM AND TO.

Where a release of a legacy given in a will is in full of all demands "from the beginning of the world to the day of its date," it will not discharge a claim of the releasor against the estate of testator which did not exist at the time the release was given. *Rapp v. Rapp*, 6 Pa. (6 Barr) 45, 50.

A contract for the shipment of freight "from and to N. and O., with stations on the line of said road between those points," refers to the carriage of goods from and to N. and O., and from and between interme-

diate points and N. and C., and does not include the carriage of freight from one intermediate point to another such station. *Baltimore & O. R. Co. v. Pittsburg, C. & St. L. R. Co.* (U. S.) 55 Fed. 701, 702.

A contract for the sale and delivery at a certain place of "from 1,000 to 3,000 bushels of potatoes" implies that the seller has the right to deliver any quantity he chooses within the range of the terms of the contract—that is, between 1,000 and 3,000 bushels—and is not bound to make his election until they arrive at the place of delivery. *Small v. Quincy*, 4 Me. (4 Greenl.) 497, 500.

An agreement as to certain goods, "from 200 to 600 tons," for delivery between two certain dates, should be construed to mean that the purchaser would accept any amount of such goods between the two limits. *Wheeler v. New Brunswick & C. R. Co.*, 5 Sup. Ct. 1061, 1065, 115 U. S. 29, 29 L. Ed. 341.

"From," as used in Gen. Laws, c. 112, § 4, making it an offense for any person to have in his possession any ruffed grouse from the 1st day of January to the 1st day of October, should be construed as equivalent to "between." *State v. Stone*, 38 Atl. 654, 20 R. I. 269.

A marine policy on a voyage described as "from Boston to St. Thomas and a market in the West Indies" is to be construed as covering a voyage from Boston to St. Thomas, and from thence to other ports in the West Indies, until the vessel finds a market in which it can dispose of its cargo. *Deblois v. Ocean Ins. Co.*, 33 Mass. (16 Pick.) 303, 308, 28 Am. Dec. 245.

#### FROM DATE.

"From the date" was said by Lord Mansfield, in *Pugh v. Duke of Leeds*, Cowp. 714, to be synonymous with the phrase "from the day of the date." *Kimm v. Osgood's Adm'r*, 19 Mo. 60, 61; *Oatman v. Walker*, 33 Me. 67, 70; *Bigelow v. Willson*, 18 Mass. (1 Pick.) 485, 494.

#### As exclusive.

"From the date," as used in a contract reciting the conveyance of real estate by deed dated November 25, 1848, and covenanting that if, at the expiration of one year from the date of such deed, the grantee should prefer to reconvey the land and house, and should offer to do the same, the grantor should accept such reconveyance, paying therefor a certain sum, has precisely the same meaning as "from the day of the date." The date of a deed is not the hour or minute when the deed was executed, but a memorandum of the day when the deed was delivered. This day in a legal sense is

an indivisible point of time, there being no fraction of a day. On this principle the day on which the instrument is dated, in the computation of time, is excluded. November 26, 1849, was the day on which the grantee was bound to make the offer of a reconveyance of the estate. *Oatman v. Walker*, 33 Me. 67, 70.

A guaranty of all the notes of the prospective debtor, discounted by the guarantee, which are presented to the guarantee "from time to time from date" of contract, means after date hereof, and hence does not cover a note discounted on the day of the contract. *Peoria Savings, Loan & Trust Co. v. Elder*, 45 N. E. 1083, 1085, 165 Ill. 55.

"From date," when used in a lease to designate the commencement of a term, has precisely the same meaning as from the day of the date, and excludes such day. *Bigelow v. Willson*, 18 Mass. (1 Pick.) 485, 494.

#### As inclusive.

"From the date," as used in a contract which contemplates that a present interest is to commence from the date, will be construed as including the date of the day; but, where it is used merely to fix a terminus from which to compute time, the day is in all cases excluded. *Pearpoint v. Graham*, 19 Fed. Cas. 60, 65. And it is accordingly held that where a bond was dated on the 22d of July, 1818, payable in five years from the date, a scire facias quare executio non might issue on the 22d day of July, 1823. *Lysle v. Williams*, 15 Serg. & R. 135, 136.

"From the date," as used in a life insurance policy providing that the full amount of the policy should only be paid in the event insured died after one year "from the date" of the policy, and where the policy took effect on the day of its date, should be construed inclusively, rather than exclusively, and in computing the year the day of the date of the policy should be excluded. *Walker v. John Hancock Mut. Life Ins. Co.*, 45 N. E. 89, 90, 167 Mass. 188.

As used in articles of copartnership to continue for four years from the date of the contract, "from" is equivalent to the statement, in a declaration in an action relating to such contract, that the commencement of the four years of its continuance was to be with the day of the date of the contract. "A datu" does not exclude the date, and it was the same with "cum datu"; but "a datu" and "a die datus" are not the same. *Seignoett v. Noguire*, 2 Ld. Raym. 1241, 1242.

#### FROM THE DAY.

The term "from the day" is equivalent to "from the day of the date," and the day on which the act is done is included in count-

ing from that act. *Cromellen v. Brink*, 29 Pa. (5 Casey) 522, 524.

#### As exclusive.

"From the day of the date," when used in a lease to designate the commencement of a term, has precisely the same meaning as "from the date," and excludes such day. No moment of time can be said to be after a given day until that day has expired. *Bigelow v. Willson*, 18 Mass. (1 Pick.) 485, 494.

A policy of insurance, insuring the life of one for one year from the day of the date thereof, excludes the day of the date of the policy. *In re Sir Robert Howard*, 2 Salik. 625.

#### As inclusive.

In written leases the phrase "from the day of the date," or "from the date," may be inclusive or exclusive according to the context or subject-matter. Where there is no stipulation postponing the commencement of the lease, the day of the demise is made inclusive, and is to be considered in computing the time of the commencement and termination of the lease. *Donaldson v. Smith* (Pa.) 1 Ashm. 197.

18 Stat. 420, providing that the title to lands acquired by any Indian by virtue thereof shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years "from the day of the date" of the patent thereof, should be construed to include the day of the issuance of the patent, and hence the land may be alienated on the fifth anniversary of such date. *Taylor v. Brown*, 40 N. W. 525, 528, 5 Dak. 335.

#### FROM THE FIELD.

The term "from the field," in a statute making it criminal to steal from the field any grain or cotton not yet severed, was used "to point out a particular kind of property, to wit, the products of or outgrowth from the field of the kind designated before they were gathered by the owner, and not the stealing of that kind of property in any particular locality." Thus the word "from" is material, and an indictment charging the stealing of corn in the field is fatally defective. *State v. Shuler*, 19 S. C. 140, 141.

The words "from the field," in a statute describing the offense of stealing grain or cotton from the field, has a technical and special significance, bound to and indicating products or outgrowth from the field. An indictment which alleges the stealing of the corn "in the field" is an insufficient charge

of the crime. *State v. Nelson*, 4 S. E. 792, 793, 28 S. C. 16.

#### FROM THE GRASS ROOTS DOWN.

In an action for the price of mines sold, where the defense was fraudulent representations, in that plaintiff represented that the mines would yield in gold not less than 10 cents per yard "from the grass roots down," it was contended that the expression "from the grass roots down" meant in mining parlance from the grass roots to the bed rock, and that it was so understood by miners; but the court said that the expression "from the grass roots down" in its literal sense means to the center of the earth, and that if it has a signification peculiar to the locality or to a particular industry the court would not take notice of it, and it should be set up in the pleadings. *Martin v. Eagle Creek Development Co.*, 69 Pac. 216, 219, 41 Or. 448.

#### FROM THE PERSON.

Comp. St. § 710, providing punishment for larceny from the person, means on the person, or in the immediate charge and custody of the person, from whom the theft is made. For instance, should a cane or umbrella be taken from the hand of a person, or a barrow that he was wheeling, or tool with which he was employed, or horse that he was driving, leading, or holding by the bridle, the theft would be "from the person." In each of these cases the rights of the person to inviolability would be encroached upon, and his personal security endangered, quite as much as if his watch or purse had been taken from his pocket. *State v. Eno*, 8 Minn. 220, 222 (Gil. 44).

"From the person," as used in section 59 of an act concerning crimes and punishments, defining robbery to be the felonious and violent taking of money, goods, etc., from the person of another by force or intimidation, means what the words naturally import, and an allegation in an indictment that the property was taken from another person is not equivalent to the term "from the person of another," as used in the statute. *People v. Beck*, 21 Cal. 385.

The phrase "from the person of another," as embraced in the definition of robbery, does not require that the taking must necessarily be from the actual contact of the body, but if it is from under the personal protection that will suffice; but the sudden snatching up and carrying away of a pistol with intent to steal is not robbery, where there was no intimidation of the owner, who was near the pistol, and no resistance was offered by him to the taking. *Jackson v. State*, 40 S. E. 1001, 114 Ga. 828, 88 Am. St. Rep. 60.

Within the meaning of a statute declaring that if any person by force or violence, or by putting in fear, steal or take from the person of another any property that is the subject of larceny, he is guilty of robbery, the preposition "from" does not convey the idea of contact or propinquity of the person and property. It does not imply that the property is in the presence of the person. The thought of the statute as expressed in the language is that the property must be so in the possession or under the control of the individual robbed that violence or putting in fear was the means used by the robber to take it. If it be away from the owner, yet under his control in another room of the house, it is nevertheless in his personal possession; and if he is deprived thereof it may well be said it is taken from his person. Goods are called "personal property" in the law, and presumed to accompany the person. If taken from the owner, this relation of owner and property is surrendered, and the goods are separated from the person; and so in the case where defendant by violence bound the prosecuting witness, and thereby put her in fear, and by this violence extorted from her information of the place where she kept her money and watch in another room of the house, and, leaving her bound, went into that room and took the property, it was taken "from her person," in the sense of the words as used in the statute. *State v. Calhoun*, 34 N. W. 194, 196, 72 Iowa, 432, 2 Am. St. Rep. 252.

"Theft from the person," within Pen. Code, § 763, means a taking of property from the person of another without his knowledge, or so suddenly as to preclude resistance. *Wilson v. State*, 3 Tex. App. 63, 64.

Pen. Code, art. 745, provides that, in order to constitute the offense of "theft from the person," it is necessary that the following circumstances concur: (1) The theft must be from the person. It is not sufficient that the property be merely in the presence of the person from whom it is taken. (2) The theft must be committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away. (3) It is only necessary that the property stolen should have gone into the possession of the thief. It need not be carried away in order to complete the offense. Under this statute it is held that evidence that the owner of stolen money felt some one touch his pocket containing his purse, and that upon looking around quickly he saw defendant's hand, holding the purse, pass from his to defendant's own pocket, is sufficient to prove theft from the person. *Green v. State*, 13 S. W. 784, 785, 786, 28 Tex. App. 493.

In *Dukes v. State*, 22 Tex. App. 192, 2 S. W. 590, it is said that in "theft from the

person" as in other thefts, the offense is complete when the property has gone into the possession of the thief. It is not essential to the completion of the offense that the property be carried away by the thief. The taking of the property includes the carrying away thereof, within the meaning of the statute. *Green v. State*, 13 S. W. 784, 786, 28 Tex. App. 493.

#### FROM PLACE TO PLACE.

"From place to place," as used in St. 1855, c. 215, § 20, prohibiting the transportation of spirituous liquors from place to place in the state, does not mean only from towns or counties, or such other territorial divisions or districts as have been or may be established by a law or by authority of the commonwealth. It is not every possible removal of spirituous liquor which comes within the statute. If the removal were only on the premises of the owner, or from one to another of his warehouses, or from one to another part of his shop, it would not be from place to place within the meaning of the statute; but the transportation from one place, whether it be a shop, warehouse, railroad depot, or building used for any purpose whatever, of which the owner has no possession and in which he has no interest, to a store of his own in which he transacts his usual business, is a thing altogether different in itself, and is a transportation from place to place. *Commonwealth v. Waters*, 77 Mass (11 Gray) 81, 84.

"From place to place," as used in St. 1786, c. 67, § 4, relative to the laying out of roads, and authorizing the establishment of roads from town to town and from place to place, means from one place in a town to another place in the same town. *Commonwealth v. Inhabitants of Cambridge*, 7 Mass. 158, 162.

Where statutes regulating hawkers and peddlers (Laws 1846, c. 200; Laws 1848, c. 63) required a license for all peddlers traveling from place to place, the term "from place to place" did not mean from a place in one town to a place in another town, but included persons traveling about from one place to another within the same town. *Andrews v. White*, 32 Me. 388, 389.

#### FROM THENCE.

Where insurance was on a ship "at and from Liverpool to ports and places in China or Manila, all or any, during the ship's stay there for any purpose, and from thence to her port of discharge in the United Kingdom," the words "from thence" meant, not only from Manila, but from ports or places in China or Manila, all or any. *Ashley v. Pratt*, 16 Mees. & W. 471, 481.

"From thence hither," as used in a description of a grant as certain "lots of meadow ground lying over against ye springe, where a passage hath been used to ford over from this island to the maine and from thence hither," do not apply to any boundary. They are descriptive of the ford. *Obionis v. Creeth* (U. S.) 67 Fed. 303, 305.

#### FROM THENCEFORTH.

The expression "from thenceforth," as used in Act March 2, 1875, § 4, providing for the making of an order prohibiting the sale or giving away of spirituous liquors within three miles of an academy, institute of learning, or university, and from thenceforth it should not be lawful to loan or give away spirituous liquors within such limits, indicated the beginning, and not the duration, of the operation of the act. *Wilson v. State*, 35 Ark. 414, 421.

#### FROM THE RENDITION OF JUDGMENT.

The phrases "from the rendition of judgment," "next after judgment," "next after the rendition of judgment," "from the time of rendering judgment," "after entering up final judgment," and "after judgment entered of record," occurring in various statutes providing that certain proceedings may be had within fixed times after the event designated by such phrase, all refer to the same time, and this, according to an intendment at law and the practice of the New Hampshire courts, is the last day of the term in which the record shows the judgment to have been rendered, unless the true time of entering the judgment appears upon the record. *New Hampshire Strafford Bank v. Cornell*, 2 N. H. 324, 331.

#### FROM TIME TO TIME.

Where a deed conveyed all the right, title, and interest which the grantor had in a certain invention as secured to him by letters patent, and also all rights which might be secured to him for alterations and improvements from time to time, the phrase "from time to time" imported all patents which might be issued thereafter on alterations and improvements. *Philadelphia, W. & B. R. Co. v. Trimble*, 77 U. S. (10 Wall.) 367, 379, 19 L. Ed. 948.

The expression "from time to time" is not equivalent to "from term to term," as used in Acts 1892, p. 38, requiring a recognizance to bind a defendant to appear before the trial court from term to term. *Forbes v. State* (Tex.) 25 S. W. 1072.

"The Century Dictionary defines the phrase 'from time to time' to mean 'occasionally'; and the Universal Dictionary de-

fines 'from time to time' to mean, 'at intervals; now and then.' " The phrase is used in such meaning in Acts 1898, c. 123, § 95, which directs the police commissioners of Baltimore, at the request of the park commissioners, to detail from time to time members of the regular police force for the preservation of order in the parks. *Upshur v. City of Baltimore*, 51 Atl. 953, 955, 94 Md. 743.

The phrase "from time to time," as used in the Constitution, authorizing the Legislature to increase the number of judges of the Supreme Court from time to time, means occasionally; that is, as occasion requires, and therefore the words cannot be held to mean that the Legislature may not decrease the number of judges after an increase thereof. *State v. McBride*, 70 Pac. 25, 27, 29 Wash. 335.

#### FROM WHATEVER CAUSE.

See "Whatever Cause."

#### FRONT.

See "River Front."

See, also, "In Front of."

In a deed describing a tract of land the language used was "front thirty rods," and the contention was as to whether the land included all of the land up to a navigable stream or not. The court held that a lot of land may be said to front on water, but not usually to front on another piece of land; but it may front on a road. But in this case there did not appear to be any road, so that it appeared to front on the water. *Proctor v. Maine Cent. R. Co.*, 52 Atl. 933, 935, 96 Me. 458.

#### As adjoining or bordering.

"Fronting," as used in Act March 22, 1895, § 8 (P. L. p. 424), requiring a petition for review of an improvement assessment to be signed by the owners of at least two-thirds either in lineal feet or in area of the lands and real estate "fronting" on the road or section of road to be improved, means adjoining at some point the road or section of road involved. *Erisman v. Board of Chosen Freeholders of Burlington County*, 45 Atl. 998, 999, 64 N. J. Law, 516.

Lots separated in a city street by a five-foot strip are not fronting on the street, within the meaning of the Kansas City charter of 1875, providing that land fronting on the street, etc., shall be subject to assessment for improvements thereon. *Crane v. French*, 50 Mo. App. 367, 369.

Where property mortgaged was described as being on the left bank of a river and as having a certain front to the river,



the expression "front to the river" was intended to denote a riparian estate bordering on the river. *La Branch's Heirs v. Montegut*, 17 South. 247, 248, 47 La. Ann. 674; *Morgan v. Livingston (La.)* 3 Mart. (N. S.) 19, 226.

"Front to the river," as used in a sale of a certain and limited part of a tract of real estate taken from a whole tract owned by the vendor, leaving another part between the premises sold and the river, are merely descriptive of the position of the land sold, and no land passes beyond the expressed limits. *Cambre v. Kohn*, 8 Mart. (N. S.) 572, 579.

#### **As street frontage.**

"Front," as ordinarily used in reference to lands or property on the lands, refers to the street frontage or facing according to the manner in which the property is improved and used, and hence a deed describing land as "the front 31 feet of the rear 82 feet, lots 6 and 7," etc., and the improvements fronted on the side of lot 6, which was the corner lot, is too ambiguous and uncertain to render the deed valid. *Connecticut Mut. Life Ins. Co. v. Ingarrison*, 78 N. W. 10, 11, 75 Minn. 429.

The phrase "front of the lot," as used in a lease in which the lessee agreed to keep up the sidewalks in front of the lot in accordance with the city ordinances, means that part of the lot which faces a street or streets. It may front on one street only, or it may front on two. What is the front of a lot is a question determinable by its facing on a public street or streets. A lot standing on a corner, with a street on two sides of it, has two fronts, because its face is opposite to and fronts on two different streets. *City of Des Moines v. Dorr*, 31 Iowa, 89, 93.

#### **FRONT AND REAR BUILDINGS.**

An insurance on "front and rear buildings" includes connecting walls. *Monteleone v. Royal Ins. Co.*, 18 South. 472, 47 La. Ann. 1563, 56 L. R. A. 784.

#### **FRONT FOOT.**

Under Rev. St. § 2264, providing that, in case of an improvement made to an existing street, the expense might be assessed by the front foot on the property bounded and abutting upon the improvement, in making such an assignment the council must have regard to what the front of the lot is. It may abut, and yet not front on, the improvement for its full length, or any part of it. Hence, where a lot fronted  $37\frac{1}{2}$  feet on one street, and the side of the lot, extending 75 feet, abutted on the street which was improved, it should be deemed or regarded as fronting breadthwise on the improvement,

and the assessment on the lot should be for the number of feet it would then have; that is, in such case,  $37\frac{1}{2}$  feet, and no more. It may be said that this is assessing according to a fiction. Admit this to be true, and still it must be remembered that equity many times resides in fictions, and that they have been frequently resorted to for the purpose of working out justice against the hard lines of law. *Haviland v. City of Columbus*, 34 N. E. 679, 680, 50 Ohio St. 471.

By the front-foot rule the total cost is ascertained, as well as the total frontage of the property chargeable with a special tax, then the former item is divided by the number of feet of frontage, and the rate per foot is thus ascertained. Each lot is then assessed by multiplying the rate per foot of cost by the front feet it exhibits, and the total is the assessment against each lot. *Mound City Const. Co. v. Macgurn*, 71 S. W. 460, 462, 97 Mo. App. 403 (citing *Farrar v. City of St. Louis*, 80 Mo. 379, 393).

#### **FRONT PART.**

A contract to finish the "front part" of a basement cannot be limited necessarily to mean only the external front part, but may well include both sides of the front wall of the building. *Bedard v. Bonville*, 15 N. W. 185, 186, 57 Wis. 270.

#### **FRONTAGE.**

A statutory requirement that, in making local assessments for street improvement work, each lot shall be charged in proportion to the frontage thereof, does not contemplate that the work in front of each lot shall be necessarily charged to that lot, but that the amount of the whole work shall be ascertained, and each lot charged in the proportion that its frontage bears to that of all the lots. *Neenan v. Smith*, 50 Mo. 525, 531.

#### **FRONTAGE ASSESSMENT.**

An assessment on lots fronting on a highway is a "frontage assessment" to the same extent as if the words had been used, so that a contention that where a statute makes property liable to a frontage assessment in case of sidewalks, and provides for an assessment on lots fronting on the street of other improvements, does not provide for a frontage assessment on such lots, is untenable. *Lyon v. Town of Tonawanda (U. S.)* 98 Fed. 361, 366.

#### **FRONTIER.**

In Act Cong. 1838, commonly called the "Neutrality Act," authorizing the collectors and other officers therein mentioned to seize and detain vessels having arms, etc., on board, passing toward a foreign state or col-

any coterminous with the United States, when they had reason to believe that the vessels, etc., were to pass the frontier and were to be employed in a military expedition or operation against said state or colony, the term "frontier" means something more than the boundary line. It means a tract of country contiguous to the line, and it is not material whether such vessels were actually intended to be passed across the boundary line into the plaintiff's territory. *Stoughton v. Mott*, 15 Vt. 162, 169.

## FROST.

The term "frost," as used in a charter party providing for demurrage over and above the lay days, except in case of frost or floods, revolutions or wars, or any unavoidable accidents hindering the loading or discharging, means freezing, and includes any freezing that would hinder or obstruct the loading or unloading of the ship, and an obstruction in moving a lighter used in unloading caused by ice is within the exception. *Aalholm v. A Cargo of Iron Ore* (U. S.) 23 Fed. 620, 623.

## FROZE.

"Froze" is a term used in the iron trade to designate bundles or bars of iron which are so stuck or run together with rust that no use can be made of them until they are unrolled. *The Nith* (U. S.) 36 Fed. 86, 87.

## FRUCTUS.

In the civil law, fruit; fruits; produce; profit or income; the organic productions of a thing. "Fructus fundi," the fruits of the land. "Fructus pecudum," the produce of flocks. The right to the fruits of a thing belonging to another. The compensation which a man receives from another for the use or enjoyment of a thing, such as interest or rent. *Black, Law Dict.*

## FRUCTUS INDUSTRIALES.

"Fructus industriales" are those products of the earth which are annual, and are raised by yearly manurance and labor, and essentially owe their annual existence to the cultivation of man. The manner, as well as the purpose, of planting, is an essential element to be taken into consideration. If the purpose of planting is not the permanent enhancement of the land itself, but merely to secure a single crop, which is to be the sole return for the labor expended, the product would naturally fall under the head of "fructus industriales." *Sparrow v. Pond*, 52 N. W. 36, 49 Minn. 412, 16 L. R. A. 103, 32 Am. St. Rep. 571.

The term "fructus industriales" is used to designate grain, vegetables, or other kinds of crops which are the product of periodical planting and culture. *Purner v. Piercy*, 40 Md. 212, 223, 17 Am. Rep. 591.

The term "fructus industriales" is used to designate crops raised by yearly cultivation. The term includes a growing crop of fruit requiring periodical expense, industry, and attention in its yield and protection. Thus apples, peaches, and blackberries, which require the manurance and industry of man for their annual production, are included within the term. *Smock v. Smock*, 37 Mo. App. 56, 64.

At the common law growing crops, produced by manual labor and cultivation, are called "fructus industriales," and for some purposes form a part of the real estate to which they are attached, and unless there has been a severance of them from the land, actual or constructive, they follow the title thereto. For other purposes they are regarded as personality, and so do not pass with the land, but go to the planter. *Phillips v. Keysaw*, 56 Pac. 695, 696, 7 Okl. 674.

## FRUCTUS NATURALES.

"Fructus naturales" is the term applied to the fruit of trees, perennial bushes, and grasses growing from perennial roots, in contradistinction to those products of the earth which are annual, and are raised by yearly manurance and labor, and essentially owe their annual existence to the cultivation of man, to which the term "fructus industriales" is applied. *Sparrow v. Pond*, 52 N. W. 36, 49 Minn. 412, 16 L. R. A. 103, 32 Am. St. Rep. 571.

## FRUIT.

See "Annual Fruit"; "Natural Fruits." As chattel, see "Chattel."

Fruit covers a large family, and the adjectives "green," "ripe," or "dried" indicate the three great groups into which that family may be divided; and a citron is a dried fruit, within such subdivision as used in the tariff act. *United States v. Nordlinger* (U. S.) 121 Fed. 600, 691, 58 O. C. A. 438.

The term "fruit," in legal acceptance, is not confined to the produce of those trees which in popular language are called "fruit trees," but applies also to the produce of oak, elm, and walnut trees. *Bullen v. Denning*, 5 Barn. & C. 842.

"Fruits in brine," in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 559, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1683], does not include lemons cut in two and placed in casks of brine, the pulp of which, on reach

ing this country, has left half of the lemon, and the fruit of which has been destroyed; but it is properly dutiable under par. 267, schedule G, § 1, c. 11, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1651], as "lemon peel, preserved." *Hills Bros. Co. v. United States* (U. S.) 113 Fed. 857.

Cherries of an inedible variety, imported in casks in a surrounding fluid containing alcohol, added for the purpose of resisting fermentation and decay, such being intended for use in the manufacture of cherry juice, are dutiable under paragraph 263, schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], as "fruits preserved in spirits," and not under paragraph 299, schedule H, § 1, c. 11, 30 Stat. 174 [U. S. Comp. St. 1901, p. 1655], as "cherry juice," etc. *Voight v. Mihalovitch* (U. S.) 125 Fed. 78, 82.

#### Dried prunes.

The term "fruit," in a marine policy on goods from Bordeaux to Charleston, excluding fruit from average unless general, was construed to include dried prunes. *De Pau v. Jones* (S. C.) 1 Brev. 437, 438.

#### Oranges.

The term "fruit," in a marine policy exempting the underwriter from particular average or partial losses on fruit, includes oranges. *Humphreys v. Union Ins. Co.* (U. S.) 12 Fed. Cas. 876, 880.

#### Pineapples.

"Fruits preserved in their own juices," as used in Tariff Act Oct. 1, 1890, par. 304, include pineapples, peeled, sliced, and placed in cans filled with cold water, and hermetically sealed; their juice permeating the water. *Johnson v. United States* (U. S.) 66 Fed. 725, 726.

"Fruits, green, ripe, or dried," as used in Tariff Act Oct. 1, 1890, par. 580, does not include pineapples, peeled, sliced, and placed in cans filled with water, and hermetically sealed; their juice permeating the water. *Johnson v. United States* (U. S.) 66 Fed. 725, 726.

"Fruit," as used in Rev. St. § 2517, as amended by chapter 4531, Acts 1897, denouncing punishment against whoever takes and carries away from any farm, garden, orchard, etc., any farm products, fruit, etc., while possibly sufficient to include the unsevered fruit of the pineapple plant, is not sufficient to include the growing plant; that being part of the realty. *Long v. State*, 28 South. 775, 777, 42 Fla. 509.

#### Tomatoes.

"Fruit" is defined as the seed of plants, or that part of the plant which contains the seed, and especially the juicy, pulpy prod-

ucts of certain plants, covering and containing the seed; and the term as used in Tariff Act March 3, 1883, does not include tomatoes. *Nix v. Hedden* (U. S.) 39 Fed. 109, 110, on appeal, 18 Sup. Ct. 881, 882, 149 U. S. 304, 37 L. Ed. 745.

In *Robertson v. Salomon*, 130 U. S. 412, 9 Sup. Ct. 559, 32 L. Ed. 995, and *Nix v. Hedden*, 149 U. S. 304, 13 Sup. Ct. 881, 37 L. Ed. 745, tomatoes were shown in the language of botany to be included in the term "fruit"; but it was held that they were also included in the term "vegetables," as the latter term was used in the tariff act. *United States v. Buffalo Natural Gas Fuel Co.* (U. S.) 78 Fed. 110, 112, 24 C. C. A. 4.

#### FRUITLESS.

The word "fruitless," when applied to an investigation by Congress, characterized to be fruitless, means that it can result in no valid legislation on the subject to which the inquiry refers. *Kilbourne v. Thompson*, 103 U. S. 168-195, 26 L. Ed. 377.

#### FUCK.

In an action for slander, where the charge was carnal knowledge of an animal, the word "fuck" being used to convey the imputation, the court said: "Because the modesty of our lexicographers restrains them from publishing obscene words, or from giving the obscene signification to words that may be used without conveying any obscenity, it does not follow that they are not English words, and not understood by those who hear them, or that chaste words may not be applied so as to be understood in an obscene sense by every one who hears them." *Edgar v. McCutchen*, 9 Mo. 768.

The words "I've f——d her" have no other meaning than "did have carnal knowledge," so that the slander, alleged in the indictment in a prosecution for slander of a female as "the said J. B. had had carnal intercourse with her, the said B. H.," is proved by showing that defendant said, "I've f——d her." *Barnett v. State*, 33 S. W. 340, 35 Tex. Cr. R. 280.

The word "f——ked," used in reference to relations between unmarried persons, is equivalent to a charge of whoredom. *Linck v. Kelley*, 25 Ind. 278, 87 Am. Dec. 362.

#### FUEL

See "Patent Fuel."

#### FUERO.

"A fuero (forum) is a use and custom combined which has the force of law."

*Strother v. Lucas*, 37 U. S. (12 Pet.) 410, 448, 9 L. Ed. 1187.

## FUGITIVE FROM JUSTICE.

A fugitive from justice is one who, having committed a crime within one jurisdiction, goes into another in order to evade the law and to avoid punishment. *State v. Hall*, 20 S. E. 729, 730, 115 N. C. 811, 28 L. R. A. 289, 44 Am. St. Rep. 501 (citing *Bouv. Law Dict.*); *Jones v. Leonard*, 50 Iowa, 106, 108, 32 Am. Rep. 116. And the Constitution of the United States defines such a person to be "one who flees from justice." *Jones v. Leonard*, 50 Iowa, 106, 108, 32 Am. Rep. 116.

A fugitive from justice is one who commits a crime in a state and withdraws himself from such jurisdiction without waiting to abide the consequences of such act. In *re Voorhees*, 32 N. J. Law (3 Vroom) 141, 150.

To be a fugitive from justice it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed after an indictment found, or to avoid a prosecution, but simply that, having committed in the state that which by its laws is a crime, when he is sought to be subjected to its criminal process, he has left its jurisdiction. *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544. A person who commits a crime within a state, and withdraws himself from such jurisdiction without waiting to abide by the consequences of such act, must be regarded as a fugitive from justice of the state whose laws he has infringed. In *re Voorhees*, 32 N. J. Law, 141. That a man is charged with a crime in one state and is afterwards found in another has generally been regarded as *prima facie* evidence that he is a fugitive. *State v. Clough*, 53 Atl. 1086, 1089, 71 N. H. 594 (citing *Drinkall v. Spiegel*, 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486).

A person who commits a crime and withdraws himself from such jurisdiction without waiting to abide the consequences of such act must be regarded as a "fugitive from justice" of the state whose laws he has infringed. *People v. Kuhn*, 35 N. W. 88, 89, 67 Mich. 463 (citing In *re Voorhees*, 32 N. J. Law [3 Vroom] 141).

A person who, while under indictment, escapes from his proper custodians, and succeeds thereafter for years in eluding capture, will be conclusively presumed to be a fugitive from justice, and if he leaves the jurisdiction his intention in so doing is not open to controversy. *Howgate v. United States* (D. C.) 7 App. Cas. 217, 247.

### Constructive presence.

What constitutes a fugitive from justice has been the subject of much discussion by

eminent text-writers, and of many decisions by the courts and by the Governors of the several states. There seems to be a substantial unanimity in all the authorities on one proposition: that, to be a fugitive from justice, a person must have been corporeally present in the demanding state at the time of the commission of the alleged offense. So that a person who was only constructively present in a state demanding his extradition at the time of the commission of the alleged crime cannot be said to be a fugitive from justice; his actual presence being required. *People v. Hyatt*, 64 N. E. 825, 826, 172 N. Y. 176, 60 L. R. A. 774, 92 Am. St. Rep. 708. See, also, *State v. Hall*, 20 S. E. 729, 730, 115 N. C. 811, 28 L. R. A. 289, 44 Am. St. Rep. 501; *Jones v. Leonard*, 50 Iowa, 106, 108, 32 Am. Rep. 116; *Hartman v. Aveline*, 63 Ind. 344, 345, 30 Am. Rep. 217; In *re Mitchell*, 4 N. Y. Cr. R. 596, 601; *Hyatt v. People*, 23 Sup. Ct. 456, 462, 188 U. S. 691, 47 L. Ed. 657.

To make one a fugitive from justice it must first appear that he was within the state when the crime charged is alleged to have been committed; second, that, being subject to criminal process, he either concealed himself or avoided it, so that he could not be served, or that he departed from the state to avoid service. *Bruce v. Rayner* (U. S.) 124 Fed. 481, 485.

### Inquiry as to guilt.

It is sufficient to constitute a person a fugitive from justice, within the meaning of the provisions of the federal Constitution relating to the extradition of fugitives from justice, that a crime has been properly charged, that the prisoner is a fugitive, and a requisition has been properly made. The words do not mean that the guilt of the alleged fugitive should be inquired into. *Kingsbury's Case*, 106 Mass. 223, 227.

### Purpose or time of flight.

The expression "fugitive from justice," as used in Rev. St. § 5278 [U. S. Comp. St. 1901, p. 3597], regulating the extradition of fugitives from justice, means that a person having within the state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, has left its jurisdiction, and is found in the territory of another state. It is not necessary that the party charged should have left the state in which the crime is alleged to have been committed after an indictment found, or for the purpose of avoiding a prosecution, anticipated or begun, and the fact that the person does not leave the state for any such purpose or with any such intent does not exclude him from the meaning of the term "fugitive from justice" as used in the statute. *Roberts v. Reilly*, 116 U. S. 80, 97, 6 Sup. Ct. 291, 29 L. Ed. 544; *Ex parte Brown* (U. S.) 28 Fed. 653,

654; In re Cook (U. S.) 49 Fed. 833, 839; State v. Richter, 87 Minn. 436, 35 N. W. 9. In other words, there need be in his departure from the state no element of conscious flight. It suffices that after the commission of the offense he has merely departed from the jurisdiction of the state. In re Cook (U. S.) 49 Fed. 833, 839.

#### Return home.

The term "flee from justice," in Const. art. 4, § 2, includes cases where a citizen of one state commits a crime in another and then returns home. Hess v. Grimes, 48 Pac. 596, 598, 5 Kan. App. 763 (citing Ex parte Swearingen, 13 S. C. 74); In re Roberts (U. S.) 24 Fed. 182, 184.

Departure from the jurisdiction of the state after the commission of an act in furtherance of a crime subsequently consummated is a flight from justice, within the meaning of the law, where a resident of North Carolina, who while in Pennsylvania procured by a false representation a contract for the shipment of goods from that place to his residence, and then returned there and received the goods, and is indicted in Pennsylvania for false representation. In re Sultan, 20 S. E. 375, 376, 115 N. C. 57, 28 L. R. A. 294, 44 Am. St. Rep. 433.

#### FULFILLED.

Rev. St. 1881, § 84, provides that, in pleading the performance of a condition precedent in a contract, it shall be sufficient to allege generally that the party performed all the conditions on his part. A complaint in an action on an insurance policy alleged that the plaintiffs duly fulfilled all the conditions of said agreement. It was held that "fulfilled" is sufficiently synonymous with the word "performed," as used in the statute, to hold that its use is a sufficient compliance with the statutory provision for pleading generally the performance of conditions precedent. Aetna Ins. Co. v. Kittles, 81 Ind. 96, 98.

#### FULL.

See "In Full."

In a statute conferring "full legislative powers" on the board of commissioners of education in regard to school matters, "full" meant ample, complete, perfect, not wanting in any essential quality, and conferred authority to legislate in any manner in which the Legislature might have done, had such authority not been conferred. Mobile School Com'rs v. Putnam, 44 Ala. 506, 537.

An agreement whereby one of the parties thereto was to retain the "full and peaceable possession" of certain property during his lifetime, means complete, entire,

and peaceable possession. Reed v. Hazleton, 15 Pac. 177, 180, 87 Kan. 321.

One of Webster's definitions of the word "full" is "complete, entire, without abatement, mature, perfect," and, as used in an instruction holding a physician to be liable unless he uses "his full skill and ability," is erroneous. Quinn v. Donovan, 85 Ill. 194, 195.

#### FULL AGE.

A person is of full age on the day preceding the twenty-first anniversary of his birth. Hamlin v. Stevenson, 34 Ky. (4 Dana) 597.

#### FULL AMOUNT.

The phrase "full amount of the sum so payable," as used in Rev. St. § 2739, prescribing the rule for valuing tangible personal property, and declaring that every credit for a sum payable either in money or property of any kind, etc., shall be "valued at the full amount of the sum so payable," means the sum payable by the terms of the instrument, and is equivalent to payable on the face of the instrument. As thus construed it requires the owner of a promissory note, bank account, or other credit payable in money to list the same for taxation at its face value, without regard to the solvency of the debtor; and as thus construed the provision conflicts with that clause of Const. art. 12, § 2, which declares that all property subject to taxation shall be listed at its true value in money, since the value of a promissory note or bank account held against the insolvent is not its "true value in money" in any fair sense of that term. McCurdy v. Prugh, 55 N. E. 154, 158, 59 Ohio St. 465.

#### FULL AND COMPLETE CARGO.

The meaning of the words "full cargo," in a charter party requiring the charterer to furnish a full cargo, "is a question which can only be solved by experienced shipmasters. What is a full cargo for the ship to carry in safety is not a fact which can be settled by any rule of law or mathematical computation, and the court must necessarily rely upon the opinions of those who have experience, skill, and judgment in such matters." Ogden v. Parsons, 64 U. S. (23 How.) 167, 169, 16 L. Ed. 410.

A charter party requiring a ship of 261 tons to load a "full and complete cargo" requires the ship to put on board as much goods as she is capable of carrying with safety, not necessarily 261 tons. Hunter v. Fry, 2 Barn. & Ald. 421, 426.

A charter party requiring the defendant to load on board a vessel "a full and complete cargo of sugar, molasses, <sup>and</sup> <sub>or</sub> produce." is to be construed that the vessel was to be

loaded according to the usual mode of stowage of sugar and molasses or other produce, so that the charterer would have the option of loading sugar and molasses, either with or without other produce. *Cuthbert v. Cumming*, 11 Exch. \*405, 408.

### FULL AND COMPLETE POSSESSION.

A lease requiring the lessee, on the termination of the term, to deliver up to the lessor full and complete possession of the lands, should be construed to mean full and complete possession of the lands, including the buildings and improvements thereon, in as good a condition as they were at the time the agreement was made, natural decay and inevitable accidents excepted. *Streeter v. Streeter*, 43 Ill. 155, 161.

### FULL ANSWER.

The term "full answer," in Clay's Dig. p. 251, § 39, providing that no decree pro confesso shall be set aside, but on filing a full and complete answer to the bill, is as extensive a term as the words "complete answer," as therein used, and therefore the use of the latter words is unnecessary. *Bentley v. Cleveland*, 22 Ala. 814, 817.

Under Code, § 77, authorizing a judgment entered upon service by publication to be opened on presenting a full answer to the complaint and payment of costs, if required by the court, a full answer means not wanting in any essential requisite, a meritorious answer, and where the answer filed fails to show complete defense it is not a full answer. *Durham v. Moore*, 48 Kan. 135, 136, 29 Pac. 472.

### FULL CASH VALUE.

The term "full cash value," as used in the title on Taxation, means the amount at which the property would be taken in payment of a just debt due from a solvent debtor. *Rev. St. Utah* 1898, § 2505; *Mills' Ann. St. Colo.* 1891, § 3782, cl. 4; *Pol. Code Mont.* 1895, § 3680, subd. 5; *Pol. Code Cal.* 1903, § 3617, subd. 5.

"Full cash value," as used in *Pol. Code*, § 3627, providing that all taxable property must be assessed at its "full cash value," means the amount for which the property would be taken in payment of a just debt from a solvent debtor, and they are not equivalent to "actual value for agricultural purposes," since the value for the purposes named may be, and often is, less than it would be taken for in payment of a just debt from a solvent debtor. *Ballerino v. Mason*, 23 Pac. 530, 83 Cal. 447,

By *St.* 1891, pp. 137, 138, it is directed that all property shall be assessed at its full

cash value, and that the term "full cash value" means the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor. A railroad, the same as every other class of property, is to be assessed at its true cash value at such an amount as it would be appraised if taken in payment of a just debt due from a solvent debtor. But this does not necessarily mean that the same rules and principles are to be applied to all the different kinds of property in determining what their true cash value is. The true value of each class is to be determined by evidence applicable to that class. Wherever property has a well-defined market value, which is usually the case with personal property, or with town and farm property, the market value is usually the best criterion of its value for purposes of taxation. It is fair to presume that property to be taken in payment of a just debt from a solvent debtor would be appraised at what it is reasonably worth in the market—at what it would probably bring. So one rule is really the equivalent of the other. But there are many other kinds of property to which this test would be entirely inapplicable. It cannot be said, although sometimes bought and sold, that they have a market value. Such, for instance, is a water ditch, a salt marsh, a borax field, or a mine of any kind. A toll road is another instance. Take, for example, the famous "Geiger Grade," which must have cost many thousands of dollars, and have been, at one time, a wonderfully productive piece of property, but which now would probably not pay the wages of a toll keeper. The market cannot be appealed to to fix a value upon such property, but its value may be and must be fixed by other obvious considerations. A railroad comes within this class. Railroads are bought and sold so seldom, and the value of each road depends so entirely upon its surroundings, that in determining the amount at which such property would be appraised, if taken in payment of a debt, we must resort to other principles. Railroads are usually constructed and operated for profit. They are not valued, as men sometimes value a beautiful home, a horse, or a diamond, for the pleasure that comes from their ownership, but for the returns that can be obtained from them as a business investment. Neither are they usually held for speculative purposes, as much other property, particularly unimproved lands and town and city property, is so often held. The value of a railroad is generally strictly prosaic and utilitarian. To obtain any return from it, either present or prospective, a railroad must be operated, expense must be constantly incurred, and the result is that its true value as a railroad depends very largely, or almost entirely, upon what its net income can be expected to be. *State v. Virginia & T. R. Co.*, 46 Pac. 723, 23 Nev. 283, 35 L. R. A. 759.

**FULL COMPENSATION.**

Code Civ. Proc. § 2736, providing that, when the personal estate of a decedent amounts to \$100,000 or more over all debts, each executor, not exceeding three, is entitled to full compensation, means that he is entitled to full statutory commissions. In *re Kenworthy's Estate*, 17 N. Y. Supp. 655, 656, 63 Hun, 165.

The appropriation by Congress in 19 Stat. 294, of \$2,600 each "in full compensation" for the fiscal year ending June 30, 1878, for salaries of the chief justice and two associate judges of the territory of Wyoming, being wholly inconsistent with so much of Rev. St. § 1879, as fixed such salaries at \$3,000 each per annum, necessarily operated as a repeal thereof, and limited the compensation of such officers for that year to the amount so appropriated. *United States v. Fisher*, 3 Sup. Ct. 154, 155, 109 U. S. 148, 27 L. Ed. 885.

**FULL CONFIDENCE.**

"Full confidence," as used in a will providing that the testator's wife should have the use, benefit, and profits of the testator's real estate during her natural life, and also all his personal estate, absolutely, having full confidence that she will leave the surplus to be divided at her decease justly among the testator's children, was not sufficient to create a trust in favor of the testator's children, and the personal property vested absolutely in the widow. In *re Pennock's Estate*, 20 Pa. 268, 279, 59 Am. Dec. 718.

A will providing that the husband of the testatrix should have the use and income of a certain estate, in the full confidence that he would give her children by a former marriage such comfort and support as they might stand in need of, was sufficient to subject the income to a trust in favor of her children by the former marriage, which could be enforced in equity. *Warner v. Bates*, 98 Mass. 274, 279 (cited and approved in *Handley v. Wrightson*, 60 Md. 198, 202).

**FULL CONVICTION.**

"Full conviction" is not the criterion of the degree of proof necessary to a conviction. It is a loose phrase. It has no distinct legal import, and is without accuracy to the common understanding. It is vague, indefinite, and inexact. It may be the equivalent of sincere or conscientious belief. It may mean that full conviction, when the facts proven satisfy the judgment as to the truth of the charge. There is but one rule and one law in this state as to the measure and sufficiency of proof which will warrant conviction. It is that the evidence must engender a certainty of belief beyond a reasonable

doubt. *Lipscomb v. State*, 23 South. 210, 212, 75 Miss. 559.

**FULL COPY.**

A full copy of a bill in chancery means not only a full transcript of the bill, with all its indorsements, but one including a copy of every exhibit. If counsel could witness or realize the perplexity and the hazard of their clients' rights occasioned by omitting to furnish such full copy to the chancellor, such omissions would cease to occur. *Finley v. Hunter* (S. C.) 2 Strob. Eq. 208, 210, note.

**FULL COSTS.**

"Full costs," as used in St. 17 Car. II, c. 7, § 2, entitling the successful party in replevin to full costs, means ordinary costs as between party and party, and not costs as between attorney and client. *Jamieson v. Trevelyan*, 10 Exch. 748, 752, 28 Eng. Law & Eq. 535, 536.

An order allowing plaintiff to file an amended complaint after reversal on appeal to the General Term, on condition that plaintiff pays to defendant's attorney a "full bill of costs and disbursements to date," means "such costs as would go to the party against whom the amendment was allowed, in case there had been a determination favorable to him at the date of the order granting leave to amend." It includes the costs made at the general term. *Bowen v. Sweeney*, 20 N. Y. Supp. 733, 66 Hun, 42.

**FULL CREAM CHEESE.**

All cheese manufactured, sold, or offered for sale in the state at retail or wholesale, made from milk or cream of same, which tests not less than 3 per cent. of butter fat, shall be deemed to be a full cream cheese. Rev. St. Mo. 1899, § 4756.

**FULL FAITH AND CREDIT.**

The full faith and credit which the Constitution declares shall be given by each state to the public acts, etc., of every other state, implies such full force and effect as they have by law or usage in the state from whence they are taken. *Gibbons v. Livingston*, 6 N. J. Law (1 Halst.) 236, 275.

The expression "full faith and credit," in Const. U. S. art. 4, § 1, means that the record, when duly authenticated, shall have in every other court of the United States the same faith and credit as it has in the state court from whence it was taken, and does not merely mean that such record shall be admitted as evidence without declaring its effect. Speaking of the act, Judge Story says: "If a judgment is conclusive in the state where it is pronounced, it is equally

conclusive everywhere in the courts of the United States." *Christmas v. Russell*, 72 U. S. (5 Wall.) 290, 302, 18 L. Ed. 475.

The phrase "full faith and credit," as used in the United States Constitution, only requires the recognition of the rights of parties as settled in a suit in the foreign state, and only closes all investigation of the merits where it appears the court from which the record comes had jurisdiction of the parties. It does not mean that all the effects and consequences of the litigation in one state shall follow it to another. *Shelton v. Johnson*, 38 Tenn. (4 Sneed) 672, 682, 70 Am. Dec. 265.

The phrase "full faith and credit" is not to be construed or received in the fullest import of the term, but is to be held only to refer to such records, etc., as pleadings and evidence, since any other construction which would give the same effect to a foreign judgment as to a domestic judgment would be to give to the laws of one state complete operation in another, and would make the judgment of one state bind property in another, which could not be permitted. *Joice v. Scales*, 18 Ga. 725, 727.

"Full faith and credit," as used in Const. art. 4, § 1, declaring that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof, and Act Cong. May 26, 1790, declaring that the records and judicial proceedings of one state shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence said records are or shall be taken, means that the judgment of another state shall have the same conclusive effect and obligatory force in every state in the Union that it had in the state where it was rendered. It means that such a judgment has the same faith and credit as it has in the state court from which it is taken. If in such court it has the faith and credit of the highest nature—that is to say, of record evidence—it must have the same faith and credit in every other court. If a judgment is conclusive in the state where it was pronounced, it is equally conclusive everywhere. If re-examinable there, it is open to the same inquiries in every other state. It is, therefore, put upon the same footing as a domestic judgment. The term "faith and credit," as used in the Constitution and act of Congress, point to the attributes and qualities which such records and judicial proceedings shall have as evidence. That a judgment shall have full faith and credit does not mean that, because by the laws of a state it is entitled to a preference in the distribution of assets, it shall have the same effect and a similar

priority in the distribution of assets in another state. The possession of such a quality is not essential to that full faith and credit and absolute verity with which it was the intention of the Constitution and act of Congress to invest it. *Brengle v. McClellan* (Md.) 7 Gill & J. 434, 438.

"Full faith and credit," as used in Const. U. S. art. 4, § 1, providing that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, means such faith and credit as they have by law or usage in the courts of the state from whence the records were taken. Therefore, if a judgment is conclusive in the state where pronounced, it is equally conclusive everywhere in the Union; but, if it is re-examinable where rendered, it is open to the same inquiry in every other state. It is, therefore, put on a footing of a domestic judgment, by which is meant not having the operation and force of a domestic judgment beyond the jurisdiction declaring it to be a judgment, but a domestic judgment as to the merits of the claim or subject-matter of the suit; that is, that the judgment of a state court should have the same credit, validity, and effect in every other court of the United States which it had in the state court where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any court in the United States. It has been well said "that the Constitution did not mean to confer the power of jurisdiction, simply to regulate the effect of the acknowledged jurisdiction over persons and things within the state." *McElmoyle v. Cohen*, 38 U. S. (13 Pet.) 312, 326, 10 L. Ed. 177.

#### Jurisdictional questions.

The clause of the federal Constitution requiring full faith and credit to be given in each state to the public acts, records, and judicial proceedings of another state does not preclude an inquiry into the action or the jurisdiction of the court rendering the judgment. The judgment of a court of another state has no force or effect, unless the court rendering the same had acquired jurisdiction of the subject-matter and of the person. In *re Norton's Estate*, 66 N. Y. Supp. 317, 319, 82 Misc. Rep. 224.

#### Proceedings after judgment.

The expression "full faith and credit," as used in Const. U. S. art. 4, § 1, which provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, would apply to judgments entered in a state court, but not to subsequent acts under the judgment, such as the issuing and returning of executions. *Carter v. Bennett*, 6 Fla. 214, 242.



**FULL FORCE.**

The averment in a plea "that a decree continues in full force" imports only that it has not been reversed. It is not equivalent to an averment that it has not been satisfied. *Dorsey v. Sands*, 28 Ky. (5 J. J. Marsh.) 37, 38.

**FULL INCOME.**

The words "full income," as used in a will written by one not a lawyer, will ordinarily be understood to mean annual interest upon securities and property. *McLouth v. Hunt*, 48 N. E. 548, 550, 154 N. Y. 179, 39 L. R. A. 230.

**FULL INDORSEMENT.**

A "full indorsement" is that by which the indorser orders the money to be paid to some particular person by name. *Kilpatrick v. Heaton* (S. C.) 3 Brev. 92, 93; *Lee v. Chillicothe Branch of State Bank* (U. S.) 15 Fed. Cas. 151, 153. It differs from a blank indorsement, which consists only of the name of the indorser, as where the indorser simply writes his name on the back of negotiable paper. *Lee v. Chillicothe Branch of State Bank* (U. S.) 15 Fed. Cas. 151, 153.

"An indorsement is said to be in full when the name of the assignee or transferee is stated, without any words of limitation. The usual form of a full indorsement is 'Pay to A. B., or order.'" *Lee v. Chillicothe Branch of State Bank* (U. S.) 15 Fed. Cas. 151, 153.

**FULL INVENTORY.**

"Full inventory," as used in the attachment law of Montana, requiring a full inventory in the sheriff's returns after seizure, means a reasonably brief and certain naming of the articles seized. *Silver Bow Min. & Mill. Co. v. Lowry*, 6 Pac. 62, 64, 5 Mont. 618.

A schedule which merely states that it is a schedule of the creditors of the assignor, verified by his affidavit that the schedule is just and true, is not a full and complete inventory of all indebtedness of the assignor, within the requirements of Acts 1884-85, pp. 100, 101, that no assignment shall be valid unless accompanied by a sworn full and complete schedule of the assignor's indebtedness. The schedule may be just and true as far as it goes, and still not be a full and complete schedule. *Fort v. Martin Tobacco Co.*, 1 S. E. 223, 224, 77 Ga. 111.

**FULL JURISDICTION.**

The act passed in 1833, which provided that it shall be competent for any person or persons, deeming themselves to have a full

claim against the state of Mississippi, to exhibit and file a bill in equity against the state, is not invalid under Const. art. 4, § 16, providing that a separate superior court of chancery shall be established, with "full jurisdiction" in all matters of equity. This provision does nothing more than to create the court. It leaves its jurisdiction to the determination of the common law, and neither enlarges nor limits the powers which it derives from that source. "The full powers in all matters of equity," which are secured to it by the provision for its establishment, were intended to embrace such subjects of jurisdiction as the chancery court has possessed by immemorial usage or particular legislative enactments. It follows that, whenever the Legislature creates a new subject of chancery jurisdiction, it becomes immediately one of those "matters of equity" of which that court has full jurisdiction by the Constitution. It is not the subject of the suit which determines the criterion of the jurisdiction of a court of chancery, so much as the particular mode in which it proceeds, differing, then, from a court of law principally in the mode of proof, of trial, and of relief. *Farish v. State*, 5 Miss. (4 How.) 170, 175.

Under the Mississippi Constitution of 1832, giving to chancery courts "full jurisdiction in all matters of equity," the statute of 1853, giving a remedy by scire facias on the bond of a receiver of a bank, is valid. The words "full jurisdiction" imply that nothing is reserved. Whatever is a matter of equity, as to that the power to adjudge is full. This court was established to preside over and administer that system of equity jurisprudence which then existed, unwritten and positive, and such enlarged dimensions as it might attain to by an ample development of its principles and a more enlarged application of them to the new circumstances of an advancing society and civilization. Equity jurisprudence is especially the product of English tried reason and conscience, perhaps their highest and most beneficent achievement. From small germs it has been of rapid growth, especially in the last century. However the system may expand, the "full jurisdiction" conferred gives the court capacity to fully administer it. *Bank of Mississippi v. Duncan*, 52 Miss. 740-745.

**FULL KNOWLEDGE.**

In an answer in an action against a railroad company to recover damages for personal injuries caused by a defect in the track, an allegation in the answer, being that the person injured had "full knowledge" of such defect and had had such knowledge for a long time, means such knowledge as would fairly apprise the employé of the danger. *Worden v. Humeston & S. Ry. Co.*, 33 N. W. 629, 632, 72 Iowa, 201.

**FULL MEASURE OF CARE AND DILIGENCE.**

The words "full measure of care and diligence, all that could be expected," cannot be held to mean less than extraordinary diligence, and therefore an instruction that such a measure of care and diligence is required is erroneous in a case where extraordinary diligence is not required. *Western & A. R. R. v. King*, 70 Ga. 261, 263.

**FULL NAMES.**

"The expression 'full names' of persons composing the association, as employed in the limited partnership act, means the names in form habitually used by those persons in business, and by which they are generally known in the community, and does not mean that given names must necessarily be spelled out in full in every case." *Gearing v. Carroll*, 24 Atl. 1045, 1046, 151 Pa. 79.

The full names of partners, required by the limited partnership act to be signed to articles of association, is satisfied by a signature only consisting of initials of the given names and the last names in full, when the persons so signing are in the habit of signing their names in such manner, and are generally known in the community by the names as thus signed. *Lafin & Rand Powder Co. v. Steytler*, 29 Wkly. Notes Cas. 230, 232, 146 Pa. 434, 23 Atl. 215, 14 L. R. A. 690.

**FULL PARTICULARS.**

"Full particulars," as used in an insurance policy requiring that, as a condition precedent to a recovery, the insured shall deliver full particulars of the loss or damage, together with an inventory of the property destroyed or damaged, etc., means the best particulars the assured can reasonably give. It means that the assured will, within a convenient time after the loss, produce to the company something which will enable them to form a judgment as to whether or not he has sustained the loss. *Bumstead v. Dividend Mut. Ins. Co.*, 12 N. Y. 81, 95; *Mason v. Harvey*, 8 Exch. 819, 820.

**FULL PAYMENT.**

In a will leaving certain property to trustees, with directions to divide into three equal shares, and out of such shares pay to each of three children a certain amount at the end of one year, a further sum at the end of three years, and the balance of such shares at the end of five years, provided that, should either of such children die before the full payment of the whole of his or her share of such residue, then the executors should pay the remainder of such share to the issue of such child, if any, or to the remaining chil-

dren, the term "die before full payment" of the whole means before the share becomes payable, and where a daughter died after the expiration of five years, but before the whole of her share had actually been paid to her, the amount remaining should be deemed as having been paid, within the meaning of the will, and it descended to her personal representatives, and not to her son. *Finley v. Bent*, 95 N. Y. 364, 368.

**FULL PERFORMANCE.**

Under Gen. Laws 1883, c. 100, providing a penalty if a mortgagee neglects to discharge a mortgage after "full performance" of the conditions of the mortgage, the penalty is not incurred by refusal to execute a discharge after a mere offer to perform or tender of performance. A tender of performance is not full performance. *Crumby v. Bardon*, 70 Wis. 385, 386, 36 N. W. 19, 20.

**FULL PRIVILEGE.**

A deed granting a certain lot, and the "full and free privilege" of ingress, egress, and regress over a certain alley, owned by the grantor, signifies not only a unity but an equality of enjoyment, both in manner and quantity, between the grantee and the grantor and his assigns. *Kirkham v. Sharp* (Pa.) 1 Whart. 323, 335, 29 Am. Dec. 57.

**FULL PROOF.**

Mr. Starkie says: "Evidence which satisfies the minds of the jury of the truth of the fact in dispute to the entire exclusion of every reasonable doubt constitutes full proof of the fact. \* \* \* The distinction between full proof and mere preponderance of evidence is in its application very important. In all criminal cases whatsoever it is essential to a verdict of condemnation that the guilt of the accused should be fully proved. Neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt. But in many cases of a civil nature, where the right is dubious and the claims of the contesting parties are supported by evidence nearly equipoised, a mere preponderance of evidence on either side may be sufficient to turn the scale." *Kane v. Hibernia Mut. Fire Ins. Co.*, 38 N. J. Law (9 Vroom) 441, 450, 20 Am. Rep. 409 (quoting 1 Starkie, Ev. \*478).

**FULL PROSECUTION.**

The expression "full proof," as used in a charge authorizing a jury to consider the nature of facts regarding the disposition of goods in payment of debts, with reference to

their susceptibility of full proof, would be understood by a jury to mean a higher degree of weight of evidence than a preponderance. *Baines v. Ullmann*, 9 S. W. 543, 545, 71 Tex. 529.

The term "full prosecution," within the rule that for a suit to constitute *lis pendens* there must be a full prosecution of such suit, means a full prosecution of the case from the commencement to the final determination thereof. It must appear that there has been no such negligent intermission as may appear to have been inexcusable and which cannot be satisfactorily explained. The ground upon which to place the invalidity of *lis pendens* for want of prosecution is not, as in many cases seems to be supposed, negligence merely as such, but estoppel, as warranted by such negligence and from conduct on the part of those seeking the enforcement of the *lis pendens*. *Tinsley v. Rice*, 31 S. E. 174, 176, 105 Ga. 285.

#### FULL QUORUM.

The words "full quorum," in the minutes of the commissioners' court, reciting that the full quorum of the court was present when the county tax was levied, is to be construed as showing that the full bench was present, and therefore the record shows a compliance with the statute requiring such a levy to be made by a full bench. *Halfin v. State*, 18 Tex. App. 410, 413.

#### FULL RELEASE.

The term "full release," in an assignment for the payment of creditors who will execute a full release and discharge of their debts, imports that such releases shall be absolute. *Agnew v. Dorr* (Pa.) 5 Whart. 131, 136, 34 Am. Dec. 539.

#### FULL SETTLEMENT.

Settlement means an adjustment of accounts or claims and liquidation or payment, and the term "full settlement," in the statement of a receipt of certain money in full settlement of a claim, means payment of the claim. *Hoopes v. McCan*, 19 La. Ann. 201, 202.

#### FULL SUPPLY.

A contract for the sale of ice, providing that, in case of the inability of the parties of the first part to lay up a "full supply" of ice, they should be bound only to deliver and supply such proportion of the amount of ice as the quantity of ice laid up be to the fully supply, should be construed as referring to the capacity of the icehouses belonging to the seller. *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45, 52.

#### FULL TERM.

A "full term," within the meaning of Const. art. 9, § 3, providing that the same person shall not be elected sheriff for two consecutive full terms, does not include a vacancy of the last half of a term after the first half has been filled by others. *Gorrell v. Bier*, 15 W. Va. 311, 321.

#### FULL VALUE.

See "True and Full Value."

#### FULL WAGES.

The expression "full wages," in the seventh article of the Laws of Oleron, which declares that a sick mariner who is left behind is entitled to his full wages if he recover, etc., means the aggregate amount of wages for the voyage; that is, the same wages which the mariner would have been entitled to, had he served out the whole voyage. *Sims v. Jackson* (U. S.) 22 Fed. Cas. 183, 184.

#### FULL YEAR.

Poor Act (Revision, p. 834) § 1, requiring a pauper to dwell on the estate or in the township in which the estate lay "for one full year" to obtain a legal settlement, meant the full space of one year continuously and without interruption. *Inhabitants of Eaton-town v. Inhabitants of Shrewsbury*, 6 Atl. 319, 49 N. J. Law, 183.

#### FULLEST CONFIDENCE.

The words "fullest confidence," as used in a will, according to 1 Perry, Trusts, c. 4, § 112, in a clause stating that the testator has fullest confidence in a legatee to make a certain disposition of the fund bequeathed, is a word of intention, which the court will carry into effect, as if the testator had used an absolute word of devise in trust, and the court will direct the donee or first taker to hold as a trustee for those whom the donor intended to benefit. *Cockrill v. Armstrong*, 31 Ark. 580, 589; *Major v. Herndon*, 78 Ky. 123, 129.

#### FULLY.

See "As Fully As."

The provision of Bill of Rights, art. 12, which secures to the accused person the right to have his crime or offense "fully, plainly, substantially, and formally described to him," only requires such particularity of allegation as may be of service to him in enabling him to understand the charge and to prepare his defense. *Commonwealth v. Robertson*, 38 N. E. 25, 26, 162 Mass. 90.

**FULLY ACCOUNTED.**

Where plaintiff shipped goods to defendant, which the latter was to sell, and return those unsold, and fully account for the proceeds, and in an action for account rendered defendant pleaded "fully accounted," such term could not be construed so as to be sustained by evidence of accounts current rendered to plaintiff by defendant, which contained an account, but which did not contain a full account, showing a completion of the enterprise. *Read v. Bertrand* (U. S.) 20 Fed. Cas. 347, 348.

**FULLY ADMINISTERED.**

Until the executors of an estate have discharged the debts of a deceased which have been reduced to judgments, they have not fully administered the estate. *Ryans v. Boogher*, 69 S. W. 1048, 1051, 169 Mo. 673.

**FULLY BELIEVE.**

"Fully" is usually defined as meaning "sufficiently," "clearly," or "distinctly," and, when used in this its ordinary sense, the statement that, to justify a conviction in a criminal case, the jury must fully believe in the guilt of the accused, is not an equivalent to the usual form of statement that they must believe beyond a reasonable doubt. *Riley v. State* (Miss.) 18 South. 117, 118.

**FULLY CURED.**

A contract that a patient should be "fully and permanently cured" of the morphine habit means that the patient shall be restored to that normal condition of body and mind, with the same power to resist the desire to indulge in the use of the drug that he possessed and enjoyed before the habit was acquired, and not that the patient should be put into a condition where he could never again taste the drug. *Wellman v. Jones*, 27 South. 418, 418, 124 Ala. 580.

"Fully cured," as used in a contract for the sale of fully cured meat, means meat salted for 85 days; such being the meaning of the term in the trade. *Featherston v. Rounsaville*, 73 Ga. 617, 619.

**FULLY DETERMINED.**

Act Cong. March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508], authorizes removal of causes to the United States courts when there shall be a controversy which is wholly between citizens of different states and which can be fully determined between them, and either one or more of the plaintiffs or defendants actually interested may remove the cause. Held that the clause "a controversy which can be fully determined between them" must be read in connection

with the words "actually interested in such controversy," and as so read implies that there may be other parties to the suit who may not be entitled to remove it, which parties must be indispensable to the determination of the controversy which is wholly between the citizens of different states; and hence a next friend, suing in behalf of a feme covert, was not an actual party to the controversy wholly between him and the defendant, so as to authorize a removal. *Ruckman v. Palisade Land Co.* (U. S.) 1 Fed. 367, 369 (citing *Taylor v. Rockefeller*, 18 Am. Law Reg. 307).

**FULLY SATISFIED.**

An instruction in a criminal prosecution that the jury must be "fully satisfied of defendant's guilt before they could convict," etc., is not prejudicial to the defendant on the ground that the words "fully satisfied" were used, instead of the phrase "satisfied beyond a reasonable doubt." The term "fully satisfied" is at least as favorable for the defendant as "satisfied beyond a reasonable doubt." The latter phrase implies that there may be a conviction, although there be ever so many doubts, other than reasonable, but "fully satisfied" is to the exclusion of all doubts, reasonable or other. *State v. Sears*, 61 N. C. 146, 147.

**FULLED CLOTH.**

"The term 'fulled cloth' is understood in common parlance with us to imply woolen fulled cloth." An allegation in a declaration that a note was payable in fulled cloth is supported by a note showing that it is payable in woolen fulled cloth. *Wead v. Marsh*, 14 Vt. 80, 83.

**FUNCTION.**

See "Judicial Function"; "Official Function."

"Functions," as used in Const. art. 3, § 1, dividing the powers of the government into the legislative, executive, and judicial, and providing that no person charged with official duties under one shall exercise any of the functions of another, except as in the Constitution expressly provided, means "duties." *State v. Hyde*, 22 N. E. 644, 646, 121 Ind. 20.

**FUNCTIONAL DISEASE.**

A function is a peculiar or appointed action; the word is derived from one which signifies to perform. "Functional disease" of the brain is some disease of that organ which prevents or interferes with the performance of its operation. *Higbee v. Guardian Mut. Life Ins. Co. of New York* (N. Y.) 63 Barb. 462, 472.

## FUNCTUS OFFICIO.

Where there has been no levy under an execution, and the return day has expired, the writ is "functus officio," and confers no authority whatever, and any attempted levy and sale by virtue of it are nullities. *Faulk v. Cooke*, 19 Or. 455, 26 Pac. 662, 664, 20 Am. St. Rep. 836.

## FUND.

See "Assessment Fund"; "Bankable Funds"; "Canal Fund"; "Common School Fund"; "Current Funds"; "General Fund"; "Guaranty Company"; "Lawful Funds"; "New York Funds"; "Public Funds"; "Reserve Fund"; "Residuary Fund"; "School Fund"; "Sinking Fund"; "Statehouse Fund"; "Trust Fund."

Any other funds, see "Any Other."

The word "fund," in its broader meaning, may include property of every kind. In *re Tatum*, 70 N. Y. Supp. 634, 635, 61 App. Div. 513 (citing *And. Law Dict.*).

The use of the word "fund," in a devise of a life estate of all of testator's property, real and personal, to his wife, and directing that all the property remaining at her death shall constitute a fund for the support and maintenance of certain beneficiaries, savors of personality, which means something that can be invested and reinvested. It includes the intent that if, for the increase of income, any sales of realty shall become necessary, such sales could be lawfully made; the proceeds taking the place of the land sold as part of said fund. *Bierce v. Bierce*, 41 Ohio St. 241, 254.

Act April 11, 1866, concerning taxes, provides that the "endowment or fund" of any religious society, college, academy, seminary of learning, or public library shall be exempt from taxation. Held, that the words "endowment" and "fund," as used in this section, are words ejusdem generis, and are employed to signify property other than land; "fund," as a general term, including the endowment, which is that particular fund or part of a fund bestowed for its more permanent use. *Nevin v. Krollman*, 38 N. J. Law (9 Vroom) 574 (citing *First Reformed Dutch Church of New Brunswick v. Lyon*, 32 N. J. Law [3 Vroom] 360, 361).

### Appropriation or collection of money.

The ordinary meaning of the word "fund," according to Webster, is a stock or capital, a sum of money appropriated as the foundation of some commercial or other operation, undertaken with a view to profit, and by means of which expenses and credits are supported. *Boulev. v. Tompkins* (N. Y.) 5 Redf. Sur. 472, 477.

A fund is a deposit of resources, or money appropriated as the foundation of some commercial operation, or a store laid up to draw from. *Lane v. Madgeburg*, 51 N. W. 562, 563, 81 Wis. 344.

A "fund" is merely a name for a collection or an appropriation of money. It may be nothing but a designation of one branch of the accounts of the state, or of a certain amount of money, when collected, to be applied to a particular purpose. It may have no property and represent no investments, and what are called its revenues may include all the moneys appropriated or directed to be paid to it, or for its benefit, or that of the objects it represents. *People v. New York Cent. R. Co.* (N. Y.) 34 Barb. 123, 135.

The word "fund," as used in Const. art. 7, § 2, providing for the establishment of a perpetual school fund, means the entire property from which money is to be derived for maintenance of public free schools, the foundation on which rests the support of the system of schools which it is made the duty of the Legislature to establish and maintain. *Galveston, H. & S. A. Ry. Co. v. State*, 13 S. W. 619, 623, 77 Tex. 367.

The term "fund" in Act June 2, 1859, § 11, requiring the Secretary of State to examine and determine the claims of all persons against the state in cases where provisions for the payment thereof shall have been made by law, and to indorse upon the same the amount due and allowed thereon, and from what fund the same is to be paid, does not mean a fund specially appropriated and set aside by the Legislature for the payment of the designated claim, or of a designated class of which it constitutes one. With much greater reason we may infer that it had reference to some one of the few funds that are provided for under general laws in pursuance of fundamental enactments. The term "fund" is not synonymous with "appropriation," and as a matter of fact there are not many separate funds in the treasury; but there may be appropriations, and most of the latter are payable out of the general fund. *Shattuck v. Kincaid*, 49 Pac. 758, 762, 31 Or. 379.

In *Ketchum v. City of Buffalo*, 14 N. Y. 356, *Selden, J.*, says: "The term 'fund' was originally applied to a portion of the national revenue set apart or pledged to the payment of a particular debt." Under the title of "National Debt," the *Encyclopædia Britannica* says: "In the early days of the English national debt, a special tax or fund was appropriated to the payment of the interest on each particular loan. This was the original meaning of 'funds,' a term which has now come to signify the national debt generally." In *Bouv. Law Dict.* (Rawle's Ed.) p. 862, it is said: "The national debt of England consists of many different loans, all of which

are included in the term 'funds.' *People v. Carpenter*, 52 N. Y. Supp. 781, 788, 81 App. Div. 603.

#### **Checks, notes, bills, stocks, and bonds.**

"Funds" include moneys and much more, such as notes, bills, checks, drafts, stocks, and bonds. *United States v. Greve* (U. S.) 65 Fed. 488, 490; *Hasbrook v. Palmer* (U. S.) 11 Fed. Cas. 766; *Ayres v. Lawrence*, 59 N. Y. 192, 198.

Webster defines the word "funds" as "the stock of a national bank; public securities; evidences of money lent to government, for which interest is paid at prescribed intervals." This is a general ordinary meaning of the term. Treasury certificates may be regarded as funds. *Ramsey v. Cox*, 28 Ark. 366, 368.

A will by which testator desired that his executor should purchase annuities for each of his two sisters of £100 a year each, the said annuities to be purchased in the "British funds," meant nothing more than that it was to be British security, and not any private security, nor security of any foreign state. *Kerr v. Middlesex Hospital*, 17 Eng. Law & Eq. 66, 70.

In an action on a note payable in "Philadelphia funds," it was said that Philadelphia funds were not money, but consisted of notes, checks, or bills upon banks or individuals in Philadelphia, or of other means of procuring money there. It was held that an action of debt would not lie, as such action is limited to the recovery of a certain and determinate sum of money. *January v. Henry*, 19 Ky. (3 T. B. Mon.) 8.

The word "funds," or money and proceeds of sale, which a county treasurer is required to keep safe under the statutes, should not be confined in their meaning to coin and bank bills. *State v. Krug*, 12 Wash. 288, 41 Pac. 126; *Byrom v. Brandreth*, 16 L. R. Eq. 475. And checks or certificates of deposit received in good faith by the board of revenue and delivered to the treasurer would be funds or money or the proceeds of the sale of bonds in the hands of the treasurer. *Montgomery County v. Cochran*, 121 Fed. 17, 21, 57 C. C. A. 261.

#### **Credits or debts due.**

"Funds," as used in the acceptance of a bill by which the acceptor agreed to pay when in "funds" of the drawer, means cash, and does not include demands which were good and available and subject to his control as treasurer. These, until collected, were not "funds," within the meaning of the acceptance. *Campbell v. Pettengill*, 7 Me. (7 Greenl.) 126, 129, 20 Am. Dec. 349.

In Laws 1872, c. 161, authorizing actions against public officers for the purpose of

preventing waste or injury to any property, funds, or estate of the county "upon a fair and reasonable interpretation, the term 'funds' embraces, not only property and funds in possession, but the credit and power of borrowing money in anticipation of taxation and other processes and means by which the municipal corporation may be charged pecuniarily, or the taxable property within its limits burdened." *Ayres v. Lawrence*, 59 N. Y. 192, 198.

A bequest of all the rest and residue of testator's funds, after providing for the discharge of certain legacies and payment of debts, to his two sons, means and includes debts due to the testator. Webster says the term "funds" means, among other things, money lent to government; constitutional and national debt. It is not a legal term with a settled meaning, but is a term in common use. It does not mean a chattel, or furniture, or the like, but money and securities, more especially government securities. *Perry v. Hunter*, 2 R. I. 80, 87.

As used in an order to pay when in funds, drawn by a consignor on his consignee in favor of a third person, the term "funds" is equivalent to "in debt to the drawer," which, by reason of the factor's right of absolute appropriation, cannot be while the principal is indebted to the factor. Funds in the consignee's hands, subject at his discretion to be applied in discharge of balances due to him, can scarcely be said to be funds belonging to the principal, or, at all events, within the meaning of such a contract as this. The factor cannot be in funds to discharge the debts of third persons. *Gillespie v. Mather*, 10 Pa. (10 Barr) 28, 33.

"Funds," as used in Code, § 1072, providing a penalty for the diversion of the "funds" of the corporations to other objects than those mentioned in their charters, is not limited to cash on hand, but includes all the resources of corporations. *Miller v. Bradish*, 28 N. W. 594, 595, 69 Iowa, 278.

The word "funds," as used in a statement by a surveyor to a committee formed for the purpose of organizing a railroad company, that he would make no claim for his services until there should be sufficient funds of the company to meet any demand he might be entitled to make, does not apply to deposits made with the committee by the prospective shareholders. *Landman v. Entwistle*, 7 Exch. \*632, \*636.

#### **Money.**

The term "funds," as employed in commercial transactions, according to its usual acceptance and signification, means money. *Galena Ins. Co. v. Kupfer*, 28 Ill. (18 Peck) 332, 335, 81 Am. Dec. 284; *Hatch v. First Nat. Bank*, 47 Atl. 908, 909, 94 Me. 348, 80 Am. St. Rep. 401.

The expression "in funds," as used in an acceptance of a bill, to be paid as soon as the acceptor should find himself "in funds," means that he must have had money in hand to pay it, which condition is not fulfilled by his having other property in his hands of greater value than the sum named in the bill. *Carlisle v. Hooks*, 58 Tex. 420, 421 (citing *Marshall v. Clary*, 44 Ga. 511, 513; *Gentry v. Owen*, 14 Ark. 396, 60 Am. Dec. 549; *Nagle v. Homer*, 8 Cal. 353; *Liggett v. Weed*, 7 Kan. 273; *Gallery v. Prindle* [N. Y.] 14 Barb. 186, 190; *Daniel*, Neg. Inst. 508, 514; *Mitchell v. Clay*, 8 Tex. 443, 446; *Salinas v. Wright*, 11 Tex. 572; *Rowlett v. Lane*, 43 Tex. 274).

An indictment charging the embezzlement of "moneys and funds" means moneys and some other species or character of funds. The word "funds" is not used in the alternative as a synonym. It is used in the conjunctive. *United States v. Greve* (U. S.) 65 Fed. 488, 490.

Within the meaning of the statute providing that, in the payment of creditors of an insolvent corporation and in the distribution of the corporation funds, the creditors shall be paid proportionately, etc., the term "funds" means the proceeds of sales of real and personal estate and the proceeds of any other assets converted into funds. Everything is supposed to be converted into money, and there was no authority for distribution of equitable assets. *Doane v. Millville Mut. Marine & Fire Ins. Co.*, 43 N. J. Eq. (16 Stew.) 522, 533, 11 Atl. 739, 742.

A fund is a deposit or collection of resources from which supplies are drawn, or out of which expenses are provided, or which may be available for the payment of debts or the discharge of liabilities. As used in Rev. St. Ind. 1881, § 5850, which provides that the clerks of the several courts throughout this state are hereby authorized to receive money in payment of all judgments, dues, and demands of record in their respective offices, and all such funds may be ordered to be paid into the respective courts, of which they are clerks, by the judges thereof, etc., "funds" has a much broader meaning than the word "moneys," as ordinarily used, and, while the two words are often used as convertible terms, the former is much more than the equivalent of the latter. *Jewett v. State*, 94 Ind. 549, 551.

In Laws 1879, c. 14, providing that each order drawn on a school district treasurer shall specify whether the money is to be paid from the teacher's fund, the contingent fund, or schoolhouse fund, and, in case the treasurer has no money in the fund drawn on to pay such school warrant, he shall indorse on it, "Not paid for want of funds," "funds" should be construed as meaning moneys generally, and not any special fund, as

distinguished from all others. *Capital Bank of St. Paul v. School Dist. No. 53*, 48 N. W. 363, 366, 1 N. D. 479.

#### As put into interest-bearing obligations.

To fund "is to put into the form of bonds or stocks bearing regular interest, and to provide and appropriate a fund or permanent revenue for the payment of the interest." *Merrill v. Town of Monticello* (U. S.) 22 Fed. 589, 596 (citing *Webst. Dict.*; *Bouv. Law Dict.*).

"Fund," as used in a will directing executors to settle up and fund testator's estate within a certain period, should be construed, as it is ordinarily understood in such connection, to signify capitalizing with a view to the production of interest. *Stephen's Ex'rs v. Milnor*, 24 N. J. Eq. (9 C. E. Green) 358, 376.

#### FUNDAMENTAL ERROR.

That error is a "fundamental error" which goes to the merits of the plaintiff's cause of action, and will be considered, whether assigned as error or not, where the justice of the case seems to require it. *Hollywood v. Wellhausen*, 68 S. W. 329, 331, 28 Tex. Civ. App. 541.

#### FUNDED DEBT.

Within Laws N. Y. 1853, c. 603, § 6, prohibiting a municipal corporation from contracting any funded debt, except in the mode prescribed, a funded debt is a debt for the payment of the principal or interest of which some fund was appropriated. *Bouvier* says: "Funded debt" is that part of the national debt for which certain funds are appropriated toward the payment of the interest." And this definition corresponds with that given by all writers on the subject. The term, even in common parlance, is never made use of to describe an ordinary debt growing out of a transaction with one individual and represented by a single instrument. It is essential to the idea of a funded debt, even under the broadest use of the term, that the debt should be divided into parts or shares, represented by different instruments, so that such parts or shares may be readily transferable. A debt incurred by the purchase of market grounds on credit is not a funded debt. *Ketchum v. City of Buffalo*, 14 N. Y. 356, 367.

The term "funded debt," as used in the Constitution, providing that no funded debt should be contracted for a municipal corporation, unless for a specific object, should be construed in its proper etymological sense, and means a debt requiring a variety of things to create it, and certain provisions to be made before it can be contracted, which

insure the payment of the interest thereon and provide a second fund for the redemption of the principal of the debt, if it is protected by a law of the Legislature binding on the corporation, or which in effect pledges all the taxable property for the payment of interest and principal, and which may be enforced by mandamus. *Ketchum v. City of Buffalo* (N. Y.) 21 Barb. 294, 305.

Within the meaning of the general municipal law relating to the different kinds of debts of a municipality, of which the headings of the sections are: (4) "Temporary Loans"; (5) "Funded Debt"; (6) "Payment of Municipal Bonds"; (7) "Funded and Bonded Debts"—a temporary loan seems to be one which is to be paid with and by the taxes of a current fiscal year, while the funded debt seems to be one where provision is to be made for the annual raising by tax of the sum necessary to pay the interest and principal as they respectively mature. As thus used, the term "funded debt" includes all municipal indebtedness embraced within or evidenced by a bond, the principal of which is payable at a time beyond the current fiscal year of its issue, with periodical terms for the payment of interest, and where provision is made for payment by raising of the necessary funds by future taxation and the quasi pledging in advance of the municipal revenue. *People v. Carpenter*, 52 N. Y. Supp. 781, 783, 31 App. Div. 603.

The term "funded debt," as used in a will directing the payment from the proceeds of the sale of certain property of testator's funded debt, though not ordinarily used in connection with the debts of an individual, must, when so used, necessarily refer to debts which are embodied in securities of a permanent character and to the payment of which certain property has been applied or pledged. The funded debts are mortgage debts. *Wells v. Wells*, 24 N. Y. Supp. 874, 875, 30 Abb. N. C. 225.

#### FUNDING.

The term "funding" has been sometimes applied in this country to the process of collecting together a variety of outstanding debts against corporations, the principal of which was payable at short periods, and borrowing money on the bonds or stocks of the corporation to pay them off; the principal of such bonds or stocks being made payable at periods comparatively remote. *Ketchum v. City of Buffalo*, 14 N. Y. 356, 367; *People v. Carpenter*, 52 N. Y. Supp. 781, 783, 31 App. Div. 603.

Within the meaning of Laws 1898, p. 84, authorizing executors and administrators to mortgage real property of the states for the purpose of funding the estate debts, the word "funding" was evidently designed to mean

the borrowing of a sufficient sum of money to discharge the claims against an estate by creating another debt in lieu thereof; and, while an estate may owe only one person a certain sum, it is just as much an indebtedness, and equally as susceptible of being funded as though the claim were divided into a given number of parts and held by several creditors. *Lawrey v. Sterling*, 69 Pac. 460, 465, 41 Or. 518.

#### FUNDING SYSTEM.

"Funding system" is defined to be a plan which provides that on the creation of a public loan funds shall immediately be formed and secured by law for the payment of the interest, and also for the gradual redemption of the capital itself. *Merrill v. Town of Monticello* (U. S.) 22 Fed. 589, 596.

#### FUNDS IN HAND.

The term "funds in hand," in a will directing the education of testator's children from the proceeds of his plantation and the funds in hand, means cash on hand and money due the estate by bond, note, or other security. *Marrow v. Marrow*, 45 N. C. 148, 156.

Where a correspondent was limited in his purchases for shipment by vessel to the application of funds in his hands, such term includes in mercantile language the balance due by the correspondent on general account. *Parsons v. Armor*, 28 U. S. (3 Pet.) 413, 430, 7 L. Ed. 724.

#### FUNERAL

The term "funeral," as used in a petition alleging that by the negligence of defendant plaintiff was unable to attend the funeral of his mother, seems to have been used to convey the same meaning as obsequies, a rite or ceremony pertaining to burial, where plaintiff admits that he was present at the burial. *Graddy v. Western Union Tel. Co. (Ky.)* 43 S. W. 468, 469.

#### FUNERAL CHARGE OR EXPENSE.

Funeral expenses have been held not to be a debt against the estate of decedent or a charge upon his estate. *Sullivan v. Horner*, 7 Atl. 411, 413, 41 N. J. Eq. 299 (citing *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384; *Schouler*, Ex'rs, § 421).

Funeral expenses are not a debt, but properly a charge on the estate of the deceased, and if the executor voluntarily pays them he shall be allowed such payment before all others, because it is a work of charity and piety. *Gregory v. Hooker's Adm'r*, 8 N. C. 394, 402, 9 Am. Dec. 646.



Under Rev. St. § 6090, providing that "every executor shall proceed with diligence to pay the debts of the deceased, and shall apply the assets in payment of debts: (1) The funeral expenses, those of last sickness, and the expenses of administration; (2) the allowance made to the widow and children for their support," etc., funeral expenses are to be considered as debts of the deceased, though manifestly they cannot be treated as contract debts, and in the settlement of the estate of a married woman such expenses are claims against her estate, to be paid by the executor, and not claims against her surviving husband. *McClellan v. Filson*, 44 Ohio St. 184, 188, 5 N. E. 861, 862, 53 Am. Rep. 814.

Funeral charges are those which are incurred for the interment of a person deceased. Civ. Code La. 1900, art. 3192.

#### Attendance on interment.

"Funeral expenses," as a charge on a decedent's estate, do not include a charge by the plaintiff, with whom decedent lived at the time of his death, for dinner and horse feed furnished to persons who had attended the funeral of the deceased. *Shaeffer v. Shaeffer*, 54 Md. 679, 684, 39 Am. Rep. 406.

The funeral expenses which an administrator may properly allow include the necessary charges attending the interment of the deceased and the executor's traveling expenses in taking the remains to the place of interment. *Hasler v. Hasler* (N. Y.) 1 Bradf. Sur. 248, 249.

#### Burial or mourning clothing.

The duty of burying the deceased devolves upon the personal representative, if there be one duly qualified, and in his absence any friend may see to the due performance of the funeral rites, and a personal representative will be liable to him for the expenses incurred, though he neither ordered the expenditure nor even knew of it. A suit of clothes in which deceased was buried was held properly included in the item of funeral expenses, although not purchased by the executor. *Steger v. Frizzell*, 2 Tenn. Ch. 369, 371.

A funeral embraces, not only the solemnization of interment, but the ceremonies and accompaniments attending the same. Such ceremonies are prompted by affection, and their character is to some extent determined by the religious faith and sentiment of the friends of the deceased, and the station in life which had been occupied by the deceased. The wearing of suitable mourning apparel is commonly regarded, not only as a proper, but almost indispensable, mark of affection and evidence of grief, and hence the cost of mourning costumes for the widow will be included in the term "funeral ex-

penses." In re *Wachter's Estate*, 38 N. Y. Supp. 941, 944, 16 Misc. Rep. 137; *Allen v. Allen* (N. Y.) 3 Dem. Sur. 524, 525.

The cost of mourning apparel for the widow is not regarded as a part of the funeral expenses. *Macknet's Ex'rs v. Macknet*, 24 N. J. Eq. (9 C. E. Green) 277, 296; *Appeal of Flintham* (Pa.) 11 Serg. & R. 16, 17.

#### Improvement of cemetery lot.

The term "funeral expenses" does not include a debt incurred by decedent's widow in inclosing the burial lot. In re *Meyer's Estate* (Pa.) 18 Phila. 42.

The expenses, amounting to \$2,400, for inclosing and curbing the cemetery lot, were improvements of real estate, and could not be allowed as funeral expenses. In re *Barclay's Estate* (Pa.) 33 Leg. Int. 108, 11 Phila. 123.

#### Monument.

The expense of erecting a suitable monument over the grave of deceased is to be classed among the funeral expenses. *Pease v. Christman*, 64 N. E. 90, 91, 158 Ind. 642; *Lutz v. Gates*, 17 N. W. 747, 62 Iowa, 513; *Crapo v. Armstrong*, 17 N. W. 41, 42, 61 Iowa, 697; *Ferrin v. Myrick*, 41 N. Y. 315, 325; *Laird v. Arnold* (N. Y.) 42 Hun, 136, 138; In re *Howard's Estate*, 23 N. Y. Supp. 836, 841, 3 Misc. Rep. 170; *Owens v. Bloomer* (N. Y.) 14 Hun, 296, 297; *Cornwell v. Beck* (N. Y.) 2 Redf. Sur. 87, 90; In re *Barclay's Estate* (Pa.) 35 Leg. Int. (Pa.) 108, 11 Phila. 123, 2 Wkly. Notes Cas. 447; In re *Meyer's Estate* (Pa.) 18 Phila. 42; *Sheetz's Estate* (Pa.) 2 Woodw. Dec. 407, 409; *Griffiths' Estate* (Pa.) 1 Lack. Leg. N. 311; In re *Webb's Estate*, 30 Atl. 827, 828, 165 Pa. 330, 44 Am. St. Rep. 666, 36 Wkly. Notes Cas. 571; *Hatchett v. Curbow*, 59 Ala. 516, 521; *Van Emon v. Superior Court of Tulare County*, 18 Pac. 877, 76 Cal. 589, 9 Am. St. Rep. 258; *Donald v. McWhorton*, 44 Miss. 124, 129.

Funeral expenses should be construed to include the cost of tombstones, which are not a necessary part of the expenses of settling an estate, for the estate can well be settled and closed without procuring them. Tombstones are connected with the burial, and properly belong to that part of the expenditures. Expenditures for digging and filling the grave certainly are, and the stones placed at each end of the grave are so placed to mark, define, and protect it. The inscription on the stone may be more extended than is necessary for that purpose, but that is the principal object. They are not set up at the time of the burial, because not then prepared, but they are, when set up, fixtures of the grave, as bounds and fences are fixtures of land, and the sums paid for them should be considered a part of the funeral

expenses. Appeal of Fairman, 30 Conn. 205, 209.

#### Portrait of deceased.

The funeral expenses properly allowable as claims against the estate of a deceased properly include a tombstone, but do not include a portrait of deceased, painted after the death for his widow. If the widow desires a memorial of this kind, she should pay for it. Appeal of McGlinsey (Pa.) 14 Serg. & R. 64, 66.

#### Post mortem examination.

Funeral expenses do not include a liability incurred for the services of physicians in performing a post mortem examination; such examinations being only in the interest of the advancement of science or the enforcement of criminal laws, and having nothing to do with the settlement of the decedent's estate or his interment. Smith v. McLaughlin, 77 Ill. 596, 597.

#### Removal of body to place of burial.

Where deceased died in Florida, whither he had gone in quest of health, from his domicile in Philadelphia, and out of respect for family associations he was buried in Connecticut, the expenses of taking the body from Florida to the place of burial were properly included and allowed the executor as funeral expenses. In re Carpenter's Estate (Pa.) 16 Phila. 290.

#### Wake.

The expenses of a wake preceding the burial of a deceased person, where the same simply consisted of the performance of a custom of watching at night over the corpse, and where it was not given merely as a pretense for pandering to the appetites of the living, the fare furnished for the watchers, consisting merely of cheese, crackers, and tobacco, were properly allowed against a decedent's estate as funeral charges. In re Johnson's Estate, 8 Pa. Co. Ct. R. 1, 3.

### FUR.

In Astor v. Union Ins. Co. (N. Y.) 7 Cow. 202, 204, evidence was held to be properly admitted showing that by the usage of the trade skins valuable chiefly on account of the fur were called "fur," while "skins" was a term appropriated to those which were valuable chiefly for the skin, by which we understand the skin with the hair removed. Seeberger v. Schlesinger, 14 Sup. Ct. 729, 731, 152 U. S. 581, 38 L. Ed. 560.

Hat bodies, which are made partly of the soft substance which is taken from the skin of rabbits and partly from the wool of sheep, are not "fur," within the meaning of the Carriers' act (St. 11 Geo. IV and 1

Wm. IV, c. 68). Mayhew v. Nelson, 6 Car. & P. 58.

"Fur skins of all kinds not dressed in any manner," as used in Tariff Act Oct. 1, 1890, par. 588, includes raw Angora goat-skins, with the hair on, being for all commercial purposes undressed fur skins; it being unprofitable to separate the hair from the skin and to use the hair as wool. United States v. Bennet (U. S.) 66 Fed. 299, 300, 13 C. C. A. 448.

### FURNACE.

The word "furnace," in a claim for a patent, implies something which may be properly called a furnace. The prominent indispensable concept of such a structure is some sort of an inclosed combustion chamber with top, sides, and bottom, or floor. Indeed, such term would not be applicable to a structure without a floor. Bryce Bros. Co. v. National Glass Co. (U. S.) 116 Fed. 186, 190, 53 C. C. A. 611.

"Furnace," as used in a lease restricting the lessee from using the premises for the purpose of a forge or furnace for the manufacture of iron, means an establishment or mechanical contrivance by which iron is made or manufactured from the ore. A blast furnace makes cast iron direct from the ore. Rogers v. Danforth, 9 N. J. Eq. (1 Stockt.) 289, 293.

A furnace may have one stack or more, in which case it is sometimes called "furnaces," and sometimes "a furnace" with stacks of a specified number. Negaunee Iron Co. v. Iron Cliffs Co. (Mich.) 96 N. W. 468, 475.

#### Forge distinguished.

The difference between a "forge" and a "furnace," so far as the ordinary use of those words in connection with actual work is concerned, is this: A furnace is used to melt ores in making metals, or to melt metals in working them, while a forge is used to heat metals to hammer them into a desired form, and not to melt them; and hence a forge in which a fire is maintained for the purpose of carrying on the ordinary business of a blacksmith is not a furnace, within the meaning of Laws 1892, c. 419, §§ 116, 117, providing that no furnace, except for the purpose of heating, shall be placed in any building without a permit from the department for the inspection of buildings. City of Boston v. Sarni, 56 N. E. 607, 175 Mass. 357.

A "furnace for the manufacture of iron" is defined to be an establishment or mechanical contrivance by which iron is made or manufactured from the ore. A forge manufactures or makes malleable iron direct

from the ore. A blast furnace makes cast iron direct from the ore. *Rogers v. Danforth*, 9 N. J. Eq. (1 Stockt.) 289, 296.

### FURNACE PLANT.

A lease requiring the lessees to keep the furnace plant in proper and sufficient repair covered six salt wells used in connection with the entire plant; the word "plant" from a commercial point being defined by Webster as the whole machinery and apparatus employed in carrying on a trade or mechanical business, also sometimes including real estate and whatever represents investment of capital in the means of carrying on the business, but not including material worked upon or finished products, as the plant of a foundry, a mill, or a railroad. *Clifton v. Montague*, 21 S. E. 858, 860, 40 W. Va. 207, 33 L. R. A. 449, 52 Am. St. Rep. 872.

### FURNISH.

Supplies furnished, see "Supplies."

A contract letting a farm for a year on equal shares, the lessor agreeing to furnish 20 cows, a horse and harness, and all the farming tools, including dairy utensils, imposes an obligation on the lessor as continuous as the lease, by which he undertook to supply the lessee with 20 cows, not only at the commencement of the term, but during the term. *Gregory v. Tomlinson*, 35 Atl. 350, 351, 68 Vt. 410.

To furnish means to supply or provide, so that a contract assuming debts incurred in furnishing a hotel covered debts incurred in the purchase of liquor supplied to the hotel. *Delp v. Bartholomy Brewing Co.*, 15 Atl. 871, 873, 123 Pa. 42./

A contract between a user of water and an irrigation company provided that "the said company agrees that when it shall have sold and have outstanding and in force a number of water rights equal to the estimated capacity of the company's canal to furnish water it will then issue and deliver to the holder of each water right who shall have complied with the terms and conditions of this contract, without further consideration, four shares of the stock of the said company for every water right hereby sold, which the purchaser hereof agrees to accept." Held, that the word "furnish," taken alone, might be deemed the equivalent of the word "supply," but inasmuch as the clause in which it occurs is continuous, not separated by punctuation, and the word "furnish" is modified, explained, and controlled by the preceding words "estimated capacity," it was evident that the contracts were predicated on the estimated carrying capacity of the canal, and not on the supply of

water, which would necessarily be fluctuating. *Wyatt v. Larimer & W. Irr. Co.*, 29 Pac. 906, 913, 1 Colo. App. 480.

The word "furnish," in a bond by defendant to plaintiff, who resided together in the same house, to furnish keeping for the plaintiff's cattle both winter and summer, was construed to mean "provide for," and not to require defendant to feed the cattle. *Erskine v. Erskine*, 13 N. H. 436, 443.

The word "furnished," as used in Syracuse City Charter, § 199, providing that the city marshal may be removed for cause on charges duly furnished, implies that the charges shall be furnished to some official or body. In re Freeman, 50 N. Y. Supp. 520, 522, 27 App. Div. 593.

"To furnish" means to provide for use, to supply, and to furnish or supply necessarily carries with it the idea of ownership, property in, or dominion over the thing furnished by the one who furnishes; and a carrier who transports for hire a package containing spirituous liquors, and whose only undertaking is to carry the goods to destination, does not by delivery violate Laws 1884-85, c. 541, § 1, providing that it shall not be lawful for any person or persons to sell "or furnish at any place of business or any other public place" any intoxicating, alcoholic, spirituous, or malt liquors within the limits of a certain county. *Southern Exp. Co. v. State*, 33 S. E. 637, 638, 107 Ga. 670, 46 L. R. A. 417, 73 Am. St. Rep. 146.

The word "furnish," as used in the chapter relating to traffic in intoxicating liquor, shall apply to cases where a person knowingly brings into or transports within the state for another person intoxicating liquor intended to be sold or disposed of contrary to law, or to be divided among or distributed to others. V. S. 1894, 4461.

### Convey distinguished.

"Furnish" and "convey" are words of widely different meaning. To furnish a thing and to convey it signify very different acts. To furnish is to provide or supply anything wanted by another; to convey is to bear, carry, or transport the thing to another person or place. A person at a distance may furnish the article desired upon request by letter or otherwise, and another may convey it, to the person for whom it is intended. One may furnish, provide, or supply a person confined in jail with food, which another may convey into the jail to the person therein confined. Therefore to furnish a person who is confined in jail with anything may, and ordinarily does, mean quite a different act from what we understand by the words "shall convey into jail." Thus an indictment charging the defendant with "furnishing" certain articles to a person confined in jail is not sufficient to describe the

crime created by Pen. Code, art. 321, which makes it criminal to convey into jail any disguised instrument, etc. *Francis v. State*, 21 Tex. 280, 285.

#### **As deliver.**

A contract in terms to furnish coal on the cars at a particular place is in effect an agreement to there deliver the coal to the buyer, though by the terms of the contract it was to be weighed at another place, to which it was to be conveyed. *Watson Coal & Mining Co. v. James*, 72 Iowa, 184, 33 N. W. 622, 623.

The word "furnished," in a contract by a contractor with a subcontractor that, in event of the cancellation of the contract of the principal contractor, the subcontractor shall be paid for labor done and materials furnished up to the day of such cancellation, is not equivalent to the word "delivered," and the right of the subcontractor to recover for materials furnished is not restricted to such materials as have been delivered, inspected, and received at the time of the cancellation of the contract, but he is also entitled to pay for materials procured or prepared to be furnished for the work. *Dickinson v. Gray* (Ky.) 8 S. W. 876, 880.

The furnishing of materials, within the meaning of a mechanic's lien law giving a lien on goods furnished, does not import that the material man has delivered the materials in the building in the construction of which they are furnished, but only means that the person selling the materials has delivered, or has them ready for delivery, at the place where he had agreed to deliver them under his contract. *Tibbetts v. Moore*, 23 Cal. 208, 214.

Mechanic's Lien Law, § 8, requiring that the statement filed shall contain the time when the first and last items of labor or material were furnished, and providing that the statement, when filed, shall operate to continue such lien during all the period of time from the time of the furnishing of the first item of such labor until the expiration of one year after the time of furnishing the last item of the same, means furnished on the premises, and the liens of mechanics or material men all attach as of the date of the performance of the first work or the delivery of the first material on the ground. *Wentworth v. Tubbs*, 55 N. W. 543, 544, 53 Minn. 388.

"Furnished," as used in How. Ann. St. Mich. § 8236, declaring that every water craft, etc., shall be subject to a lien for all debts contracted by the owner, etc., on account of work done or materials furnished by mechanics, tradesmen, or others in and about the building, repairing, fitting, furnishing, or equipping of such craft, means "ordered for and delivered to" or near the ves-

sel. It is immaterial to the validity of the lien if they are subsequently diverted and used for other vessels. *The James H. Prentice* (U. S.) 86 Fed. 777, 782.

A contract for goods to be "furnished along the line of" a certain railroad contemplates their shipment over such railroad and delivery by it to the purchaser. *Silvestri v. Missocchi*, 43 N. E. 114, 165 Mass. 337.

A contract to furnish coal on cars at a particular place is in effect an agreement to deliver the coal there to the purchaser, though by the terms of the contract it is to be weighed at another place, to which it is to be conveyed. *Watson Coal & Min. Co. v. James*, 33 N. W. 622, 623, 72 Iowa, 184.

#### **As furnish at own expense.**

The first part of a contract for the building and completion of a church edifice provided that the contractor was to complete the same by a day named, "weather permitting, and stone for front and footing being furnished." Subsequently the church authorities covenanted to pay the contractor a certain sum of money, in consideration that he would furnish all materials and faithfully and fully execute the work, etc. Held, that the word "furnish" should be construed to include all the materials necessary to complete the work, which the other party had not previously contracted to furnish, namely the stone for front and footing, since the first clause, standing alone, would obligate the other party to furnish the stone for the front and footing. *Vermont St. M. E. Church v. Brose*, 104 Ill. 206, 211.

A contract for the repair of a building, which provides that the contractor is to "furnish all the material therefor," should be construed to mean that the contractor is to furnish the same at his own expense. *Mackenzie v. Board of School Trustees of Edinburg*, 72 Ind. 189, 196.

#### **As give away or permit to be given.**

As used in Act 1852, providing that any person shall not sell or furnish intoxicating liquors, etc., to other persons, etc., "furnish" is synonymous with "give away." Literally, the word "furnish" would include both selling and giving away, and every other mode of putting spirits in the power of another. Selling seems to be one distinct mode of offense by itself. Furnishing was intended only to include such furnishing as was done by dealers in the article, where it was not in terms sold. It may include other modes of affording it to others besides giving away, but clearly does include this. *State v. Freeman*, 27 Vt. 520.

The word "furnishing," in Acts Mich. 1877, p. 72, No. 92, making the furnishing of in-

intoxicating liquors to minors a crime, is somewhat broader than the word "giving," and means letting a minor have liquor, and therefore a saloon keeper, who without protest allows an adult to buy intoxicating liquor and give it to the minor to drink, is guilty of a violation of the statute. *People v. Neumann*, 48 N. W. 290, 85 Mich. 98.

"Selling or furnishing liquor," within the meaning of the statute making it criminal to sell or furnish intoxicating liquor, includes the selling or giving away of a quart of whisky for the use of a sick person. *Dukes v. State*, 77 Ga. 738.

#### **As obtain or procure.**

"Furnish," as used in Code Iowa, § 4727, providing that the keeper of each jail must furnish necessary clothing, bedding, fuel, and medical aid for all persons under his charge, means to obtain or procure. *Feldenheimer v. Woodbury County*, 9 N. W. 315, 56 Iowa, 379.

#### **Sale or transfer of title imported.**

A contract to furnish a team of horses or mules, wagons, gear, etc., necessary for country peddling, for which there should be paid \$5 weekly until 200 payments had been made, when the owner of the property should relinquish his title thereto, was a contract of bailment, and not a conditional sale. The use of such a word as "furnish," vague as it is in its signification, would leave the clause in which it occurs of ambiguous import, if there was nothing beside to indicate the sense in which it was employed. It might imply a sale, a lease, a loan, a gift, or a delivery of chattels in payment of a debt, in accordance with its context and its subject-matter. *Enlow v. Klein*, 79 Pa. (29 P. F. Smith) 488, 490.

The term "furnish," in Laws 1885, p. 78, § 3, providing that all persons having claims unprovided for by the state board of drainage directors for materials furnished under the act to promote drainage, approved April 3, 1880, may present the same and have them allowed, etc., imports a taking and a paying of compensation sufficient to divest the title from the owner, and therefore such land cannot be said to be furnished in such a sense as to entitle the owner to damages, in the absence of the proper proceedings and paying of compensation. *Callahan v. Dunn*, 20 Pac. 737, 738, 78 Cal. 866.

#### **As sold and delivered.**

Laws 1889, c. 200, § 1, provides that one who furnishes material for a building shall have a lien thereon. Held, that in the ordinary understanding of the term the material is "furnished" when it is sold and delivered for the purpose of the erection. *Burns v. Sewell*, 48 Minn. 425, 51 N. W. 224.

#### **Furnish a building or hotel.**

As used in Act April 20, 1830, § 1, providing that every mechanic or workman performing any work toward the "erection, construction, or furnishing" of any building, etc., does not include work performed in flagging sidewalks, yards, and areas of buildings in the process of erection. *McDermott v. Palmer*, 8 N. Y. (4 Seld.) 383, 386.

A bill of sale of a leasehold interest in a hotel, containing an agreement that purchaser would assume and pay all "debts made in furnishing said hotel," would include a debt for liquor bought for use in said hotel. *Delp v. Bartholomay Brewing Co.*, 15 Atl. 871, 873, 123 Pa. 42.

#### **Furnish evidence.**

As used in the Constitution of Massachusetts providing that no subject shall be compelled to "furnish evidence against himself," the quoted phrase should be construed as protecting the person from being compelled to disclose the circumstances of his offense or the sources from which or the means by which evidence of its commission or of his connection with it may be obtained or made effectual for his conviction without using his answers as direct admissions against him. For all practical purposes such disclosures would have the effect to furnish evidence against the parties making them. They might furnish the only means of discovering the names of those who could give evidence concerning the transaction, the instrument by which a crime was perpetrated, or even the corpus delicti itself. This protection extends as well to investigations before a legislative body as to proceedings in a court of justice. *In re Emery*, 107 Mass. 172, 182, 9 Am. Rep. 22.

#### **Furnish labor.**

Act Ky. March 27, 1888, which gives a lien on a railroad, etc., in favor of persons "furnishing labor or materials for the construction or improvement" of any railroad, canal, etc., includes supplying laborers and teams by a contractor for the construction and repair of a railroad, and hence the contractor is entitled to a lien therefor. *Tod v. Kentucky Union Ry. Co.* (U. S.) 52 Fed. 241, 3 C. C. A. 60, 18 L. R. A. 305.

#### **Furnish materials.**

"When the law says the material man shall have a lien for all 'materials furnished or used' in and about the construction of bridges, it means such materials as ordinarily enter into or are used in the construction of bridges, and which are fairly within the express or implied terms of the contract between the owner and the contractor. It does not mean the machinery that may be used for the manufacture of the materials themselves. The machinery thus used is the

plant of the contractor, and can in no sense be said to be materials furnished or used in building the bridges." *Basshor v. Baltimore & O. R. Co.*, 3 Atl. 285, 286, 65 Md. 99.

Under Comp. St. c. 54, § 1, art. 2, granting a lien for labor performed or material furnished in the construction, repair, and equipment of the railroad, lumber sold to a subcontractor on a railway for the erection of shanties for his employes and stables for his teams will not be included. *Stewart Chute Lumber Co. v. Missouri Pac. R. Co.*, 49 N. W. 769, 33 Neb. 29.

"Furnishing material," within the meaning of the laws relating to mechanics' liens, includes work done or prepared at the yard or shop of the contractor. *Howes v. Reliance Wire Works Co.*, 48 N. W. 448, 449, 46 Minn. 44.

Pub. St. c. 177, § 1, gave a lien only for materials used in the construction, erection, and reparation, which had been furnished by the person contracted with or requested by the owner of the estate improved. Held, that the word "furnished" might be thought to cover materials furnished to the contractor on general account, as well as materials furnished to him for use in the performance of his contract. We think, however, that the word, taken in connection with its context, must receive the more limited interpretation; that is, for the lien to attach for the benefit of the materialman, the materials must not have only been "used in the construction, erection, or reparation," but must also have been furnished by him to be used so. *Gurney v. Walsham*, 16 R. I. 698, 700, 19 Atl. 823, 825.

#### **Furnish recruits.**

"Furnished," as used in a resolution of the City of Detroit passed October 1, 1864, declaring that the city would pay \$100 to each person or persons who furnished satisfactory evidence that he or they had furnished a person who had been mustered into the service of the United States, etc., is not to be construed strictly, so that only a person who had hired another to enlist in the army could claim the benefit of the bounty, but is to be so construed that a party who enlists may claim the benefit of the bounty. *Roberts v. Field*, 27 Mich. 337, 345.

#### **Furnish supplies.**

A cook for a logging crew furnishes supplies, within the meaning of *Tayl. St.* p. 1768, § 25, giving a lien to any person who shall furnish any supplies, or do or perform any work or labor, in cutting, driving, booming, etc., any logs or timber, and therefore such person is entitled to a lien as "he who cooks the food furnishes the supplies equally with the person who furnishes raw materials. The acts of both are essential to

the supplying of the men with food." *Winslow v. Urquhart*, 39 Wia. 260, 268.

#### **Furnish a vessel.**

As used in Rev. St. § 5283 [U. S. Comp. St. 1901, p. 3599], making it a crime to furnish or fit out a vessel with intent to commit hostilities against a state with whom United States is at peace, and providing for the forfeiture of the vessel, etc., "furnishing" has no legal or technical meaning different from its ordinary acceptation in maritime and commercial parlance, which is to supply with anything necessary or needful. It does not mean arming. *In re The City of Mexico*, 28 Fed. 148, 151.

#### **FURNISHED COMPLETE.**

The words "furnished complete," in a contract for the sale of premises in consideration of machinery to be furnished complete in a mill, means not only that all the machinery is to be furnished, but requires the person furnishing the machinery to supply the labor and material necessary to place it in its proper position for operation. *Grove v. Miles*, 58 Ill. 338, 339.

#### **FURNISHER.**

A furnisher is one who supplies or fits out. *Southern Exp. Co. v. State*, 33 S. E. 637, 638, 107 Ga. 670, 46 L. R. A. 417, 73 Am. St. Rep. 146.

#### **FURNISHING.**

The existence of the word "furnishing" as a noun is not recognized at all by Webster, while Worcester speaks of it as meaning a sample. In the absence of evidence that the term is in general use in the community to designate furniture, it is insufficient, in a mortgage on the furnishing of a hotel, to impart notice to a third person that it is on the furniture of the hotel. *Attaway v. Hoskinson*, 37 Mo. App. 132, 136.

#### **FURNITURE.**

See "Fixed Furniture"; "Household Furniture"; "Kitchen Furniture"; "Necessary Furniture."

#### **Of business.**

As tool, see "Tools—Tools of Trade."

Furniture ordinarily means that with which anything is supplied; the equipment or outfit of a trade or business; whatever may be supplied to a stock of goods or to a business to make it convenient, useful, or gainful; and hence an instruction that the machinery, tools, apparatus, appliances, implements, instruments, and such like articles used in carrying on the business would not

be furniture is erroneous. *Brody v. Crittenden*, 76 N. W. 1009, 1010, 106 Iowa, 524.

Furniture or produce exempted from execution, when applied to a barber, includes two barber chairs, a mirror, and a table accompanying each, which are used and are necessary to the barber in carrying on his trade. *Fore v. Cooper* (Tex.) 34 S. W. 341, 342.

"Furniture," as used in a fire policy covering specified contents of a saloon and such other "furniture and fixtures as is usual to saloons," does not include a safe. *Moriarty v. United States Fire Ins. Co.*, 49 S. W. 132, 19 Tex. Civ. App. 639.

#### Of house.

The word "furniture" is a very comprehensive term, embracing about everything with which a house or anything else is or can be furnished. As used in Gen. St. p. 473, § 3, exempting from execution and attachment in favor of the head of a family certain designated articles and all other household furniture, not exceeding in value \$500, it "means everything with which the residence of the debtor is furnished." *Rasure v. Hart*, 18 Kan. 340, 344, 26 Am. Rep. 772.

Furniture "means all personal chattels which may contribute to the use or convenience of the householder or the ornament of the house." *Marquam v. Sengfelder*, 32 Pac. 676, 679, 24 Or. 2.

"The word includes that which furnishes or with which anything is furnished or supplied; whatever must be supplied to a house, a room, or the like, to make it habitable, convenient, or agreeable; goods, vessels, utensils, and other appendages necessary and convenient for housekeeping; whatever is added to the interior of the house or apartment for use or convenience." *Bell's Adm'r v. Golding*, 27 Ind. 173, 179.

The word "furniture," made use of in the dispositions of the law or in the conventions or acts of persons, comprehends only such furniture as is intended for the use and ornament of apartments, but not libraries, which happen to be there, nor plate. Civ. Code La. 1900, art. 477.

#### Same—Billiard tables.

A chattel mortgage, mortgaging "all the furniture in and belonging to the summer house," would include all articles such as were in the house, belonging to it, being there for common use or ornament. Hence it might include billiard tables, pianos, pictures, etc. *Sumner v. Blakslee*, 59 N. H. 242, 243, 47 Am. Rep. 196.

#### Same—Books.

"Furniture," as used in a will providing that testator's furniture should go to a cer-

tain party, does not include a library of books, though it is a small library. *Bridgman v. Dove*, 3 Atk. 201, 202.

Furniture held not to include books. *Porter v. Tournay*, 3 Ves. 310, 313. Contra, see *Dayton v. Tilton*, 24 N. Y. Super. Ct. (1 Rob.) 21, 28; *Ruffin v. Ruffin*, 16 S. E. 1021, 1022, 112 N. C. 102.

#### Same—Carpets.

"Furniture" is a word of very broad meaning, and includes carpets, stoves, ranges, rugs, and dishes, so that, in a prosecution for failure to procure license to deal in secondhand goods, evidence that defendant dealt in such articles is admissible under an indictment alleging that defendant dealt in secondhand furniture. *State v. Segel*, 62 N. W. 1134, 60 Minn. 507.

#### Same—China and glassware.

The term "furniture," as used in an insurance policy, has been held to include plate, china, linen, bronzes, statuary, and pictures. *Patrons' Mut. Aid Soc. v. Hall*, 49 N. E. 279, 282, 19 Ind. App. 118.

China and glassware are furniture. *Ruffin v. Ruffin*, 16 S. E. 1021, 1022, 112 N. C. 102; *State v. Segel*, 62 N. W. 1134, 60 Minn. 507; *Endicott v. Endicott*, 3 Atl. 157, 158, 41 N. J. Eq. 93.

#### Same—Linen.

Where a testator gives his household furniture, plate, linen, wines, liquors, etc., it cannot be argued that, because he specially enumerated plate and linen, he did not consider that they did not pass under the word "furniture." It was natural that for greater certainty he should enumerate them specifically. *Cremorne v. Antrobus*, 5 Russ. 312, 320. See, also, *Endicott v. Endicott*, 3 Atl. 157, 159, 41 N. J. Eq. 93.

#### Same—Piano.

"Furniture," as used in Rev. St. c. 134, § 31, subd. 6, providing that certain specified articles of household furniture shall be exempt from sale on execution, and all other household furniture not herein enumerated, not exceeding \$200, does not include a piano, though its value is less than \$200. "The obvious design of this provision was to enable the debtor to select from the usual articles of furniture, such as chairs, tables, stands, etc., to the amount of the value mentioned; but a piano is a thing so peculiar and distinct in character that it is clear, from the manner in which this statute is drawn, that if the Legislature had designed to exempt it they would have specifically mentioned it." *Tanner v. Billings*, 18 Wis. 163, 164, 86 Am. Dec. 755.

"Furniture," as used in Rev. St. art. 2335, providing that all household and kitchen furniture shall be reserved to every fam-

ily exempt from attachment or execution, or other forced sale for the payment of debts, is a word of very broad signification, and according to lexicographers embraces a supply of necessary, convenient, or ornamental articles with which a residence is equipped, and would therefore include a piano. It is not confined in its meaning to such things as are necessities to a family. *Alsop v. Jordan*, 6 S. W. 831, 833, 69 Tex. 800, 5 Am. St. Rep. 53.

A contract for the sale of all the furniture in a certain hotel, used in the business of innkeeping, should be construed to include a piano kept by the vendor in the parlor of the hotel for the use of his guests. *Crossman v. Baldwin*, 49 Conn. 490, 491.

A piano is included in the term "furniture and other household effects," as such phrase is used in St. 1884, c. 313, which provides that all contracts for conditional sales of "furniture and other household effects" shall be in writing, and that a copy of the contract shall be furnished to the vendee. *Lee v. Gorham*, 42 N. E. 558, 557, 165 Mass. 130. See, also, *Sumner v. Blakslee*, 59 N. H. 242, 243, 27 Am. Rep. 196.

#### Same—Pictures and statuary.

"Furniture is not to be confounded with cabinet makers' ware, for which it is frequently used, but implies anything that furnishes or equips. Books, wines, curiosities, mineralogical or other specimens, and even pictures and statues, as well as plate, come under the designation of 'household furniture' in that sense, when they are employed in domestic use or as ornaments of a residence." *Dayton v. Tillou*, 24 N. Y. Super. Ct. (1 Rob.) 21, 28; *Patrons' Mut. Aid Soc. v. Hall*, 49 N. E. 279, 282, 19 Ind. App. 118.

Pictures are included in the term "furniture." *Patrons' Mut. Aid Soc. v. Hall*, 49 N. E. 279, 282, 19 Ind. App. 118; *Ruffin v. Ruffin*, 16 S. E. 1021, 1022, 112 N. C. 102; *Endicott v. Endicott*, 3 Atl. 157, 159, 41 N. J. Eq. 14 Stew. 93; *Sumner v. Blakslee*, 59 N. H. 242, 243, 27 Am. Rep. 196.

#### Same—Plate.

"That which fits a house for use is its furniture, just as the lock, etc., of a musket, which enables one to use it, are designated in the same way. In its ordinary signification, the word has not been understood to include silverware, china, glassware, books, or portraits attached to the wall, that are not generally essential to the comfort of housekeepers." As used in a devise of furniture, the term "must be always construed by taking the surrounding circumstances into consideration." *Ruffin v. Ruffin*, 16 S. E. 1021, 1022, 112 N. C. 102.

A will wherein testator directed that his entire estate, real, personal, and mixed,

including the "furniture," should be occupied by his wife for her natural life, meant everything about the house that had usually been enjoyed therewith, including plate, linen, china, and pictures. *Endicott v. Endicott*, 3 Atl. 157, 159, 41 N. J. Eq. 14 Stew. 93.

"Furniture," as used in a conveyance of household goods and furniture, includes plate used in the family. *Bunn v. Winthrop* (N. Y.) 1 Johns. Ch. 329, 338.

Furniture was held to include plate in the following cases: *Patrons' Mut. Aid Soc. v. Hall*, 49 N. E. 279, 282, 19 Ind. App. 118; *Dayton v. Tillou*, 24 N. Y. Super. Ct. (1 Rob.) 21, 28; *Cremorne v. Antrobus*, 5 Russ. 312, 320; *Porter v. Tournay*, 3 Ves. 310, 313.

#### Same—Provisions and wine.

"Furniture," as used in a petition in an action for damages to furniture, etc., cannot be construed to include coffee, sugar, and apples. *Whitmore v. Bowman* (Iowa) 4 G. Greene, 143, 149.

A bequest of the use of a house, with all the furniture, should be construed to include plate, but does not include wine and books. *Porter v. Tournay*, 3 Ves. 310, 313. See, also, *Dayton v. Tillou*, 24 N. Y. Super. Ct. (1 Rob.) 21, 28.

#### Same—Safe containing money.

A will devising testator's dwelling house, the furniture, and all contents thereof, should not be construed to include a safe containing money, since, according to the rule that in the construction of wills, when certain things are mentioned or enumerated in a bequest, followed in the same clause by a more general description, that description is taken to cover only things of a like kind with those mentioned or enumerated, "contents" should be considered as referring only to articles of the nature of furniture, and bonds, mortgages, bank books, and cash in a safe cannot be regarded as furniture or articles of the same nature. *Fenton v. Fenton*, 71 N. Y. Supp. 1083, 1087, 35 Misc. Rep. 479.

#### Same—Stoves.

Furniture was held to include a stove and ranges in *State v. Segel*, 62 N. W. 1134, 60 Minn. 507.

#### Of schoolhouse.

The term "furniture," as used in Act 1893, § 81, authorizing school trustees to buy furniture for schoolhouses, embraces only such articles as were generally understood to be in general use in schoolhouses as a part of the furniture of the house, as distinguished from appliances and apparatus that may be used in instructing the scholars. *McGee v. Franklin Pub. Co.*, 39 S. W. 335, 338, 15 Tex. Civ. App. 216.



Under a statute authorizing the school trustees to purchase furniture for a schoolhouse, they were not authorized to purchase a grammar chart. The statute authorizing the purchase of furniture clearly indicates that it was furniture for the house or building that was intended, so as to make it habitable and comfortable, and not appurtenances and appliances and supplies that may be useful to the school as a part of its system of instruction, or as an aid thereto. The grammar chart may be useful in furtherance of the system of instruction that prevails in the schools where used, but it serves no necessary or useful purpose as an article of furniture to a schoolhouse, in order that it may with comfort be used and occupied as a schoolhouse. The term "furniture," used in the statute, was evidently intended to embrace only such articles as were generally understood to be in general use in schoolhouses as a part of the furniture of the house, as distinguished from appliances and apparatus that may be used in instructing the scholars. *McGee v. Franklin Pub. Co.*, 89 S. W. 335, 338, 15 Tex. Civ. App. 216.

#### Of ship.

"Furniture," as used in an insurance policy on a ship and its furniture, includes provisions sent out for the use of the crew. *Brough v. Whitmore*, 4 Term R. 206, 211.

"Furniture," as used referring to the furniture of a ship, includes provisions for the use of the crew. In fact, furniture of ships includes everything with which a ship requires to be furnished or equipped to make her seaworthy. *Weaver v. The S. G. Owens*, 29 Fed. Cas. 489, 492.

As used in a rule providing that, in suits in rem against a ship, her "tackle, sails, apparel, furniture, and boats," if in the possession of a third person, may be ordered to be turned over to the marshal, such terms will be construed to "include everything belonging to the vessel as a navigating ship." *In re The Witch Queen*, 30 Fed. Cas. 396, 397.

As used in the legal phrase that "the tackle, apparel, and furniture" of a vessel is liable for the wages of seamen, such terms will be construed to include special apparatus or appliances on board a vessel engaged in a particular occupation, which is necessary to the prosecution of the business in which it is engaged. *In re The Edwin Post* (U. S.) 11 Fed. 602, 606.

#### Of store.

"The word 'furniture' relates ordinarily to movable personal chattels. It is very general both in meaning and application, and its meaning changes so as to take the color of or be in accord with the subject to which it is applied. Thus, we hear of the furniture

of a parlor, of a bedchamber, of a kitchen, of shops, of various kinds of a ship, of a house, of a plantation, etc. The articles, utensils, implements, etc., used in these various connections, as also those used in a drug or other store, as the furniture thereof, differ in kind according to the purposes which they are intended to subserve; yet, being put and employed in their several places as the equipment thereof, for ornament, or to promote comfort, or to facilitate the business therein done, and being kept or intended to be kept for those, or some or one of those, purposes, they pertain to such places respectively, and collectively constitute the furniture thereof." As used in a contract for the sale of a drug store, its fixtures, and furniture, it includes movable furnishings in addition to fixtures. *Fore v. Hibbard*, 63 Ala. 410, 412.

A chattel mortgage on the furniture of a boot and shoe store includes a wooden elephant, kept in the store at night, but standing in front thereof in daytime, decorated with shoes, and used for a sign. *Curtis v. Martz*, 14 Mich. 506, 512.

#### FURTHER.

"The word 'further' is not a word of strict legal or technical import. It may be used to introduce a negation or qualification of some precedent matter, but generally, when used as an adverb, our lexicographers (Webster, Walker, and others) inform us it is a word of comparison; that it means 'additional,' and is equivalent to 'moreover, or furthermore; something beyond what has been said; or likewise or also.' In this sense it is frequently used in statutes or legal instruments." *Jones v. Creveling's Ex'rs*, 19 N. J. Law (4 Har.) 127, 133.

The term "item," or "further," or "moreover," is commonly used in the beginning of a new devise or bequest in a will, without indicating any particular intention in the disposition of the property. After a testator had devised certain houses in fee, he inserted another separate clause in the following language: "Further, I wish to give to W. one other three-story house," which was properly described. In construing the will it was held that the word "further" was not used in connection with the preceding clause of the will, and thus the grant of a fee by the first clause could not be held to apply to the latter, and therefore W. was held only to take a life estate. *Burr v. Sim* (Pa.) 1 Whart. 252, 264, 29 Am. Dec. 48.

#### As limited to ejusdem generis.

In Railroad Law, Laws 1890, c. 565, § 93, as amended by Laws 1892, cc. 305, 676, and Laws 1893, c. 434, relating to the consent of local authorities to the construction or ex-

tension of street surface railroads, which provides that the franchise of using any street, etc., shall be sold by public auction to the bidder who will agree to give the city the largest percentage of the gross receipts of such corporation, etc., and that the local authorities may attach to their consent any "further conditions" respecting security, further than that provided in the act, suitable to secure the construction, completion, and operation of the railroad within the time prescribed, etc., "further" relates to matters ejusdem generis with those specially enumerated, and does not authorize the local authorities to impose as a condition of their consent that the existing railroad, if it purchases the right to construction and extension, shall pay into the city treasury a lump sum of money in addition to the percentage of gross receipts bid at the sale; and sale under such conditions vests no right in the purchaser. *Beekman v. Third Ave. R. Co.*, 47 N. E. 277, 282, 158 N. Y. 144.

#### As denoting order of sequence.

"Further," as used in a subdivision of a will beginning with the words, "Further, my said executors and trustees shall then pay over the following gifts and bequests, namely," etc., does not denote anything more than an order of sequence, and will not be construed of itself to make the legacies following them residuary, nor to import a preference. *Porter v. Howe*, 54 N. E. 255, 257, 173 Mass. 521.

#### As additional.

In an agreed case that after a certain time no further credit was asked by or given to a certain company, "further" is employed as an adjective in the sense of additional, limiting "credit," and is not to be construed as an adverb of time, qualifying the verb "given." *London & S. F. Bank v. Parrott*, 58 Pac. 164, 166, 125 Cal. 472, 73 Am. St. Rep. 64.

"Further," as used in a third proviso of an act relating to the building of branch roads by a railroad, introduced by the words "provided further," describes the scope and character of the proviso as also intended to be an additional proviso applicable to the branches included in the previous provisos, and not as a new or independent proviso intended to reach branches which were not included at all within the previous provisos. *Attorney General v. Greenville & H. Ry. Co.*, 46 Atl. 638, 644, 59 N. J. Eq. 372.

"Further compensation" means additional compensation to some compensation before mentioned, and as used in an agreement between an attorney and client that the attorney should contest the case in a Court of Appeals, and should have such further compensation as might be agreed on, refers to

a compensation in addition to that which the attorney was to receive for conducting the case in the lower court. *Hitchings v. Van Brunt*, 38 N. Y. 335, 338.

The expression "further civil and criminal jurisdiction," as used in the Constitution, providing that certain state courts should be continued with the powers and jurisdiction they then had, "and such further civil and criminal jurisdiction as may be conferred by law," meant jurisdiction over subject-matters and causes of action in addition to those of which they already had jurisdiction, and did not refer to the extension of territorial jurisdiction. *Landers v. Staten Island R. Co.*, 14 Abb. Prac. (N. S.) 346, 353, 53 N. Y. 450, 457.

In circuit court rule 97, providing that "the bill of exceptions shall be made up and signed during the term of the court, unless by special order further time is allowed," the phrase "further time" means time beyond the expiration of the term, for without an order the bill of exceptions can, under the well understood practice, be settled at any time during the term, and where, in an order refusing a motion for new trial, the defendant is allowed 30 days in which to make up his bill of exceptions and perfect his bill, the 30 days begins to run at the end of the term; the intent of the order being to give the appellant 30 days which he would not have had without it. *Lewis v. Meginniss*, 6 South. 167, 169, 25 Fla. 589.

One meaning of the word "further" is "additional," and in a complaint, the second count of which claimed the further sum of \$1,900 as damages, implied a sum in addition to the amounts claimed in the former counts. *Thompson v. Southern R. Co.* (U. S.) 110 Fed. 890, 891.

The phrase "further term of one, two, and three years," in a lease of property for a certain term with the privilege of a "further term of one, two, and three years," is to be construed as only giving a privilege of one additional term, and not to entitle the lessee to three different terms, amounting to six years in all. *Austin v. Stevens* (N. Y.) 38 Hun, 41, 42.

#### As also.

In a will devising real estate to testator's wife for life, and providing that at her decease it should be sold, and that from the proceeds of the sale a certain sum should be paid to a certain person, and that he further gave and bequeathed out of the proceeds of such sale a certain sum to be paid over to a missionary society, "further" will be held to mean "also," and not to indicate that the legacy to the society is to be given from the fund from which another legacy has been taken. *Sumner v. American Home Missionary Soc.*, 10 Atl. 616, 617, 15 R. I. 553.

**As any.**

"Further," as used in a lease which provides that, in case the rent is not paid when due, the lessor may enter without further notice or demand and divest the lessee of his estate, means "any." *Fifty Associates v. Howland*, 59 Mass. (5 Cush.) 214, 218.

Comp. St. 1893, § 127, providing that a tax deed made by the county treasurer shall vest in the grantee the title to the property "without further acknowledgment or evidence" of such conveyance, should not be construed to read "without any acknowledgment or evidence" of such conveyance, since the holder of a void tax deed is subrogated to the lien of the public for taxes on the land, and is authorized to foreclose his lien in equity against the property, and thus acquire, if the property be redeemed, a large return on his investment, and, if not redeemed, an indefeasible title to the property. Therefore the statute did not authorize the execution of a tax deed without any acknowledgment whatsoever. *Larson v. Dickey*, 58 N. W. 187, 171, 39 Neb. 463, 42 Am. St. Rep. 595.

**As future.**

"Further," as used in a release of a lessee by the lessors in the following words: "We do hereby severally release the said D. N. from further liability under the covenants of said original lease"—means "future." *O'Fallon v. Nicholson*, 56 Mo. 238, 241.

**As other.**

The word "further," in Act June 1, 1889, §§ 1, 21, imposing a tax on mortgages held by corporations, and a tax on the capital stock of corporations, and providing that corporations liable to tax on capital stock shall not be required to pay further taxes on the mortgages, etc., constituting any portion of their assets within the appraised value of their capital stock, means "other"; and therefore, under the statute, the capital stock of the corporations is first to be taxed at its appraised value, and then their mortgages, not included in the appraised value of the capital stock, are to be taxed. *Pennsylvania Co. for Insurance v. Loughlin*, 21 Atl. 163, 165, 139 Pa. 612.

**FURTHER ASSURANCE.**

See "Covenant for Further Assurance."

**FURTHER CONVEYANCE.**

See "Awaiting Further Conveyance."

**FURTHER NOTICE.**

Milwaukee City Charter, c. 10, § 1, requires that all work for the city or any of the wards shall be let by contract to the lowest

bidder, and due notice shall be given of the time and place of letting such contract. Chapter 7, § 6, provides for the publication of notice to the lot owners to do the work within a reasonable time before the street commissioners should be authorized to let the work on the contract. *Priv. Laws Wis. 1856*, c. 158, § 13, amends chapter 7, § 6, of the charter, above referred to, by adding: "And if said work be not done within the time limited in such contract, the state commissioner may relet such work without further notice." Held, that the further notice dispensed with was the notice to the lot owners. The commissioner is still bound to give notice of a reletting of the contract. *Mitchell v. City of Milwaukee*, 18 Wis. 92.

**FURTHER PROCEEDING.**

The mere filing of the remittitur and record by the clerk does not constitute "further proceedings," within the meaning of Comp. Laws, § 5239, providing that a case remanded by the Supreme Court for new trial or further proceeding in the trial court shall be dismissed if no proceedings are had therein within a year, etc. *Root v. Sweeney* (S. D.) 95 N. W. 916, 917.

**FURTHER SECURITY.**

A steamship company in New York, in order to obtain letters of credit to disburse their ships in Brazil, hypothecated all freights, and agreed to give further security when required. It was held that the agreement for further security was too indefinite to constitute a lien on the vessels; that it would have been as truly fulfilled by giving further personal security, as by giving a further maritime lien. *In re The Allianca* (U. S.) 63 Fed. 726, 729.

**FURTHER WASTE.**

The term "further waste," within the meaning of the statute authorizing an injunction to restrain further waste by persons in possession of real estate, was construed not to include the removal of wood or timber already cut. *Trustees of Episcopate v. Matteson*, 12 N. Y. St. Rep. 370, 371.

**FURTHERANCE.**

The word "furtherance," as applied to the act of one accomplished in the furtherance of a criminal project, has a well-defined and generally accepted meaning. It is the act of furthering, or helping forward, or promotion, or advancement. *Powers v. Commonwealth* (Ky.) 70 S. W. 644, 652.

**FURTUM.**

"Furtum" is simple theft, as distinguished from that which is accomplished by vio-

lence. *Spinetti v. Atlas S. S. Co.*, 80 N. Y. 71, 78, 79, 86 Am. Rep. 579.

## FUSE

A "fuse," such as is used in an electric car, consists of a piece of metallic alloy similar in nature to soft solder, one or more inches in length, connected at each end with a small circular piece of copper. These pieces of copper are called the "terminals," and they are so cut that they can be easily slipped under the thumbscrews and clamped in place. The fuse and thumbscrews are held in what is called the "fuse box." *Cassady v. Old Colony St. Ry. Co.*, 68 N. E. 10, 184 Mass. 156, 63 L. R. A. 285.

A "fuse," as used in connection with electrical appliances, is a piece of wire about six inches in length, made of very soft material, which melts when it comes in contact with a high potential current of electricity. *Chicago Tel. Co. v. Northwestern Tel. Co.*, 65 N. E. 329, 340, 199 Ill. 824.

## FUSION.

"Fusion" is the act of coalescing two political parties, or the state of coalescence; used, also, attributively, as a fusion ticket, so that, where voters mark the word "Fusion" upon ballots, they will be held to have intended to vote for the candidate of the Fusion party. *Nicholls v. Barrick*, 62 Pac. 202, 206, 27 Colo. 432.

## FUTURE.

The word "future," in Bankr. Act 1841, c. 9, § 2, by which it is provided that all future payments, securities, conveyances, etc., made or given by any bankrupt in contemplation of bankruptcy and for the purpose of giving any creditor, etc., any preference, should be deemed void, was held in *In re Chadwick*, 5 Fed. Cas. 398, to refer to the day when the act took effect. "But a contrary construction was given to this clause by Judge Story in the case of *Hutchins v. Taylor*, 12 Fed. Cas. 1079, and we all concur in his construction of that clause. The act, as Judge Story remarks, became a law by the very term of the Constitution of the United States as soon as it was approved by the President, although its operation was suspended until the 1st of February, 1842. The act, therefore, might effectually prohibit the doing of any acts between the time of its passage and the time when it was to go into operation, if such was the intention of its framers, and we cannot doubt that such was their intention." *Swan v. Littlefield*, 58 Mass. (4 Oush.) 574, 576; *Day v. Bardwell*, 97 Mass. 246, 255. The contrary rule was also held in *Weiner v. Farnum*, 2 Pa. (2 Barr) 146.

"Future time" usually means a period of time to come after present time, and would vary, of course, with what was considered present time. *State v. Rose*, 1 Pac. 817, 820, 30 Kan. 501.

## FUTURE ACTION OR PROCEEDING.

In Rev. St. c. 32, §§ 29, 30, providing that an action may be maintained by one town against another to recover for the expenses incurred for the support of a pauper whose legal settlement is established in such town, and that a recovery in such action shall bar the town against which it shall be had from disputing the settlement of such pauper with the town thus recovering in any future action brought for the support of such pauper, the term "future action" is not necessarily confined to an action commenced after the action was commenced in which the judgment was rendered; but where two actions are pending at the same time, and after the first one is tried, pending an application for a new trial, the other one is tried and final judgment rendered therein in favor of the defendant, on the retrial of the first action such judgment is a bar to a recovery in the first action. *Inhabitants of Bangor v. Inhabitants of Brunswick*, 33 Me. 352, 355.

Code Civ. Proc. § 3334, subd. 5, provided that the repeal of the provisions of the Revised Statutes respecting appeals from the surrogate courts does not effect the power and authority of the supreme court, superior court, marine court of the city of New York, or a county court in an action or special proceeding, nor effect any "future proceeding" taken pursuant to law in such action or special proceeding. Held, that an appeal in a proceeding for the proof of a will, pending in the surrogate's court when the repealing act took effect, should be held to be a "future proceeding" in an action or special proceeding, and not a mere continuation of the original action, and hence such appeal is not effected by the repealing act. *In re Gates' Will* (N. Y.) 26 Hun, 179, 180.

## FUTURE CONTINGENT INTEREST.

A future interest is contingent while the person in whom or the event upon which it is limited to take effect remains uncertain. Rev. Codes N. D. 1899, § 3294; Civ. Code S. D. 1903, § 210.

## FUTURE EDITION.

At the time of testator's death an edition of a work of which he was the author had been partly printed, and was in progress, but unfinished, at the time of his death, and his will contained a specific bequest of the work, "with the right of renewal of all

previous and future editions," according to law. Held, that "future editions" meant the edition which was then in progress. *Hone v. Kent*, 6 N. Y. (2 Seld.) 390, 394.

### FUTURE ELECTION.

Other future election, see "Other."

### FUTURE ESTATE.

See "Vested Future Estate."

A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by a lapse of time or otherwise, of a precedent estate created at the same time. *Comp. Laws Mich.* 1897, § 8792; *Gen. St. Minn.* 1894, § 4371; *Rev. St. Wis.* 1898, § 2034; 1 *Rev. St. N. Y.* p. 722, § 10; *Leslie v. Marshall* (N. Y.) 31 Barb. 560, 564; *Griffin v. Shepard*, 26 N. E. 339, 340, 124 N. Y. 70; *Palmer v. Dunham*, 6 N. Y. Supp. 46, 47, 52 Hun, 468; *Tilden v. Greene*, 7 N. Y. Supp. 382, 387, 54 Hun, 231; *Sabledowsky v. Arbuckle*, 52 N. W. 920, 50 Minn. 475. At common law the intervention of a precedent estate created at the same time was essential to the validity of a conveyance of an estate of freehold to commence at a future time, which is an estate in remainder. *Ferguson v. Mason*, 60 Wis. 377, 383, 384, 19 N. W. 420. Where a will provides that immediately after the death of the life tenants all the real estate shall go to the grandchildren of the testator, to be equally divided between them per capita, valid future estates vesting at the time of the testator's death are created in the grandchildren in being at such time. *Haug v. Schumacher*, 166 N. Y. 506, 517, 60 N. E. 245.

"Future estates" are either vested or contingent. They are vested when there is a person in being who would have an immediate right to the possession of lands upon the ceasing of the intermediate or precedent estate. They are contingent while the person to whom or the event upon which they are limited to take effect remains uncertain. 2 *Rev. St. (9th Ed.)* p. 7090, § 13; *Hersee v. Simpson*, 46 N. Y. Supp. 755, 756, 20 App. Div. 100; *In re Davis' Estate*, 36 N. Y. Supp. 822, 825, 91 Hun, 53; *Wadsworth v. Murray*, 51 N. Y. Supp. 1038, 1043, 29 App. Div. 191; See, also, *Rev. St. Wis.* § 2037; *Ford v. Ford*, 33 N. W. 188, 201, 70 Wis. 19, 5 Am. St. Rep. 117.

A future estate is described by the statutes to be one commencing at a future day; and, though it be capable of being vested, that vesting is determined by the question of whether there is a person in being who would have an immediate right to the premises. *Townshend v. Frommer*, 125 N. Y. 446, 468, 26 N. E. 805.

Every future estate, whether vested or contingent, is void in its creation which suspends the absolute power of alienation for a larger period than a continuance of two lives in being at the creation of the estate. *Rev. St. Wis.* § 2037; *Ford v. Ford*, 33 N. W. 188, 201, 70 Wis. 19, 5 Am. St. Rep. 117.

Where a future estate is dependent on a precedent estate, it may be termed a "remainder," and may be created and transferred by that name. 1 *Rev. St.* p. 722, § 11; *Palmer v. Dunham*, 6 N. Y. Supp. 46, 47, 52 Hun, 468.

### FUTURE INCREASE.

A bequest of slaves and future increase "only embraces such increase as are born after the bequest is made, and cannot be extended to embrace prior-born increase." *Marlin v. Marlin*, 11 Tenn. (3 Yerg.) 546; *Robinson v. Robinson*, 5 Ky. (2 Bibb) 76, 77; *Fightmaster v. Beasley*, 30 Ky. (7 J. J. Marsh.) 410, 411.

### FUTURE INTEREST.

See "Vested Future Interest."

A future interest entitles the owner to the possession only at a future period. *Civ. Code Mont.* 1895, § 1111; *Rev. Codes N. D.* 1899, § 3289; *Civ. Code S. D.* 1903, § 205. This interest is created by will, and in such case the death of the testator is to be deemed or taken as the time of the creation of the interest. A future interest is void in its creation which by any possibility may suspend the absolute power of alienation for a longer time than during the continuance of the lives of persons in being at the creation of such interest. *Civ. Code Cal.* §§ 716, 749; *Goldtree v. Thompson*, 22 Pac. 50, 52, 79 Cal. 613.

### FUTURES.

As gambling contract, see "Gambling Contract."

"Futures," are contracts for the sale of margins or products for future delivery, in which either seller or buyer may elect to make or demand delivery of the goods agreed to be sold and bought, but where uniformly no such delivery is made, and final settlements are made by payment and receipt of the difference in price at the time of delivery from that prevailing at the time the sale was made. *Lemonius v. Mayer*, 14 South. 33, 34, 71 Miss. 514.

A purchase of cotton to be delivered as required is not a "dealing in futures," in the speculative use of the term. Contracts relating to merchandise to be delivered in the future are an essential element in business methods, and the fact that one may gain or lose by the fluctuations of market prices does

not render them illegal. The term "futures" has grown out of those purely speculative transactions in which there is a nominal contract to sell for future delivery, but where in fact none is ever intended or executed. The nominal seller does not have or expect to have a stock of merchandise he purports to sell, nor does the nominal buyer expect to receive it or to pay the price. Instead of that, a percentage or margin is paid, which is increased or diminished as the market rates go up or down, and accounted for to the buyer. This is simple speculation, gambling, mere wagering on prices within a given time. It is not buying and selling, and is illegal as against public policy. *King v. Quidnick Co.*, 14 R. I. 181, 138.

The words "dealing in options, futures, or margins" are well understood to mean a mere speculative contract, in which the parties speculate in the rise or fall of prices,

and imply a contract in relation to the price of the contract, and not the article itself. A contract for the sale and purchase of grain to be delivered at a future time, if entered into without an intention of having any grain pass from one party to another, but with an understanding that at the appointed time the purchaser is merely to receive or pay the difference between the contract and the market price, is a transaction which the law will not sustain. *Plank v. Jackson*, 28 N. E. 568, 569, 128 Ind. 424.

Where a contract is made for the delivery or acceptance of securities at a future day at a price named, and neither party at the time of making the contract intends to deliver or accept the shares, but merely to pay the differences according to the rise and fall of the market, the contract is a gaming one and is void as contrary to public policy. *Justh v. Holliday* (D. C.) 2 Mackay, 348, 342.

## G

**GAG.**

A "gag," in dramatic language, is a word or sentence, or a passage of two or more sentences, not in a drama as composed by the author, but interpolated and uttered on the stage by a player. Gags, in general, are violations of dramatic propriety. Sometimes gags are sanctioned by the manager's approval at the rehearsal of the play. They are occasionally, in comedies of the lighter kind, licensed more or less, if not encouraged, by dramatic authors who attend rehearsals of their own plays. *Keene v. Wheatley* (Pa.) 5 Clark, 501, 523.

**GAIN.**

"Gain" means that which is acquired or comes as a benefit. *Thorn v. De Breteuil*, 83 N. Y. Supp. 849, 856, 88 App. Div. 405.

The term "gaining jurisdiction" has been applied to cases where two courts have concurrent jurisdiction over the subject-matter of the cause or proceeding. When so applied it means gaining jurisdiction by proceedings had in one of the courts. *Bolton v. Jacks*, 29 N. Y. Super. Ct. (6 Rob.) 166, 195.

**As extort.**

In 2 Rev. St. p. 678, § 59, which provides that every person who shall knowingly send or deliver, etc., any letter or writing, etc., threatening therein to accuse any person of any crime, etc., with a view or intent to extort or gain any money or property of any description belonging to another, shall, upon conviction, etc., "gain" is synonymous with "extort," and means something more than merely to obtain or get possession of. The statute is intended to embrace only acts where the intent is to obtain that which in justice and equity the party is not entitled to receive. The end, as well as the means employed to obtain it, must be wrongful and unlawful. *People v. Griffin* (N. Y.) 2 Barb. 427, 430.

In an indictment for blackmailing, alleging that defendant charged another with a crime with the intent to extort and gain, the word "gain" must be used, in connection with the word "extort," as referring to a mode of acquisition equally objectionable. *Mann v. State*, 26 N. E. 226, 228, 47 Ohio St. 556, 11 L. R. A. 656.

**As successful termination.**

An agreement for an exchange of lands, which provided that if H., one of the parties, should gain a law suit pending against him, the cause of such action being for 21 acres of land, he should receive in the exchange

\$1,000 more, should be construed to mean that it was the intent of the parties to regard the suit as a test of title, and that the suit should be brought to a successful termination on the question of title, which would not include a nonsuit. *Crossman v. Hamilton*, 18 Atl. 634, 635, 130 Pa. 320.

The use of the term "gained," in a contract in which a defendant in ejectment agrees to pay his attorneys a certain sum if the suit is gained by them, does not require that there be a trial in court; but the suit is gained, within the meaning of the contract, if the attorneys discover that the plaintiff has no title to the land, but that it is in a third person, and it is then purchased from the latter by defendant, which purchase is followed by a dismissal of the suit, and therefore the attorneys are entitled to recover on the contract, though the reasons which caused plaintiff to dismiss the action are not shown. *Moss v. Richie*, 50 Mo. App. 75, 77.

**GAINS.****See "Net Gains."**

Mere advance in value in no sense constitutes the "gains" specified in the revenue law as gains of the owner for the year in which the sale of the property was made. Such advance constitutes and can be treated merely as increase of capital. *Gray v. Darlington*, 82 U. S. (15 Wall.) 63, 65, 21 L. Ed. 45 (cited in *In re Graham's Estate*, 47 Atl. 1108, 1110, 198 Pa. 216).

Act Cong. March 2, 1867, provides that there shall be levied, collected, and paid annually, on the "gains, profits, and income" of every person from any source whatever, a tax of 5 per cent. on the amount so derived over \$1,000, and that such tax shall be assessed, collected, and paid on the "gains, profits, and income" for the year ending the 31st of December next preceding the time for levying, collecting, and paying said tax. Held, that "gains," as so used, means such gains or profits as may be realized from a business transaction begun and completed during the preceding year. The mere fact that property has advanced in value between the date of its acquisition and sale does not authorize the imposition of the tax on the amount of the advance. Mere advance in value in no sense constitutes the "gains, profits, or income" of the statute above referred to. *Gray v. Darlington*, 82 U. S. (15 Wall.) 63, 65, 21 L. Ed. 45.

**GALE.**

"A gale is a wind blowing at the rate of 40 to 60 miles an hour; a storm at the rate

of 60 to 80 miles." A wind blowing at the rate of 22 miles an hour was only a brisk wind, and not a gale. In re *The Snap* (U. S.) 24 Fed. 292, 293.

A gale is defined as a wind having a velocity of 40 to 70 miles an hour. *Stand. Dict.* Webster defines a heavy gale as a wind having a velocity of 80 miles an hour. Thus, where it appeared that injury to a locomotive engineer was caused by the blowing of heavy doors on the track by a heavy gale, such gale was the probable and proximate cause of the injury. *Missouri Pac. Ry. Co. v. Columbia*, 69 Pac. 338, 341, 65 Kan. 390, 58 L. R. A. 399.

## GALLEIN.

Gallein is a dye which produces blue and purple shades, and is made of two molecules or parts of pyrogalllic acid and one molecule or part of phthalic acid. The source of commercial supply of pyrogalllic acid is from nut-galls or other vegetable matter. The present source of commercial supply of phthalic acid is from coal tar. *Pickhardt v. United States* (U. S.) 67 Fed. 111, 112, 14 C. O. A. 341.

## GALLON.

When used to describe a measure for wines and liquors, a "gallon" means a measure containing 231 cubic inches. *Hollender v. Magone* (U. S.) 88 Fed. 912, 914.

"Gallon," as used by Rev. St. § 2504, schedule D, imposing a custom duty on ale, porter, and beer of a certain amount per gallon, refers to the gallon of commerce, which is the wine gallon, containing 231 cubic inches of measurement. *Nichols v. Beard*, 15 Fed. 435, 437.

Under a statute imposing a penalty for the sale without license of intoxicating liquors in quantities less than five gallons, an indictment charging the selling of one pint of brandy is sufficient. *Gen. St. c. 108, § 10*, provides that an indictment is sufficient if it can be understood therefrom that the act or omission charged as the offense is clearly and distinctly set forth in the ordinary and concise language without repetition; and, as held in *State v. Munch*, 22 Minn. 67, the meaning which ordinary use attaches to words not technical will be given to them in an indictment. In common understanding a charge of a sale of a pint of brandy means a sale of that particular quantity, and not of more. That a pint is less than five gallons is a part of the English language. *State v. Lavake*, 6 N. W. 339, 340, 26 Minn. 526, 37 Am. Rep. 415.

The word "gallon," wherever used in the internal revenue law, relating to beer, lager beer, ale, porter, and other similar fermented

liquors, shall be held and taken to mean a wine gallon, the liquid measure containing 231 cubic inches. U. S. Comp. St. 1901, p. 2188.

In all sales of spirits a gallon shall be held to be a gallon of proof spirit, according to the standard prescribed in Rev. St. § 3249, set forth and declared for the inspection and gauging of spirits throughout the United States. U. S. Comp. St. 1901, p. 2108.

### Gallons of proof spirit.

The expression "gallons of proof spirit" is not intended to be descriptive of the kind or strength of the spirit distilled, but only of the quantity according to the statute standard. *United States v. Fox*, 25 Fed. Cas. 1196, 1197.

## GAMBIA.

"Gambia" is synonymous with "terra japonica." *Hallett v. Smythe*, 11 Fed. Cas. 289.

## GAMBLE.

The word "gamble" is a derivation from the Anglo-Saxon "gamen," signifying to play. *People v. Todd*, 6 N. Y. Cr. R. 203, 224, 4 N. Y. Supp. 25, 28.

"The word 'gamble' as defined by lexicographers means to game or play for money." *Buckley v. O'Neil*, 113 Mass. 193, 18 Am. Rep. 466.

"The word 'gamble' is perhaps the most apt and substantial to convey the idea of unlawful play that our language affords. It is inclusive of hazarding and betting as well as play." *Bennett v. State*, 10 Tenn. (2 Yerg.) 472, 474.

### GAMBLER.

See "Common Gambler."

In common parlance a gambler is one who follows or practices games of chance or skill with the expectation and purpose of thereby winning money or other property. *Buckley v. O'Neil*, 113 Mass. 193, 18 Am. Rep. 466; *Stearnes v. State*, 21 Tex. 692, 694.

### GAMBLING—GAMING.

See "Illegal Gaming."

As disorderly conduct, see "Disorderly Conduct."

As infamous crime, see "Infamous Crime."

As nuisance, see "Nuisance."

Gaming is an agreement between two or more to risk money or other thing of value on a contest or chance of any kind, where



one must be the loser and the other gainer. *Bell v. State*, 37 Tenn. (5 Sneed) 507, 509.

Gaming is the use of cards, dice, billiards, or other instruments according to certain rules, with a view to win money or other thing waged upon the issue of the contest. *In re Stewart* (U. S.) 21 Fed. 398.

"To constitute unlawful gaming, there must be a game played, and upon its result some article of value must be lost or won." *Alexander v. State*, 99 Ind. 450, 451.

Gaming at common law "consisted in playing for certain stakes, as, added to the amusement, made the consequences dangerous to society." *State v. Records* (Del.) 4 Har. 554.

Gambling is defined as a contract between two or more, by which they agree to play by certain rules at cards or some other contrivance, and that one shall be the loser and the other the winner. *People v. Todd*, 4 N. Y. Supp. 25, 28, 51 Hun. 446; *People v. Fuerst*, 34 N. Y. Supp. 1115, 1117, 13 Misc. Rep. 304; *Ansley v. State*, 36 Ark. 67, 68, 38 Am. Rep. 29.

Whenever money or other valuable thing is hazarded and may be lost, or more than the value obtained, and depended upon chance, the transaction is gambling. *State v. Smith*, 10 Tenn. (2 Yerg.) 272, 281.

Gambling is the risking of money or anything of value between two or more persons on a contest of chance of any kind, where one must be the loser and the other the gainer. *State v. Shaw*, 39 N. W. 303, 307, 39 Minn. 153; *State v. Grimes*, 77 N. W. 4, 5, 74 Minn. 257.

"Anything which induces men to risk their money or property without any hope of return, and to get for nothing any gift of another, is gambling." *First Nat. Bank v. Carroll*, 45 N. W. 304, 305, 80 Iowa, 11, 8 L. R. A. 275 (quoting *Appeal of Brua*, 55 Pa. 294).

Any contest or course of action commenced and prosecuted in consequence of a bet or wager, and with a view to determine the bet or wager upon the event of such contest or course of action, is gaming. To constitute gaming there must not only be a betting upon the termination of an event, but the course of action to bring about such event must have been originated with a view to determine the bet. *State v. Smith*, 19 Tenn. (Meigs) 99, 101, 33 Am. Dec. 132; *Ansley v. The State*, 36 Ark. 67, 68, 38 Am. Rep. 29.

Gaming may be done by other means or devices as well as cards. *State v. Morgan*, 45 S. E. 1033, 1034, 133 N. C. 743.

#### **As all forms of gambling.**

Within the provisions of an excise bond for the orderly conduct of the liquor business

conditioned that the principal will not suffer or permit any gambling to be done in the place where liquor is to be sold, the word "gambling" is not limited to those forms of gambling only which are made criminal by the Penal Code, but includes all forms of gambling. *Lyman v. Shenandoah Social Club*, 57 N. Y. Supp. 372, 373, 39 App. Div. 459.

A statute providing that if any person shall keep a room, building, arbor, booth, shed, tenement, boat, or float to be used or occupied for gambling he shall be fined, is not applicable alone to such gambling as is carried on by the use of gaming tables or other apparatus used and appropriate to gambling purposes. Its language is sufficiently comprehensive to, and it does, embrace all descriptions of gambling. *Roberts v. Commonwealth*, 50 Ky. (11 B. Mon.) 3, 5.

#### **Backgammon.**

See "Backgammon."

#### **Betting distinguished.**

See "Bet."

#### **Betting on foot race.**

Betting upon a foot race between two persons is gaming within the meaning of Pub. St. c. 99, § 1. *Jones v. Cavanaugh*, 21 N. E. 306, 149 Mass. 124.

#### **Betting on horse race.**

Betting on a horse race is gaming within the meaning of a statute providing for recovering back money lost in gaming. *Garrison v. McGregor*, 51 Ill. 473, 474; *State v. Shaw*, 39 N. W. 305, 307, 39 Minn. 153; *Dyer v. Benson*, 69 Ga. 609, 610; *Thrower v. State*, 45 S. E. 126, 127, 117 Ga. 753.

Code, § 5701, as amended by Act 1891, c. 115, § 1, authorizes betting on horse races, and section 2 of such act makes it unlawful to bet on any horse race unless the race track on which the race is run is inclosed by a fence, and the bet is made within such inclosure on a race to be run within such inclosure. Held, that betting in Tennessee on a horse race to be run on a race track in another state, in which it is lawful to bet on races on such track, is gambling. *Williams v. State*, 21 S. W. 662, 663, 92 Tenn. 275.

#### **Betting on shooting match.**

Prior to Act 1817, c. 61, § 7, betting on a shooting match was indictable. By that act it was provided that "nothing herein contained shall be so construed as to prevent shooting matches." Act 1821, c. 63, § 1, declares that "any person or persons who shall shoot at a mark within the bounds of any town or within 200 yards of any public road shall be subject to a fine." All the statutes on the subject of gaming are to be taken together as one law, and, as shooting

within 200 yards of a public road is unlawful, the wager of a watch on, as described in the indictment, a "contest of skill and hazard commonly called 'shooting,' which was then and there unlawfully contested, had and shot at a mark nearer than 200 yards of a certain public road, of the second class," was gaming within the prohibition of the statute. *Myers v. State*, 35 Tenn. (3 Sneed) 98, 106, 107.

#### **Betting on election.**

It is not gaming to bet on the result of an election. *State v. Henderson*, 47 Ind. 127, 128; *People v. Weithoff*, 16 N. W. 442, 445, 51 Mich. 203, 47 Am. Rep. 557; contra, *Mitchell v. Orr*, 64 S. W. 476, 477, 107 Tenn. 534.

#### **Buying or selling pools.**

The term "gambling" includes the buying of pools on horse races. *Bride v. Clark*, 38 N. E. 745, 161 Mass. 130.

It is gaming to sell a pool on a horse race run on a track in another state, for a pool is a bet. *Edwards v. State*, 76 Tenn. (8 Lea) 411, 412.

Horse racing is a game, and the betting of money or selling pools or making books on the result of a horse race is gaming, because it is betting on a game, and unlawful and void, although the game in itself is not unlawful. A game which is not in itself unlawful may be contested without its constituting gaming, but, if money is staked upon it, it becomes gaming and unlawful. *Swigart v. People*, 50 Ill. App. 181, 190.

"Gambling," as used in Act 1882, c. 271, making it penal to keep any gaming table or other place of gambling, means playing at any game of chance for money or any other thing. "It was playing at that kind of a game which gave a criminal character to the table at which it was played. If we could suppose that the term 'gambling' included other games besides those which were forbidden, we should reach this singular anomaly; we should hold that the Legislature intended to permit some games at a gaming table which were forbidden in other places; hence the selling of pools on horse races, and the keeping of rooms where such pools are sold, do not constitute gambling within the meaning of the statute." *James v. State*, 63 Md. 242, 252.

#### **Cock fighting.**

Cockfighting is gaming within Act 1799, c. 8, making void all contracts the consideration of which is money lost by playing at cards, dice, billiards, horse racing, or any other species of gaming whatever. *Bagley v. State*, 20 Tenn. (1 Humph.) 486, 489.

Under Act 1799, c. 8, § 2, declaring that any game or match of hazard or address for

money or other valuable thing is gaming, the act of cockfighting for money or other valuable thing constitutes gaming. By the same act all who encourage or promote any game, etc., are involved in the same guilt with the actors or bettors. How could any one more effectually promote and encourage a match of this kind than by not only giving it countenance by his presence, but actually paying his money to support and sustain it? The preparations are made by the principal offenders; notice is given of the time and place; the public are called upon to attend, and pay money for the privilege of participating in the enjoyment of the sport; and one who accepts the invitation and contributes his money to the extent of the fee demanded is actively and efficiently aiding, abetting, and encouraging the unlawful thing. *Johnson v. State*, 36 Tenn. (4 Sneed) 614, 621.

#### **Dealing in options.**

In common speech "gambling" is applied to plays with stakes at cards, dice, or other contrivance, to see which shall be the winner and which the loser. A contract for purchase of option is not gambling within the meaning of this term. *Boyce v. O'Dell Commission Co.* (U. S.) 109 Fed. 758, 761 (citing *Shaw v. Clark*, 13 N. W. 786, 787, 49 Mich. 384, 43 Am. Rep. 474).

A contract between two persons by which one for a consideration paid is allowed the privilege of buying or selling to the other shares of stock agreed upon if he should elect to do so before the stock reaches a given per cent. of advance or diminution in value from the contract price, it not being intended to deliver the shares, but to settle the transaction by payment of the difference between the contract price and the value reached by the stocks, is not gambling, within the meaning of Pen. Code, c. 9, prohibiting any one to keep or use any table, cards, dice, or other apparatus commonly used in gambling; for here there is no contest to be decided, no game *eo nomine* to be played. The result is to be determined by such fluctuations in the legal disposition of securities as marked their value or their price by sale or purchase at the stock exchange. *People v. Todd*, 4 N. Y. Supp. 25, 28, 51 Hun, 446.

A transaction in stocks by way of margin, settlement of difference and payment of gain or loss without intending to deliver stocks, is a mere wager. It is a gambling or wagering operation. *Waugh v. Beck*, 6 Atl. 923, 924, 114 Pa. 422.

Determining by chance at what price an article shall be bought or sold does not render the transaction gaming if there is an actual bona fide intent on the one part to deliver and on the other to receive and pay

for the article at the price fixed; but where the transaction shows intent merely to traffic in differences which are determined by chance it is gaming, by whatever method the price may be fixed. Dealings were carried on by the aid of a device called a clock. This is a piece of machinery that works automatically. The quotations are printed on cards ranging from one-eighth to one-half cent, there being an equal number of each. A large number of these quotations are placed in the machine after having been first thrown together and mixed up on a table. At half past 9 o'clock in the morning the machine begins to give the market. The quotations appear one above the other, the upper showing the rise, and the lower the decline of the market, the upper being called first and the lower one next. As soon as called, the quotations are placed on a blackboard. On some of the cards are printed, as well as the fractions above stated, the word "Wheat," on others the name of some stock. The regular market price of each commodity supposed to be dealt in is placed on the blackboard every morning, and the cards having the name of the particular article would, as they came from the upper or lower aperture of the clock, show the advance or the depreciation of the commodity. The clock gave quotations every half minute, and those who dealt bought or sold at the price which, for the time being, was shown on the blackboard, and the usual practice was to close out the deal on the next quotation that changed the price by the payment of differences. That this kind of dealing was gaming, within the prohibition of our statute, can scarcely be doubted. The quotations on the blackboard were determined by the chance operation of the clock, instead of any actual sales of the particular article in the market, and each deal was in essence and effect a bet as to what the next card that issued from the clock bearing the name of the article dealt in would show. *New York & Chicago Grain & Stock Exch. v. Mellen*, 27 Ill. App. 556, 557.

#### **Gambling and gaming synonymous.**

The word "gambling" is equivalent to and interchangeable with the word "gaming." They both have the same meaning and signification. *State v. Dyson*, 39 Mo. App. 297, 301; *Evans v. Cook*, 11 Nev. 69, 75; *Bennett v. State*, 10 Tenn. (2 Yerg.) 472, 474; *In re Smith*, 39 Pac. 707, 708, 54 Kan. 702; *McBride v. State*, 22 South. 711, 712, 39 Fla. 442.

An indictment charging that one kept a house to be used and occupied for gambling is equivalent to a charge of keeping a gaming house as such, and is indictable as a misdemeanor under the rule that anything which would be a nuisance at the common law is indictable as a misdemeanor under the statute. *State v. Crowder*, 39 Tex. 47.

The word "gaming" has two significations, one of which refers to what is illegal, and the other to what is legal and proper. Where the statute provides that there shall be assessed against each person keeping a billiard table an annual direct tax, it authorizes any person to keep for the purpose of gaming a table called a billiard table. "Gaming" is here used in a different sense from "gambling." The "gaming" contemplated as illegal is synonymous with "betting." *Wolz v. State*, 33 Tex. 331, 335. See, also, *Thrower v. State*, 45 S. E. 126, 127, 117 Ga. 753.

As used in an indictment charging the unlawful keeping of a room to be used for gambling, and permitting such room to be used and occupied for gambling, "gambling" is not synonymous with "gaming," as used in *Paschal's Dig. art. 2055*, providing for the punishment of permitting illegal gaming. *State v. Bullion*, 42 Tex. 77.

#### **Horse racing.**

Horse racing is gaming within the meaning of the statute authorizing the recovery of money lost at any games or playing at cards, dice, or any other game of cards. *Stone v. Clay (U. S.)* 61 Fed. 889, 890, 10 C. A. 147 (citing *Tatman v. Strader*, 23 Ill. [13 Peck] 493; *Mosher v. Griffin*, 51 Ill. 184, 99 Am. Dec. 541; *Garrison v. McGregor*, 51 Ill. 473; *West v. Carter*, 129 Ill. 249, 21 N. E. 782).

Rev. Laws 1825, p. 406, providing that all promises, notes, bills, bonds, etc., made or entered into by any person where the whole or any part of the consideration thereof shall be for money won by gaming or playing at cards, dice, or any game or games, shall be void, should be construed to include horse racing. *Shropshire v. Glascock*, 4 Mo. 536, 539, 31 Am. Dec. 189; *Boynton v. Curle*, 4 Mo. 599.

Running a horse race along a public road is not within the meaning of the word "gaming" as used in a statute allowing the grand jury to send for witnesses whenever they suspect a violation of the laws against gaming, etc. *Harrison v. State*, 44 Tenn. (4 Cold.) 196, 198.

#### **Lottery or gift enterprise.**

While in some states all games upon the result of which the right to money or property is made dependent altogether upon skill or chance, or upon both, are classified under the general head of "gaming" or "gambling," yet in this state a distinction has been made between "gaming" and "lotteries"; a lottery being defined to be a scheme for the distribution of property by chance among persons who have paid or agree to pay a valuable consideration for the chance, whether called a lottery, raffle, gift enterprise, or by some

other name. *People v. Fuerst*, 34 N. Y. Supp. 1115, 1117, 13 Misc. Rep. 304.

The sporting artifice commonly called a "gift enterprise," by which a merchant or tradesman sells his wares for their market value, but by way of inducement gives to each purchaser a ticket, which entitles him to a chance to win certain prizes, to be determined after the manner of the lottery, is included within the term "gaming." *Bell v. State*, 37 Tenn. (5 Sneed) 507, 509.

#### **Moral turpitude involved.**

Gambling is an act beyond the pale of good morals, and is an evil practice under any circumstances, though it does not necessarily involve moral turpitude within the provision authorizing the disbarment of an attorney when he has committed a felony or a misdemeanor involving moral turpitude. *In re Voss*, 90 N. W. 15, 20, 11 N. D. 540.

#### **Playing game for use of table or alley.**

Playing billiards where the loser of the game pays money to the owner of the table is "gambling" or "gaming." *State v. Miller*, 4 N. W. 900, 901, 53 Iowa, 154; *State v. Bishel*, 39 Iowa, 42, 43; *Hamilton v. State*, 75 Ind. 586, 587. *Contra*, *Breninger v. Town of Belvidere*, 44 N. J. Law (15 Vroom) 350, 351; *Blewett v. State*, 34 Miss. 606, 614.

Playing in a public tenpin alley, where one of the terms of the establishment is that the loser is to pay for the use of the alley, is not gaming or gambling. It is obvious that the parties did not play for gain. They played simply for amusement, and it seems like putting a false gloss on the affair to call this gaming. *State v. Hall*, 32 N. J. Law (3 Vroom) 158, 165.

#### **Playing game or throwing dice for treats.**

The playing at cards under an agreement that the party who loses shall treat the others to cigars is gambling. *State v. Wade*, 43 Ark. 77, 78, 51 Am. Rep. 560.

"Playing cards for beer constitutes gaming. It is just as clearly gaming to play cards for a glass of beer as it is to play for a barrel or ten barrels of beer. The difference is only in the value of the stake played for." *Brown v. State*, 7 Atl. 340, 341, 49 N. J. Law (20 Vroom) 61.

Gambling is gambling whether it is for five cents or for a larger sum, and the loser at cards who buys the other party a drink or a cigar as a penalty for losing the game is engaged in gambling the same as if he paid in money. *Hay v. Reid*, 85 Mich. 296, 303, 48 N. W. 507, 509.

Revision 1860, § 4363, providing for the punishment of any person keeping a house,

shop, or place resorted to for the purpose of gambling, should be construed to include the playing of a game called "pigeon hole" on a sort of a table, the loser paying for the use of the table and for beer, oysters, or cigars. *State v. Bishel*, 39 Iowa, 42, 43.

Laws 1799, c. 8, § 2, declaring gaming to be a playing at any match or matches at cards, dice, billiards, or any other game of hazard or address for money or other valuable thing, includes playing tenpins where the loser was to treat to a bottle of champagne, notwithstanding the treat was to be a voluntary thing. *Walker v. State*, 32 Tenn. (2 Swan) 287, 289.

It is gaming to play any game of hazard for money or other article of value. A game of hazard to determine who shall pay for the beer or other liquor to be drank is, strictly, playing for money. It is to determine which party shall pay a sum of money for the other. *Commonwealth v. Taylor*, 80 Mass. (14 Gray) 26, 29.

Throwing dice to determine who shall pay for liquor or for any other article bought is gaming. *Commonwealth v. Gourdier*, 80 Mass. (14 Gray) 390, 391; *McDaniel v. Commonwealth*, 69 Ky. (6 Bush) 328, 327.

#### **Playing game on which others are betting.**

A person is guilty of gaming who engages in a game of hazard or address on which he knows persons are betting, though he may not bet anything himself. *Smith v. State*, 24 Tenn. (5 Humph.) 163, 164.

#### **Playing keno.**

Gaming is the risking of money between two or more persons on a contest or chance of any kind where one must be loser and the other gainer. Some games depend altogether on skill, others on chance, and others are of a mixed nature. Billiards are an example of the first, lotteries of the second, and backgammon of the last. Each person putting up money in the game of keno in effect bets that the card he has selected contains the numbers which will entitle him to the money of the others engaged in the game, which bet is determined by the globes, balls, and cards connected with the game, which is purely a game of chance, and constitutes gaming. *Portis v. State*, 27 Ark. 360, 362.

#### **Playing policy.**

"Gambling" is defined as "gaming," "playing for money"; "gaming" is defined as the practice of staking property beyond the purposes of mere sport on the hazards of cards or dice; and all these definitions hinge back on the word "game," which is defined as any sport or amusement, public or private, as the game of checkers, baseball, etc. No definition which the court has been able to

and includes within the terms "gambling," "gaming," or "game" lotteries, or the scheme of chance commonly called "policy." Hence, under an information for gambling a person cannot be prosecuted for playing policy or some kind of lottery. *State v. Lark*, 4 Ohio Dec. 241, 242, 3 Ohio N. P. 155.

It is a question of fact for the jury whether policy is a form of illegal gaming. *Commonwealth v. Baker*, 29 N. E. 512, 155 Mass. 287.

#### **Selling lottery tickets.**

It is not gaming to sell foreign lottery tickets. *Commonwealth v. Chubb* (Va.) 5 Rand. 715, 723.

#### **Selling prize packages.**

The selling of prize candy packages, in which a certain amount was put, at risk on the chance of getting more or less than its value, is gaming. *Eubanks v. State*, 50 Tenn. (3 Heisk.) 488, 490 (citing *Bell v. State*, 37 Tenn. [5 Sneed] 407).

#### **Single transaction.**

The offense of gaming is complete by playing once, and it does not require a repetition of it. *Cameron v. State*, 15 Ala. 333, 384; *Swallow v. State*, 20 Ala. 30, 32.

#### **Speculation.**

Speculation is not necessarily gambling. A purely speculative contract is not necessarily a wagering contract. Speculation and speculators may serve a useful purpose in providing a continuous market and in differentiating a special class to assume the hazards of fluctuations in prices, and thus relieve the regular trader or purchaser of that risk. So long as there is a real transaction—so long as something is actually bought or sold or is actually contracted for, either for purchase or sale—there is no wagering, not even if the thing contracted for does not then exist. Nor does a subsequent change in or cancellation of the contract affect its original validity. When, however, there is no real transaction—no real contract for purchase or sale—but only a bet upon the rise or fall of the price of a stock or article of merchandise in the exchange or market, one party agreeing to pay if there is a rise and the other party agreeing to pay if there is a fall in price, the agreement is a pure wager; no business is done; nothing is bought or sold or contracted for. There is only a bet. *Dillaway v. Alden*, 33 Atl. 981, 982, 88 Me. 230.

#### **Sunday laws.**

The word "gaming" in Act 1723, c. 16, § 11, prohibiting Sabbath breaking, which provides that no housekeeper shall suffer any drunkenness, gaming, or unlawful recreations

in his or her house, is synonymous with the words "betting on games." It cannot be supposed to mean unlawful gamings, which is the usual signification given to the term, for such would be a violation of the law whether practiced on Sunday or any other day of the week, or, if they were not, the policy of the law would prohibit such practices alike on every day of the week as well as on Sunday; and therefore we cannot suppose that the Legislature designed to give such a construction to the word "gaming." We are to regard the act as designing to make that unlawful on a Sunday which would be deemed in law as innocent on any other day of the week. *State v. Fearson*, 2 Md. 310, 312.

#### **Taking chance in raffle.**

It is not gaming by an individual who takes a chance in a raffle at \$20 a chance, or any smaller sum, where the property raffled for exceeds \$20 in value, and the raffling takes place in a private house. *Commonwealth v. Garland* (Va.) 5 Rand. 652, 654.

#### **GAMBLING APPARATUS.**

A billiard table is not a gaming apparatus. *State v. Hope*, 15 Ind. 474, 475.

Under a statute providing that any gaming apparatus or implements used or kept and provided to be used in unlawful gaming in any gaming house are required to be burned or otherwise destroyed under the direction of the court, the words "implements" and "apparatus" have the same meaning, and are so defined, and do not include fighting cocks. No one ever did or would call a living animal an apparatus, nor is there any reason to suppose that the Legislature intended to authorize a magistrate to burn or destroy any living animal. *Coolidge v. Choate*, 52 Mass. (11 Metc.) 79, 83.

#### **GAMBLING BANK.**

See "Bank (In Gaming)."

#### **GAMBLING CONTRACT.**

"A gaming contract is a contract in which both parties agree to a game." *Alsop v. Commercial Ins. Co.* (U. S.) 1 Fed. Cas. 564, 569.

All contracts between two or more persons, whereby they agree to risk their money or property upon a contingency or chance, which, in the nature of things, may or may not happen, and whereby the one party will be a gainer and the other a loser, are gambling contracts. *Jacobus v. Hazlett*, 78 Ill. App. 239; *State v. Stripling*, 21 South. 409, 410, 113 Ala. 120, 36 L. R. A. 81.

A gambling contract is a fictitious contract, in which neither of the parties are bound, and which has none of the elements

of good faith; and it is a matter of no consequence where the contract was made, whether on the board of trade or elsewhere. *Osgood v. Bauder*, 39 N. W. 887, 890, 75 Iowa, 550, 1 L. R. A. 655.

#### Contract for future differences.

"Contracts for the sale and purchase of commodities, where neither party intends to deliver or accept the property sold, but where they are merely to pay the differences in price according to the rise and fall in the market, are gambling contracts." *Lowry v. Dillman*, 18 N. W. 4, 59 Wis. 197.

All bargains for the purchase and sale of things where it is the understanding of the parties, whether expressed or not, that the things are not to be delivered, but at the agreed time the differences between the market values at the two periods are to be adjusted, constitute wagers or gambling contracts. *Lester v. Buel*, 49 Ohio St. 240, 255, 30 N. E. 821, 34 Am. St. Rep. 556.

A contract relating to stocks or other commodities, to be performed at a future day, by which the parties contemplate only the payment of the difference in the market value by one or the other, as the case may be, is a mere gaming contract, and void. *Hatch v. Douglas*, 48 Conn. 116, 127, 40 Am. Rep. 154.

A deal in grain in which there is no intention on the part of either party that any grain is to be delivered or received, is a gambling contract. *Doxey v. Spaid*, 8 Ill. App. (8 Bradw.) 549.

The distinction between a gambling contract, which is forbidden by law, and a bona fide contract, is that in a gambling contract or transaction no actual property is dealt with, no actual goods are bought and sold. The parties merely agree to settle their mutual wagers with reference to the price of stock or goods by agreeing to pay the difference between the price at the time of making the agreement and the price at the agreed time of settlement; while in a bona fide transaction the actual property is bought and sold, the parties merely speculating upon the rise and fall of the market. *Smith v. Bouvier*, 70 Pa. (20 P. F. Smith) 325, 331.

A contract to give to another the privilege to deal in options, and settled on the differences as indicated or determined by the fluctuations of the market, is a gambling contract within the meaning of a statute providing that "whoever contracts to have or to give the option to sell or buy at a future time any grain or other commodity" shall be subject to a fine, and that "all contracts made in violation of this section shall be considered gambling contracts, and shall be void." Of course, the party who contracts to have the option is equally guilty with the party who

contracts to give it, and his ignorance of the statute in that respect does not change the character of the contract. *Pearce v. Foote*, 113 Ill. 228, 235, 55 Am. Rep. 414.

#### Contract to repurchase conditionally.

An agreement between the seller and buyer of stock that after the expiration of a certain time, if the buyer is then willing, the seller will repurchase at the price specified in the agreement of sale, makes the contract one of conditional sale, and not a gambling contract, within Cr. Code, § 130, inflicting a punishment on him who contracts to have or give to himself or another the option to buy or sell at a future time any stock of any railroad or other company, and declaring contracts made in violation thereof gambling contracts. *Ubben v. Binnian*, 55 N. E. 552, 553, 182 Ill. 508; *Wolf v. McNulta*, 52 N. E. 896, 897, 178 Ill. 85.

#### Guaranty of certain price.

An agreement by which a person, in consideration of a certain sum, paid him by the owner of cattle, then on the road to market, guaranties that they shall sell for a certain price, and promises to make good the deficit in case they shall sell for less, and the owner promises on his part to pay such person the overplus in case they shall sell for more, is a gambling contract. The absence of the purpose to deal with actual property marks the distinction between a legal and a gambling contract. *First Nat. Bank v. Carroll*, 45 N. W. 304, 305, 80 Iowa, 11, 8 L. R. A. 275.

#### GAMBLING DEN.

The term "gambling den" means "a place at which gambling is practiced, and includes the idea that the place is resorted to for that purpose." *Buckley v. O'Neil*, 113 Mass. 193, 18 Am. Rep. 466.

#### GAMBLING DEVICE.

Any other gambling device, see "Any Other."

Other gambling device, see "Other."

A "gambling device" is the same thing as a "gaming device" as the latter term is used in the statute prohibiting gaming devices. *State v. Mohr*, 55 Mo. App. 329, 331; *State v. Nelson*, 19 Mo. 393, 395.

A gambling device is defined to be anything which is used as a means of playing for money or other thing of value, so that the result depends more largely on chance than skill. *In re Lee Tong* (U. S.) 18 Fed. 253, 257.

A gambling device is something formed by design, and has reference to something worked out for exhibition or show. *Portis v. State*, 27 Ark. 360, 362.

Any table or the device, when necessarily adapted to the use and necessarily used in carrying on any gambling game, is a gambling device in contemplation of law, although such table may have been originally designed for and ordinarily adapted to lawful uses. *Jones v. Territory*, 49 Pac. 934, 935, 5 Okl. 536.

Gambling devices are the tools, implements, and machinery of professional gamblers, and are adapted, designed, and devised for the purposes named; and articles which may be and often are used merely for purposes of amusement, such as playing cards, chessmen, billiards, dominoes, etc., are not used exclusively for gambling purposes, and hence are not gambling devices within the meaning of the statute. *State v. Hardin*, 1 Kan. 474, 477.

#### **Billiard or pool table.**

A table used for playing pool and billiards, though such games are games of science and skill, is a gambling device. *State v. Jackson*, 39 Mo. 420, 423.

#### **Bookmaking.**

By Act Cong. Jan. 31, 1883, it was provided that every person who shall set up or keep any gaming table or any kind of gambling table or gambling device shall be fined, etc. Section 4 of the act declares "that all games, devices or contrivances at which money or any other thing shall be bet or wagered, shall be deemed a gaming table within the meaning of this act." Held, that bookmaking on a horse race was a game of chance or gambling device within the meaning of section 4, and therefore came within the meaning of a gaming table as used in the act. *Miller v. United States (D. C.)* 6 App. Cas. 6, 11.

#### **Cards.**

A deck of cards is a gambling device within a statute providing a penalty against any person who shall suffer any gaming table or gambling device on which any game of chance is played to be set up or used in his or her house. *State v. Purdom*, 3 Mo. 114, 115; *State v. Herryford*, 19 Mo. 377, 379. And also within a statute prohibiting the betting of money at or upon any gambling device. *State v. Trott*, 36 Mo. App. 29, 34; *Eubanks v. State*, 5 Mo. 450, 451; *State v. Torphy*, 66 Mo. App. 434, 436; *State v. Bates*, 10 Mo. 166; *State v. Dyson*, 39 Mo. App. 297, 301; *State v. Mohr*, 55 Mo. App. 329, 331.

A pack of cards is not a gambling device within a statute prohibiting the keeping of any kind of gambling table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property. *State v. Hardin*, 1 Kan. 474, 477. Nor within a statute making it

an offense for any one to bet on any gambling device or any game played with such a device. *State v. Stillwell*, 18 Kan. 24, 25 (cited in *Commonwealth v. Kammerer*, 13 S. W. 108, 109, 11 Ky. Law Rep. 777, 779).

"Gaming device," as used in Rev. St. p. 970, punishing any one who allows any game or games to be played for gain upon his premises by means of any gaming device, does not mean a device used exclusively for gaming, but refers to any device which may be, or in fact is, used for that purpose, thus including cards and other devices which may be used for other purposes than gambling, but which are sometimes in fact used for such purposes. *State v. Lewis*, 12 Wis. 434, 436.

#### **Chips.**

The dice and chips used in a game of craps are gambling devices. *State v. Oswald*, 53 Pac. 525, 59 Kan. 508.

#### **Crack loo.**

The game of crack loo is a gambling device within the provisions of an ordinance providing that whoever shall set up or keep a gambling device in which a game of chance shall be played for money shall be deemed guilty of a misdemeanor. *Town of Canton v. Dawson*, 71 Mo. App. 235, 239, 240 (citing *State v. Flack*, 24 Mo. 378).

#### **Contract for delivery of futures.**

Though a contract for the delivery of goods in the future, where the real purpose of both parties is merely to speculate in the rise or fall of prices and to adjust the difference between the contract and market prices without the delivery of any goods, is a wager, it is not a game or gambling device within the meaning of Rev. St. 1879, §§ 5721, 5723, making all notes void where the consideration is money or property won at any game or gambling device. *Crawford v. Spencer*, 4 S. W. 713, 716, 92 Mo. 498, 1 Am. St. Rep. 745.

#### **Dice.**

The dice and chips used in a game of craps are gambling devices within the meaning of the statute. *State v. Oswald*, 53 Pac. 525, 59 Kan. 508.

#### **Election.**

Rev. Code 1835, p. 290, §§ 1, 3, relating to gaming, and prohibiting the betting on games and gambling devices, should not be construed to include a presidential election. An election is a political institution, essential to the existence and operation of our government, and recognized by the Constitution and laws. It is difficult to see how such an institution could have been in the contemplation of the Legislature when they enacted laws against games and gambling

devices. *Hickerson v. Benson*, 8 Mo. 8, 10, 40 Am. Dec. 115.

#### Horse race.

A horse race is a gambling device within a statute providing that notes, the consideration of which is money won at gambling or at any game or gambling device, shall be void. *Joseph v. Miller*, 1 N. M. 621, 628.

A horse race is not a gambling device within the meaning of the act concerning crimes and punishments. *State v. Hayden*, 31 Mo. 35, 36; *State v. Lemon*, 46 Mo. 375.

Pen. Code, §§ 294, 295, prohibiting gambling or the keeping of a gambling house in which gambling is conducted by means of cards, dice, gaming table, or other gambling device whatever, cannot be construed to include a horse race, or a descriptive list of such races, or statements or announcements of the particulars thereof, from which those desiring to bet on the race may more conveniently obtain information in respect to the same. There is no element of chance in their use, which is the test. The use of such list, statement, or announcement undoubtedly serves to facilitate gambling, and so does the fact that a place for gambling is kept open, and the same may be said also of the published schedules of races and games; but they cannot be denominated gambling devices within the meaning of the statute, the betting being on the races exclusively, and the result in no way determined by the use of the instrumentalities in question, and no additional element of chance being introduced thereby. *State v. Shaw*, 39 N. W. 305, 307, 39 Minn. 153.

#### Keno.

The game of keno, which is a game at which money or property may be won or lost, and is played by a device containing figures, the players paying an equal amount for the cards, which are numbered and registered, the first number registered completing a line of figures getting all the money paid for the cards except an amount which goes to the keno keeper, is a gambling device within a statute providing that every person shall be deemed guilty of a misdemeanor who shall set up, keep, or exhibit any gaming table or gambling device of any description adapted, devised, or designed for the purpose of playing any game of chance at which money or property may be won or lost. *Trimble v. State*, 27 Ark. 355, 357; *Portis v. State*, Id. 360, 362.

#### Loto.

Loto is a gambling device, when played for money, within a statute providing for the punishment of any person permitting or suffering any gambling device at which any game of chance is played or money or prop-

erty won or lost to be set up or used in his or her house. The gambling device meant by the statute must be used for games of chance, and there must be a betting and winning and losing. *Lowry v. State*, 1 Mo. 722, 723; *State v. Foster*, 2 Mo. 210.

#### Pico.

The game of pico, which is the same in principle and detail as the game of keno, and is played and carried on in the same manner, except that in pico common playing cards were used both on the balls and on the pico cards sold to the players, instead of numbers, as in keno, and that there were but four cards to fill out on the pico card instead of five numbers, as in keno, in order to be the winner, the exhibitors of the game betting nothing on the game, but, as in the game of keno, receiving and taking a commission out of the money paid by the players, is a gambling device. *Euper v. State*, 35 Ark. 629, 630.

#### Poker.

Under a statute prohibiting all gambling with cards and all gambling devices, where several persons met with defendant in his store and made up a game of what is familiarly known as "poker," half a dollar ante, played with common playing cards on a card table, playing all night, such gambling with cards constituted a gambling device. *Frisbie v. State*, 1 Or. 264, 266.

The term "gambling device" in Code Cr. Proc. § 666, prohibiting all gambling devices, of whatever name or nature, adapted, devised, or designed for the purpose of playing any game of chance, does not include the game of cards commonly called "poker," because, in order to constitute a gambling device, there must be some tangible adapted device or design for the purpose of playing a game of chance for money. A game is nothing tangible, and is not adapted nor can it be used in playing a game of chance. The game is the result produced by the use of the device, and the prohibition of the action is evidently against the use of the device instead of the result of it. The term "gambling device" has no settled and definite meaning, and is nowhere defined in the Code nor by the common law; and therefore the statute is void for uncertainty. *State v. Mann*, 2 Or. 238, 240.

#### Rondo.

Rondo is a gambling device. *Glascock v. State*, 10 Mo. 508.

Dig. c. 51, §§ 1, 8, providing that gambling devices adapted, devised, or designed for the purpose of playing any game of chance, or in which any money or property may be won or lost, are liable to seizure and confiscation, and the owners or keepers of



them denounced as vagrants, etc., should be construed to refer to banking games and all devices of the like kind, and not to embrace the game of rondo, which is a game played with balls by rolling them upon a billiard table, at which the players bet against each other, but not against the keeper or exhibitor of the table, who merely receives from the players a commission upon the amount bet between them for the use of his table. "The court has repeatedly held that the statute relates exclusively to the banking games, so called, whether played with cards or by means of any other contrivance, whether called by the name specified or by any new name or device, and the distinguishing feature of which is that they are set up and exhibited to be bet against by all comers." *State v. Hawkins*, 15 Ark. 259, 260 (citing *Stith v. State*, 13 Ark. [8 Eng.]; *Johnson v. State*, 13 Ark. [8 Eng.] 684, 685).

#### Six-wheel.

A device known as a "six-wheel," whereby money is won and lost, is a gambling device. *Atkins v. State*, 32 S. W. 391, 95 Tenn. 474.

#### Slot machine.

A nickel slot machine is a gambling device. The mechanism of the machine is such that, when a five-cent piece is dropped into one of the several slots representing several colors, a disk is made to revolve, on which are painted corresponding colors, and when it ceases to revolve the color upon its face opposite to a finger determines whether the player has won or lost. Each color has a different value, from 10 cents up to \$1, and, if the player has won upon the color selected, the sum won is by a mechanical device delivered to him in a cup. The machine is a contrivance or apparatus by which it is determined who, as between the player and the proprietor, is the winner or loser of the money hazarded. The player stakes or hazards his money on a chance which is sufficient to make out the gambling. Within the general understanding such a machine is a gambling device. *Lyman v. City Trust, Safe-Deposit & Surety Co.*, 59 N. E. 903, 905, 166 N. Y. 274; *Lyman v. Brucker*, 56 N. Y. Supp. 767, 770, 26 Misc. Rep. 594; *Kolshorn v. State*, 23 S. E. 829, 830, 97 Ga. 343; *State v. Grimes*, 52 N. W. 42, 49 Minn. 443; *Portis v. State*, 27 Ark. 360, 362; *Jeffries v. State*, 32 S. W. 1080, 1081, 61 Ark. 308; *Bobel v. People*, 173 Ill. 19, 20, 50 N. E. 322, 64 Am. St. Rep. 64.

#### Stock clock.

A gambling device is an invention or contrivance to determine the question as to who win and who lose their money on a contest of chance. Thus, a stock clock so con-

structed that cards representing well-known and marketable stocks were dropped by the mechanical contrivance contained therein from one of two slots, one at the top of the clock and the other at the bottom, and so constructed that, if the card purchased by a customer was dropped from the top slot, the stock represented thereby would be considered as having risen, and the customer would win an amount equal to one-half of the amount invested, and, if it dropped from the lower slot, he lost a corresponding amount, the transaction being a mere bet on which slot the clock would force the particular card from, which depended entirely on chance, was a gambling device within such definition. *State v. Grimes*, 52 N. W. 42, 49 Minn. 443.

#### Tenpins.

A game of tenpins is not a gambling device within the statute. According to Webster the word "device" in one sense means artificial contrivance, stratagem. "He disappointeth the devices of the crafty." *Job*, v. "They imagined a mischievous device." *Psalms*, xxi. *Crow v. State*, 6 Tex. 334, 336.

#### GAMBLING HELL.

The term "gambling hell," by the practice of good writers and by common use has "acquired the meaning of a notorious place and public resort for the purpose of gaming; a place devoted to business of that description." *Buckley v. O'Neil*, 113 Mass. 193, 18 Am. Rep. 466.

#### GAMBLING HOUSE.

See "Common Gaming House"; "Public Gaming House."

As disorderly house, see "Disorderly House."

As public house, see "Public House."

A gaming house is defined to be a house or part of a house where gaming is carried on as a business. The gaming must be so continuous and frequent that it can be said that it is the business or occupation carried on in the house. If the house is used for other purposes mainly, then one or more acts of gaming, or, indeed, several acts of gaming, would not necessarily constitute it a gaming house. *Anderson v. State (Tex.)* 12 S. W. 868, 869.

A gaming house is defined as a house where gaming is practiced, a gambling house. In *People v. Weithoff*, 51 Mich. 203, 213, 16 N. W. 442, Judge Cooley says: "A house or room whose use is intended to facilitate gambling purposes, and where sporting characters are invited to congregate for illegal amusement and gambling, or to take money and other things of value upon trials of chance,

skill, or endurance. The house or room must be specially set aside and devoted to the purpose of gaming." We understand that a gaming house is one that is set apart and run or conducted by its owner or proprietor for the profits to be derived from the game there played, whether lawful or unlawful. *Miller v. State*, 34 S. W. 959, 960, 35 Tex. Cr. R. 650.

A gaming house is a house where gaming is practiced; a gambling house; a house or room whose use is intended to facilitate gaming purposes, and where sporting characters are invited to congregate for illegal amusement and gaming, or to bet money or other thing of value upon trials of chance. The house or room must be specially set apart and devoted to the purpose of gaming. *Morgan v. State*, 60 S. W. 763, 764, 42 Tex. Cr. R. 422.

Where the evidence shows that the accused was an officer of a social club, that gaming with cards for money was carried on in a room thereof, that a portion of the losses on the games played were appropriated to the use of the club, and that accused, knowing these facts, collected and received the same for its benefit, a verdict finding him guilty of keeping a gaming house was warranted. *Cochran v. State*, 29 S. E. 433, 102 Ga. 631.

"Gaming house" is synonymous with "gaming table," and means a house, hall, or room kept for the purpose of gambling, and supplied with materials for that purpose. *Hardaway v. Lilly* (Tenn.) 48 S. W. 712, 717.

#### **Billiard room.**

The term "gaming house," as used in the common law of nuisance, did not include a house kept for games of chance conducted for mere recreation. The term does not include a billiard room, though the loser pays for the use of the table. *People v. Sergeant* (N. Y.) 8 Cow. 139, 140.

#### **Place where lottery tickets are sold.**

The term "gaming house" cannot be applied to a place where tickets in unauthorized lotteries are sold. *People v. Jackson* (N. Y.) 3 Denio, 101, 102, 45 Am. Dec. 449.

#### **GAMBLING IMPLEMENT.**

Within St. 1887, c. 448, § 2, which makes it an offense to be present in a common gaming house when gaming implements are found there, any material instrument in ascertaining whether a player shall win or lose in a game as actually carried on is an implement of gaming, regardless of the fact that it is susceptible of a lawful use, or that the game can be played without its use. *Commonwealth v. Adams*, 35 N. E. 851, 160 Mass. 310.

Rev. St. c. 142, §§ 1, 2, authorizing the issue of warrants to search for and seize any gaming apparatus or implements, is to be construed in a strict sense, and does not authorize the seizing of a game cock. *Coolidge v. Choate*, 52 Mass. (11 Metc.) 79, 82.

#### **GAMBLING PLACE.**

The term "gambling place" means "a place at which gambling is practiced, and includes the idea that the place is resorted to for that purpose." *Buckley v. O'Neil*, 113 Mass. 183, 18 Am. Rep. 466.

#### **GAMBLING ROOM.**

A gaming room is any room in which games for money are habitually played, or which is kept or maintained for the purpose of gaming, even though the room may be put to other uses, and though such other use is for some other and lawful object than a gaming room. *Toll v. State*, 23 South. 942, 943, 40 Fla. 169.

A room where pools are sold on the result of base ball games and horse races for profit and gain is a gaming room within a statute providing for the punishment of any person who shall for hire, gain, or reward keep or maintain a gaming room. *People v. Weithoff*, 18 N. W. 442, 444, 51 Mich. 203, 47 Am. Rep. 557. Likewise a room in which a telegraph operator was kept by the defendant, who, for a commission paid by any person, telegraphed the amount of money such person desired to bet on a horse race at another place, an order being signed by the person desiring to send the money, stating that he had made defendant his common carrier, and put in his charge the money to be placed on the horse therein named; the day of the race, the place, and the odds that would be accepted being also specified in the order; a blackboard being kept in the room, on which was recorded at brief intervals the position of the horses in the race, and, if the person betting won, he received the money in the room, and, if he lost, the knowledge of the loss was brought to him there. *People v. Weithoff*, 53 N. W. 784, 93 Mich. 631. 32 Am. St. Rep. 532.

#### **GAMBLING TABLE.**

Other gaming table, see "Other."

Code 1876, § 4208, providing for the punishment of any person keeping or exhibiting any "table for gaming" should be construed to include any table used for gaming, without regard to its appliances or adaptation to any particular game. *Bibb v. State*, 4 South. 275, 276, 84 Ala. 13.

The term "gaming table" in the statute prohibiting the maintenance of gaming ta-

bles, etc., is not to be construed literally as meaning any table or structure, whatever it may be, on which the game is played, as giving the character and designation of a gaming table, but it is rather from the character of the play or the game which is played that it receives its specific designation. *Estes v. State*, 10 Tex. 300, 307.

"Gaming table," as used in Pen. Code, arts. 358, 359, punishing any person who keeps any gaming table, does not mean literally a table or structure, but refers to any species of table, bank, or game device resembling either that is kept for gaming. *Chappell v. State*, 11 S. W. 411, 27 Tex. App. 310.

Code 1876, § 4208, providing for the punishment of the keeping, exhibiting, or being interested in, etc., any table for gaming, of whatsoever name, kind, or description, not regularly licensed under the laws of this state, etc., should not be construed as meaning gaming tables, if there be such, as distinguished from other tables. It is not the character of the table—that is, whether it contains devices or any appliances adapted and essential to particular gaming—that makes it a table for gaming. It is the use to which the table is appropriated and the absence of a license for that use which renders the keeping or exhibition, etc., indictable. *Toney v. State*, 61 Ala. 1, 3.

"Gaming table" is synonymous with "gaming house," and means a house, hall, or room kept for the purpose of gambling, and supplied with materials for that purpose. *Hardaway v. Lilly* (Tenn.) 48 S. W. 712, 717.

A statute punishing any party "permitting a gaming table to be set up or kept" is not violated by merely permitting games of cards to be played, although such games are unlawful. *Ervine v. Commonwealth*, 35 Ky. (5 Dana) 216.

#### **Billiard table.**

The keeping of a billiard table is a violation of a bond conditioned not to keep a gambling table. *People v. Harrison* (N. Y.) 28 How. Prac. 247, 248.

A billiard table is not a gambling table, even though the loser pays for its use. *People v. Forbes*, 4 N. Y. Supp. 757, 52 Hun. 30.

Articles 412, 418, of the chapter relating to gaming, do not mention billiard tables among the games specified by name as included within the intention of the articles, but, after enumerating the games intended to be prohibited, the same article provides that any game played for money upon a billiard table, other than the game of billiards licensed by law, is punishable under the provisions of this chapter. Held, that an indictment alleging that the defendant played "on a certain gaming table, such table being a billiard

table," was defective, which did not also allege that the table was being used as a gambling device to evade the law, and that the game played was not the usual game of billiards. *State v. Bristow*, 41 Tex. 146, 147.

#### **Chuck-a-luck table.**

Though a particular table was not a part of, or essential to, the playing of chuck-a-luck, if the defendant kept and exhibited it for use in the playing of that game, he was guilty of keeping a table for gaming. *Toney v. State*, 61 Ala. 1, 3.

#### **Crap table.**

A crap table is within the Texas statute prohibiting the keeping and exhibiting a gaming table. *Harmon v. State* (Tex.) 22 S. W. 1038.

A table specially designed for gaming, and exhibited as such, is a gaming table within the meaning of Pen. Code, art. 358, prohibiting the maintenance of gaming tables. A table specially provided for the game of craps, and exhibited to attract all the bettors by a person who presides at and keeps his money on such table, against whom all patrons bet, and who takes every bet offered, is a gaming table within the meaning of the statute. *Bell v. State*, 22 S. W. 687, 32 Tex. Cr. R. 187.

#### **Dice or domino table.**

"Gaming table," as used in Pen. Code N. Y. arts. 358, 359, prohibiting the keeping of a gaming table, means a table constructed with a view to certain specific games, in which the table is not only part of the gaming device, but is also necessary to the proper playing of the game. In other words, the table is an essential to the game, and from its peculiar construction, and the manner in which it is operated, forms part of the game. A table on which the game of dice is thrown for drinks and money, and on which a game of dominoes is played, is not a gaming table. *Whitney v. State*, 10 Tex. App. 377, 378.

#### **Faro bank.**

See "Faro Bank."

#### **Grand raffle.**

See "Grand Raffle."

#### **Keno table.**

A keno table is a gaming table, the game of keno being one at which money or property may be won or lost, and persons playing such games, betting and hazarding certain sums of money which goes into a pool, less 10 per cent. of which goes to the keeper of the table, and the successful player taking all the money which has been staked and bet on a chance of winning the game, being a

game of chance and hazard. *Overby v. State*, 18 Fla. 178, 180.

A table used for the playing of the game keno is a gaming table within Rev. Code, § 3621, providing that any person who keeps, exhibits, or is interested or concerned in keeping or exhibiting, any table for gaming, of whatever name, kind, or description, not regularly licensed under the laws of this state, must, etc. Whenever a game is kept or exhibited by one person, who is said to run the game, or is the conductor or manager and presides over the same, and it is carried on by means of instruments, as in this case by a wheel, balls, cards, etc., that necessarily require the use of a table or something in the place of it, and is kept or exhibited and third persons may gamble at it, whatever be its name or description, it is a gaming table, or a table for gaming, within the meaning of the statute. *Miller v. State*, 48 Ala. 122, 128.

A table on which or over which is a hollow globe containing balls or numbers, the drawing out of which determines which of several parties shall take a "pot" to which each has contributed, is a gaming table under section 4465 of the Code, providing that any person who shall preside and deal at any faro table "or other table of like character" for the purpose of playing and betting at the same shall be guilty of keeping a gaming table. *Brown v. State*, 40 Ga. 689, 690.

#### **Poker table.**

A table upon which draw poker is played is not a gaming table within Code, c. 194, § 1, which declares that a person who shall keep or exhibit a gaming table commonly called "ABC" or "EO" table, or "faro bank," or "keno table," or table of the like kind, etc., shall be confined in jail, etc. *Nuckolls v. Commonwealth (Va.)* 32 Grat. 884, 885.

A table on which poker is played, and which has a hole in the center, into which the players put a chip for the proprietor when they hold threes, flushes, or full hands, was not a gaming table within the meaning of Pen. Code, art. 358. It is rather from the character of the playing or game which is played that it receives its specific designation. The table, to come within the meaning of the statute, must be such as can be bet at by some one besides the keeper or exhibitor, for it must be kept or exhibited for the purpose of obtaining bettors. *Lyle v. State*, 16 S. W. 765, 30 Tex. App. 118, 28 Am. St. Rep. 893.

"Gaming table," as used in Code, § 4208, prohibiting the keeping or exhibition of a gaming table, is not confined to tables on which banking games are played, such as

faro, roulette, etc., but includes tables for games of cards, such as draw poker, checks being used as the representative of money in playing the game, which were sold to the players by the keeper of such table. It is the use for which a table is kept or exhibited that makes it a gaming table. If the use is gaming in any of its forms, or by any of its names, or with any of its appliances, it is a gaming table. *Wren v. State*, 70 Ala. 1, 3.

#### **Rondo.**

It is held that the court will take judicial notice, without averment, that rondo is a gaming table within the meaning of the statute prohibiting gaming tables. *State v. Mann*, 13 Tex. 61, 63.

#### **Raffle.**

The leading elements of a gaming table is that it is a game and has a keeper, dealer, or exhibitor. It is based on the principle of one against the many, the keeper, dealer, or exhibitor against the bettors, directly or indirectly; and it must be exhibited—that is, displayed—for the purpose of obtaining bettors. "The raffle, which is in common use, is not a gaming table, for it is a game of perfect chance, in which every participant is equal with every other in the proportion of his risk and prospect of gain. The element of one against the many, the keeper against the bettors, either directly or indirectly, is not to be found in it. It has no keeper, dealer, or exhibitor. Grand raffle is a gaming table, there being fifty prizes of jewelry placed on the numbers from ten to sixty, the whole amount amounting to over \$500 in value, every person paying 50 cents being entitled to a throw of ten dice; which, when thrown, will exhibit numbers in the aggregate not less than 10 nor more than 60, the prizes not being less than 25 cents and not more than \$125 each. At every throw the bettor must get a prize of 25 cents at least; and in that case, if he does not want the prize, the keeper hands him back 25 cents in money, and retains the jewelry. The effect of the whole contrivance is that the bettor gives the keeper 25 cents for the improbable chance of winning some of the tempting prizes. The jewelry is the lure to the crowd. The real fund which the bettor stakes his money against is the money in the keeper's pocket or on his table, as he may choose to keep it. On the side of the bettors it is a game of perfect chance; on the side of the keeper there are both chance and skill, and his skill is exercised in so placing the prizes in value that the bettor will have but a remote possibility of winning them. The bettors, however numerous, may all throw in turn for the same prizes, which may still remain on the table, being paid for by the keeper if accidentally won by any bettor.

Here is found the leading characteristic of a common gaming table—one against the many; the exhibitor, with an interest in the game, against the bettors, and that not disguised even." *Stearnes v. State*, 21 Tex. 692, 694.

#### Wheel of fortune.

In *Smith v. Commonwealth*, 3 Ky. Law Rep. 249, it is stated that Judge Hargis, affirming a conviction for permitting a machine or contrivance used in betting and other games of chance to be set up and exhibited, etc., held that the words "gaming table," as used in section 7, c. 47, of the General Statutes, include any sort of machine or contrivance used in betting or other game of chance. It would appear, though it is not clearly stated, that a wheel of fortune was held to come within this definition. *Smith v. Commonwealth*, 3 Ky. Law Rep. 249.

#### GAMBLING TRANSACTION.

It is a gambling transaction where one person purchases cotton futures or futures in cotton with the understanding between all the parties concerned that no cotton should actually be received or delivered, but that the sale or purchase was to be completed and finished by the paying or receiving of the difference in the price at which the cotton was sold or purchased, and the price that cotton bore on the date fixed for delivery. A note given for a debt arising out of such a transaction is void. *Seeligson v. Lewis*, 65 Tex. 215, 219, 57 Am. Rep. 593.

A purchase of stocks on margin is not necessarily a gambling transaction. Stocks may be bought on credit, just as flour or sugar or anything else, and the credit may be for the whole price or for a part of it, and with security or without it. Margin is security, nothing more; and the only difference between stocks and other commodities is that, as stocks are more commonly made the vehicle of gambling speculation than some other things, courts are disposed to look more closely into stock transactions to ascertain their true character. *Hopkins v. O'Kane*, 32 Atl. 421, 169 Pa. 478.

#### GAMBLING VERDICT.

Where a jury added together the number of years which each thought the prisoner should be confined in the penitentiary, and divided the aggregate by 12, and the result was agreed upon and returned by the jury as the sentence, the verdict was not a "gambling verdict," there being no agreement or understanding, express or implied, before the result was determined, that that result should be the verdict. It is the fact of the agreement or understanding before

the result is adopted that vitiates the verdict. *Glidewell v. State*, 83 Tenn. (15 Lea) 133, 136.

#### GAME.

See "Banking Game"; "Confidence Game"; "Unlawful Game."

Any game, see "Any."

Any other game, see "Any Other."

"Game" is defined by the Century Dictionary as a contest for success or superiority in a trial of chance, skill, or endurance, or any two or all three of these combined, and is very comprehensive, and embraces every contrivance or institution which has for its object to furnish sport, recreation, or amusement. *Desgain v. Wessner* (Ind.) 67 N. E. 991 (citing *People v. Welthoff*, 51 Mich. 203, 16 N. W. 442, 447, 47 Am. Rep. 557).

A game is a trial of skill or of chance, or of skill and chance, between two or more contending parties, according to some rule by which each one may succeed or fail in the trial. Of skill, as chess and billiards; of chance, as raffle and simple lottery; of chance and skill combined, as backgammon, whist, faro, etc. The instruments by which the chance may be developed and upon and about which the skill may be exercised are various—as cards, dice, balls, figures, letters, chessmen, checks, etc.; and these may be operated on singly, or in double, triple, or even quadruple combinations. *Stearnes v. State*, 21 Tex. 692, 694; *Toler v. State*, 56 S. W. 917, 41 Tex. Cr. R. 659.

"A game is a contest of chance or skill, where the party in whose favor the result appears wins or receives something by reason thereof which he would not otherwise have received, and for which he paid no consideration." *Cheek v. Commonwealth*, 79 Ky. 359, 362.

The word "game" in an indictment for gaming is as strong and expressive as the word "gamble," and therefore, the word "gamble" being sufficient to characterize unlawful gaming, the word "game" may be used in an indictment with the same effect. *Bagley v. State*, 20 Tenn. (1 Humph.) 486, 489.

"Game," as defined by Webster, is a single match at play, a single contest, and therefore, as used in an indictment in different allegations, might well indicate separate offenses. *People v. Sullivan*, 33 Pac. 701, 702, 9 Utah, 195.

The word "games," as used in a statute prohibiting games of any kind on Sunday, was intended to apply to such sports and contests as are exhibited as spectacles to the people, and not to such private diversions

as card playing and chess playing, and the like. *Rucker v. State*, 67 Miss. 323, 329, 7 South. 223.

**Baseball.**

See "Base Ball."

**Cockfight.**

The term "game," within the meaning of Act 1799, c. 8, making void all contracts in consideration of money lost by playing at cards, dice, billiards, horse racing, or any other species of gaming whatever, and inflicting a penalty upon any person who shall promote any match or matches at cards, dice, billiards, or any other game of hazard or address for money or other valuable thing, includes cockfighting. We think that the question that cockfighting is gaming has been expressly determined by the courts of Great Britain in adjudicating upon the statutes of their own, very similar in verdict to ours. Under St. 33 Henry VIII, c. 61, inflicting a penalty for keeping a house for unlawful games, a cockpit is held out to be a gaming house. 2 Hawk. P. C. 478, 529. This could not be unless a cockfight were a game, because it is not specified by name in the statute, and therefore must be embraced by the word "game." *Bagley v. State*, 20 Tenn. (1 Humph.) 486, 489.

While horse racing and cockfighting may be classed generally as games, in the sense that they are amusements, diversion, or sports, yet they are not such games as are commonly understood may be played at, and therefore their particular designation in a statute prohibiting horse racing, cockfighting, or playing at cards or games of any kind on Sunday cannot be construed as calling for the application of the rule of ejusdem generis in construing the term games of any kind. *State v. Williams*, 35 Mo. App. 541-549.

**Collection of execution.**

Gen. Laws, p. 299, c. 24, § 140, providing that all contracts, promises, agreements, etc., given, etc., for money, property, or other valuable thing won by any "gaming," etc., shall be utterly void and of no effect, means physical contests, whether of man or beast, when practiced for the purpose of deciding wagers or for the purpose of diversion, as well as to games of hazard by means of instruments or devices, but does not include a wager as to whether an execution can be collected. Such a wager is not upon any game within the meaning of the statute. *Boughner v. Meyer*, 5 Colo. 71, 74, 40 Am. Rep. 139.

**Contract for delivery of futures.**

"Game," as used in 3 Burns' Rev. St. Ind. 1894, § 6676, providing that a person betting on a game and losing any money

thereon may recover it by action, cannot be construed to embrace a bet or wager on the market price of the commodity, so that transactions in a bucket shop, consisting of fictitious contracts of sale or purchase for future delivery of stocks, grain profits, etc., with the intention that there should be no delivery, but a settlement by paying the difference of prices, are not a game. *Boyce v. O'Dell Commission Co.* (U. S.) 109 Fed. 758, 760; *Lancaster v. McKinley* (Ind.) 67 N. E. 947, 948.

Though a contract for the delivery of goods in the future, where the real purpose of both parties is merely to speculate in the rise or fall of prices and to adjust the difference between the contract and market prices without the delivery of any goods, is a wager, it is not a game or gambling device within the meaning of Rev. St. 1879, §§ 5721, 5723, making all notes void where the consideration is money or property won at any game or gambling device. *Crawford v. Spencer*, 4 S. W. 713, 716, 92 Mo. 498, 1 Am. St. Rep. 745.

**Dog fight.**

A dog fight on which money is wagered is a game, so that a person losing money betting on the result thereof may recover it. *Grace v. McElroy*, 83 Mass. (1 Allen) 563, 568.

**Dog match.**

A dog match is a coursing match between greyhounds, and is a game within 9 Anne, c. 14, § 3, making void the contracts or agreements for the playing of any game whereby the party losing pays the sum of £10 or more. *Daintree v. Hutchinson*, 10 Mees. & W. 85, 100.

**Election.**

The term "game" cannot be applied to an election, so as to make betting thereon gaming. *State v. Henderson*, 47 Ind. 127, 128; *Hickerson v. Benson*, 8 Mo. 8, 10, 40 Am. Dec. 115; and money lost by betting on an election cannot be recovered under a statute authorizing the bringing of an action for money lost by betting on a game. *Woodcock v. McQueen*, 11 Ind. 14; *McHatton v. Bates* (Ind.) 4 Blackf. 63, 65; *Liebman v. Miller*, 46 N. Y. Supp. 532, 20 Misc. Rep. 705; *Graves v. Ford*, 42 Ky. (3 B. Mon.) 113, 114.

**Foot race.**

A foot race is a lawful game, sport, or pastime. *Batty v. Marriott*, 5 C. B. 818, 831.

Rev. St. § 5720, provides: "Any person who shall lose any money or property at any game or gambling device may recover the same by civil action." It was early held that under that statute a horse race was a

game (*Shropshire v. Glascock*, 4 Mo. 536, 31 Am. Dec. 189; *Boynton v. Curle*, 4 Mo. 599, 600), and the consistency between that holding and the subsequent holding that a horse race was not a gambling device within the meaning of our Criminal Code (*State v. Hayden*, 31 Mo. 35) was explained in *Hayden v. Little*, 35 Mo. 418, 420, and we must hold it to be the settled law of this state that a horse race is a game under that statute; and we think that it necessarily and logically follows that, if a horse race is a game, a foot race is also a game in the meaning of that statute, and that, therefore, money or property won in a wager on a foot race may be recovered back. *Swaggard v. Hancock*, 25 Mo. App. 596, 605.

#### Horse race.

A horse race is a game within the statute forbidding gaming. *Richardson v. Kelly*, 85 Ill. 491, 494; *Ellis v. Beale*, 18 Me. (6 Shep.) 337, 339, 36 Am. Dec. 726. *Contra*, *Commonwealth v. Shelton* (Va.) 8 Grat. 592, 596.

A horse race is a game within the statute providing that any person who shall lose any money or property at any game or gambling device may recover the same by civil action. *Shropshire v. Glascock*, 4 Mo. 536, 539, 31 Am. Dec. 189; *Boynton v. Curle*, 4 Mo. 599, 600; *Swaggard v. Hancock*, 25 Mo. App. 596, 605.

Horse racing is a game, and the betting of money or selling pools or making books on the result of a horse race is gaming, because it is betting on a game, and unlawful and void, although the game in itself is not unlawful. A game which is not in itself unlawful may be contested without its constituting gaming, but, if money is staked upon it, it becomes gaming and unlawful. *Swigart v. People*, 50 Ill. App. 181, 190.

A horse race is a game, and is within the statute enacting that any person legally called to give evidence against another for gaming shall be deemed a competent witness to prove such gaming, although such witness may have been concerned as a party. *Cheesum v. State* (Ind.) 8 Blackf. 332, 333, 44 Am. Dec. 771.

"While horse racing and cockfighting may be classed generally as games in the sense that they are amusements, diversion, or sports, yet they are not such games as are commonly understood may be played at"; and therefore their particular designation in a statute prohibiting horse racing, cockfighting, or playing at cards or games of any kind on Sunday cannot be construed as calling for the application of the rule of *ejusdem generis* in construing the term games of any kind. *State v. Williams*, 35 Mo. App. 541-549.

#### Pool selling.

*Smith v. Commonwealth*, 3 Ky. Law Rep. 249, states that Judge Hargis, reversing a conviction under an indictment for permitting gaming by knowingly allowing pools to be sold, alleged that pool selling was neither a wager nor a game. *Smith v. Commonwealth*, 3 Ky. Law Rep. 249.

#### Roulette.

Rev. Code, § 1874, providing that any person who has paid any money or delivered anything of value on any game or wager may recover such money or thing by action commenced within a certain time, should be construed to include roulette. *Harris v. Brooks*, 56 Ala. 388, 390.

#### Thimble.

The game called "thimble," or "thimbles and balls," is within the terms of the act of 1816 (6 St. at Large, p. 27) against gaming. *State v. Red* (S. C.) 7 Rich. Law, 8, 9.

#### Wager.

Money lost on a wager is not recoverable under Comp. St. c. 110, § 12, providing that money lost at a game or sport may be recovered. The statute refers to gaming only, and the word "sport" is added to "game" so as to show that game was intended to be used in its utmost extension; but yet it was only intended to include money lost at some game or play either of skill or chance. *West v. Holmes*, 26 Vt. 530, 534.

#### Wrestling match.

A wrestling match is a game within the statute authorizing the recovery of money lost by a bet on a game. *Desgain v. Wessner* (Ind.) 67 N. E. 991.

#### GAME FOR MONEY.

A game of pool, in which the loser pays for the use of the table or for drinks, is a game for money within a statute providing for the punishment of any person playing any game for money on a billiard table or table resembling a billiard table other than a game of billiards licensed by law. "It certainly was not what the parties might drink which was risked or bet on the game, it was not property or its representative, but it was money, which, instead of being paid by the loser to the winner, was paid to the dramseller." *Tuttle v. State*, 1 Tex. App. 364, 367; *Stone v. State*, 3 Tex. App. 675, 676.

#### GAME OF CARDS.

The words "game of cards," in an indictment that an innkeeper permitted persons to play at the game of cards in his dwelling house, is of no greater meaning

than the word "cards," and therefore the words "at the game of" may be struck out as superfluous. *Commonwealth v. Arnold*, 21 Mass. (4 Pick.) 251.

### GAME OF CHANCE.

Games are divided into two kinds; games of chance and games of skill, and a game which consists in the trial of strength or of speed is a game of skill and not a game of chance. *Harless v. United States* (Iowa) *Morris*, 169, 172.

A game of chance is "a game which is decided or some advantage therein lost or gained by the player or some third person doing an act which is required by some rule of the game to be done, the result of which is determined by chance, and not by the skill of the actor, and which is required to be done because of the accidental character of its consequence to the end that chance may enter as an element of the game. It is the character of such a game, and not the skill of the player, which brings it into or excludes it from the prohibition of the statute." *Wortham v. State*, 59 Miss. 179, 182.

Games of chance consist of but two kinds or classes—the first, where the chances are equal, all other things being equal; and the second, where, all other things being equal, the chances are notwithstanding unequal—that is, in favor of one side. *Commonwealth v. Wyatt* (Va.) 6 Rand. 694, 702.

It is a matter of universal knowledge that a game of chance, to wit, cards, means one that is played with an ordinary deck of cards; and no one would fail to understand that he was charged with hazarding money upon the result of a game played with such cards as the instrument from which neither skill nor intelligence could entirely eliminate the risk. *State v. Taylor*, 16 S. E. 168, 169, 111 N. C. 680.

#### Betting at cards.

Betting at cards is indictable under a statute prohibiting the playing of games of chance. *Eubanks v. State*, 5 Mo. 450, 451.

#### Billiards.

The game of billiards is a game of skill, and not a game of chance. *Wortham v. State*, 59 Miss. 179, 182.

#### Bookmaking.

By Act Cong. Jan. 31, 1883, it was provided that every person who shall set up or keep any gaming table or any kind of gambling table or gambling device shall be fined, etc. Section 4 of the act declares "that all games, devices or contrivances at which money or any other thing shall be bet or wagered, shall be deemed a gaming table

within the meaning of this act." Held, that bookmaking on a horse race was a game of chance or gambling device within the meaning of section 4, and therefore came within the meaning of a "gaming table," as used in the act. *Miller v. United States* (D. C.) 6 App. Cas. 6, 11.

#### Chuck-a-luck.

See "Chuck-a-luck."

#### Poker.

See "Poker."

#### Tenpins.

The game of tenpins is not a game of chance within the meaning of acts making it a misdemeanor for any person to play at a game of chance at which money, property, or any other thing of value is bet. *State v. King*, 18 S. E. 169, 170, 113 N. C. 631 (citing *State v. Gupton*, 30 N. C. 271).

#### Turkey raffle.

The putting up by each of several persons of a piece of money, and the deciding by throwing dice which of such persons should have a certain turkey, constitutes a game of chance within Acts 1891, c. 29, making it unlawful for any person to play at any game of chance at which money, property, or other thing of value is bet, whether the same be at stake or not, and those who play and those who bet thereon shall be guilty of a misdemeanor. This statute has no application to the long-prevailing custom of shooting for beef, or at turkeys, and other similar trials of skill. It is true there each participant pays for the privilege or so-called "chance" of shooting for the prize; but there is no chance in the sense of the acts against gambling. These are trials of skill, which the law has never discouraged, and not games of chance in any sense. Nor does the statute prohibit the social diversions in which the hostess offers prizes for the most successful player at cards or other games. In such cases the players bet nothing; they lose nothing, if unsuccessful; and pay nothing for the chance of winning. *State v. De Boy*, 23 S. E. 167, 168, 117 N. C. 702.

### GAME OF HAZARD OR SKILL.

Gould, Dig. §§ 9, 10, p. 371, prohibiting the betting of money at any "game of hazard or skill," means only gaming banks, tables, cards, and other gambling contrivances and devices, and does not include horse racing, which is rather a test of endurance. *State v. Rorie*, 23 Ark. 726, 728.

### GAME OF SKILL.

A game of skill is one in which nothing is left to chance, but superior knowledge and



attention, or superior strength, agility, and practice gain the victory. Of these kinds of games chess, draughts, or checkers, billiards, fives, bowls, and quoits may be cited as examples; and it is true that in these latter instances superiority of skill is not always successful. The victory is not necessarily to the swift. Sometimes an oversight, to which the most skillful is subject, gives an adversary the advantage, or an unexpected puff of wind or an innocent gravel in the way may turn aside a quoit or a ball and make it come short of the aim. But, if those instances were sufficient to make the games in which they may occur games of chance, there would be none other but games of that character. Games of skill are distinguished from games of chance in that the latter are games dependent upon chance or luck, and in which adroitness has no office at all. *State v. Gupton*, 30 N. C. 271, 274.

A game of baseball is a game of skill within the statute making it a criminal offense to bet on such a game. *Mace v. State*, 22 S. W. 1108, 58 Ark. 79.

#### GAME WITH DICE.

A game with dice, within a statute making it a penal offense to play at any game with dice, is a game where the throw of the dice determines the result of the game between parties, who bet on the result. *Wetmore v. State*, 55 Ala. 198, 200.

#### GAME.

The term "game" includes all kinds of animals and birds found in the state of nature, and commonly so called. *Code Miss.* 1892, § 2118.

##### Fish.

"Game," as used in *Const. art. 3, § 84*, forbidding the enactment of any local or special law "to provide for the protection of game," includes fish. In *Am. & Eng. Enc. Law*, p. 23, it is said "animals pursued and taken by sportsmen are designated as game," and in a note to that paragraph it is said "game includes wild bees and fish." *State v. Higgins*, 28 S. E. 15, 16, 51 S. C. 51, 38 L. R. A. 561.

##### Quail.

The word "game" means birds and beasts of a wild nature obtained by fowling and hunting. Quail and other wild fowl or birds fit for food are included within the meaning of the word "game." And such is its meaning when used in the statute for the protection of game, wild fowl, and birds. *Meul v. People*, 64 N. E. 1106, 1107, 198 Ill. 258 (citing *People v. O'Neil*, 71 Mich. 325, 39 N. W. 1).

#### GANANCIAL PROPERTY.

Ganancial property, in the Spanish law, is all that is increased or multiplied during marriage. By "multiplied" is understood all that is increased by onerous cause or title, and not that which is acquired by a lucrative one; as inheritance, donation, etc. *Cutter v. Waddingham*, 22 Mo. 206, 255.

Ganancial property is that which husband and wife, living together, acquire during matrimony by a common title, lucrative or onerous, or that which husband and wife or either acquire by purchase or by their labor and industry; as also the fruits of the separate property which each brings to the matrimony or acquires by lucrative title during the continuance of the partnership. *Cartwright v. Cartwright*, 18 Tex. 626, 634.

#### GANG.

The word "gang" is sometimes used to describe a body of men associated together for purposes entirely proper, as a gang of laborers, but is commonly used to describe a body of men banded together for improper or unlawful purposes, like a gang of thieves, or a gang of robbers; and such is its meaning when used in a newspaper article speaking of certain men as members of a gang who had entered into a scheme to obtain property by improper methods, and is libelous per se. *Hatch v. Matthews*, 31 N. Y. Supp. 926, 928, 83 Hun, 349.

#### GANGWAY.

The word "gangway," as used in *St. c. 93, § 8*, entitled "Mines," and requiring that all underground self-acting or engine planes or gangways on which coal cars are drawn and persons travel shall be provided with some proper means of signaling between the stopping places and the end of such planes or gangways, and sufficient places of refuge at the sides of such planes or gangways shall be provided at certain intervals, should be construed in its general signification, which is given by Webster as "a passageway or avenue into or out of any inclosed place." *Sangamon Coal Min. Co. v. Wiggerhaus*, 13 N. E. 648, 650, 122 Ill. 279.

#### GARBAGE.

The Century Dictionary defines garbage as follows: "(1) Originally the entrails of fowls, and afterwards of any animal; now, offal or refuse organic matter in general; especially the refuse animal and vegetable matter from a kitchen. (2) Any worthless, offensive matter." The trimmed heads, feet, and bones of beef cattle, from which the flesh and skin have been removed, and which are fresh and clean, and do not emit an

offensive odor, do not come within the meaning of the term "garbage" as used in an ordinance regulating the hauling of the same through the public streets. *City of St. Louis v. Robinson*, 87 S. W. 110, 113, 135 Mo. 460.

Garbage is defined as that which is purged or cleansed away; the bowels of an animal, refuse parts of flesh, offal; hence refuse animal and vegetable matter from a kitchen; and is so used in a city ordinance authorizing the appointment of scavengers for removal of offal, cleansing cesspools, and removing garbage, and prohibiting any one else from doing so; and the ordinance is therefore unconstitutional. *In re Lowe*, 39 Pac. 710, 712, 54 Kan. 757, 27 L. R. A. 545.

In an ordinance prohibiting the deposit of garbage or offal in certain places, the words "garbage" and "offal" were defined to include every refuse accumulation of animal, fruit, or vegetable matter, liquid or otherwise, that attends preparation, use, cooking, dealing in or storing of meat, fish, fowl, fruit, or vegetable. *City of Grand Rapids v. De Vries*, 82 N. W. 269, 270, 123 Mich. 570.

"Garbage," as used in a city ordinance, is defined to mean all refuse matter, animal or vegetable; so that it would include all waste material, all accumulation of rubbish of whatsoever character, which in time, if allowed to accumulate in large quantities, would doubtless become a nuisance, to abate which the city might employ any lawful means. So that the ordinance prohibiting its removal by any one except a contractor is invalid, as not within the police powers of the city. *Iler v. Ross*, 90 N. W. 869, 870, 64 Neb. 710, 57 L. R. A. 895, 97 Am. St. Rep. 678.

## GARDEN.

"A garden is a piece of ground appropriated to the cultivation of herbs or plants, fruits or flowers. It is usually a small plot of ground near a dwelling house, and used in connection therewith." And under a statute relative to laying out roads through gardens which have been cultivated for four years land merely inclosed in a garden, but not cultivated, is not included. *People v. Town of Greenburgh Com'rs*, 57 N. Y. 549, 550.

Whether a garden is always a field or not, it may be in a field; and hence an indictment for working in a field on Sunday is sustained by proof that defendant was seen working in his garden, which had a field adjoining. *Commonwealth v. Josselyn*, 97 Mass. 411, 412.

## GARDEN SEEDS.

In common speech garden seeds are the seeds used either for planting or sowing in

the gardens adjacent to dwelling houses, small spaces of land, and in the large spaces of land called "market gardens," lying about cities or other large places of numerous and condensed population. They are those seeds from which are raised, in the growing season of the year, the vegetable products, which, before complete maturity, are used upon the table as part of the customary food of mankind, in distinction from those seeds which, sowed or planted on a broader scale in the fields, produce the vegetables which are stored for winter use as food. As the word is used in the United States revenue laws, it would include beans and sugar beet seeds. *Ferry v. Livingston*, 6 Sup. Ct. 175, 179, 115 U. S. 542, 29 L. Ed. 489.

The term "garden seeds" in the tariff act of 1883 is a word which, in the abstract, may mean either seeds intended for use in the garden, or the class of articles known commercially as garden seeds; but the use of the word in the act has been considered by the Supreme Court in the case of *Ferry v. Livingston*, 115 U. S. 542, 6 Sup. Ct. 175, 29 L. Ed. 489, and the rule there laid down, which is controlling, was that it would not be sufficient to show that seeds were not garden seeds to show that they were used both in the garden and in the field; but, if it appeared that the seeds in question belonged to a variety not intended to be used to be consumed by man, then they could not be regarded as garden seeds. *Clay v. Magone* (U. S.) 40 Fed. 230-232.

## GARDEN SQUARE.

The words "garden square," marked on a square in a town plat, do not necessarily imply a dedication of it to the public. *City of Pella v. Scholte*, 24 Iowa, 283, 288, 95 Am. Dec. 729.

## GARNETTED WASTE.

Garnetted waste is the product of a garnett machine, which tears and ravel out the twist in thread, thus reducing it back to the original purified wool, by reason of taking out the twist which is originally given to the wool to make it yarn or thread. *Standard Varnish Works v. United States* (U. S.) 59 Fed. 456, 458, 8 C. C. A. 178.

## GARNISHEE.

A garnishee is a trustee or one warned by legal process in respect to the interest of third parties in property held by him. *Smith v. Miln* (U. S.) 22 Fed. Cas. 603, 606.

"A garnishee is a person in whose hands money or goods have been attached, and he is so called because he has had garnishment; that is, warning not to pay the money to

the defendants in attachment." *Welsh v. Blackwell*, 14 N. J. Law (2 J. S. Green) 344, 348 (quoting 3 Jac. Law Dict. 175).

In case of conflicting claims, a garnishee is a stakeholder, who, after a full disclosure, shall be protected from a double liability. *Hanaford v. Hawkins*, 28 Atl. 605, 18 R. I. 432.

A garnishee, in the eyes of the law, is a mere stakeholder—a custodian of the property or funds in his hands attached. He has no pecuniary interest in the matter, he does not have to pay costs, and he has discharged his full duty when he has let the law take its course between the original litigants. He has no right to favor one party more than another, and he should stand and act indifferently and without prejudice to either party. See *Schindler v. Smith*, 18 La. Ann. 476. A garnishee must be a third person, so far as the parties to the attachment proceedings are concerned. *Nevlan v. Poschinger*, 55 N. E. 1033, 1035, 23 Ind. App. 695 (citing *Wade*, *Attachm.* § 341; *Crosby v. Harlow*, 21 Me. [8 Shep.] 499, 38 Am. Dec. 276; *Hoag v. Hoag*, 55 N. H. 172).

#### GARNISHEE PROCEEDING.

"Garnishee proceeding" means this: the creditor takes the place of the debtor—only this and nothing more. The former takes only that which the latter could enforce. That which the garnishee owes, whether due or not, is appropriated, and the process has no future effect. *Burlington & M. R. Ry. Co. v. Thompson*, 1 Pac. 622, 625, 31 Kan. 180, 47 Am. Rep. 497.

#### GARNISHMENT.

See "Equitable Garnishment."  
See, also, "Trustee Process."

The office of a garnishment is to apply the debt due by the third person to the defendant in judgment, to the extinguishment of that judgment, or to apply effects belonging to the defendant in the hands of a third person to its payment. *Strickland v. Madrox*, 4 Ga. 393, 394.

Garnishment is a proceeding by which the plaintiff in an action seeks to reach the rights and effects of the defendant by calling into court some third party, who has such effects in his possession or who is indebted to the defendant. *Jeary v. American Exch. Bank*, 89 N. W. 771, 772, 2 Neb. (Unof.) 657.

The object of garnishment is to enable a creditor to appropriate to the satisfaction of the debt due him the property of the debtor in the hands of the garnishee, or a debt owing by the garnishee to the debtor. It operates as a levy upon the property or

debt in his hands, as a seizure by the officer does upon property in the possession of defendant. The service of the process upon the garnishee arrests the debt or property in his hands belonging to defendant, and gives the court jurisdiction to condemn it to the payment of plaintiff's demand. The garnishee is in the attitude of a mere stakeholder, supposed to be indifferent between the plaintiff and defendant. *Georgia & A. Ry. Co. v. Stollenwerck*, 25 South. 258, 259, 122 Ala. 539.

A garnishment may be regarded as a suit brought in the name of and on behalf of one who claims to be a creditor. *Skelly v. Westminster School Dist.*, 37 Pac. 643, 645, 103 Cal. 652.

A garnishment proceeding is no more than a substitution of the plaintiff for the defendant debtor in the enforcement of any liability against the garnishee. And therefore the plaintiff can acquire no greater rights against the garnishee than the debtor himself possessed or could enforce. *R. T. Davis Mill Co. v. Bangs*, 40 Pac. 628, 629, 6 Kan. App. 38 (citing *Rock Island Lumber & Mfg. Co. v. Equitable Trust & Inv. Co.*, 54 Kan. 124, 37 Pac. 983).

A garnishment, as it has often been defined and described in the course of judicial decision, is "the institution of a suit by a creditor against the debtor of his debtor, and is governed by the general rules applicable to other suits, adapted to the relative situation of the parties." 1 Brick. Dig. p. 173, § 276. Thus an order discharging a garnishee is final and appealable, under Code 1886, § 2900, relating to garnishment, and providing that an appeal lies at the instance of the plaintiff, and section 3611, providing that appeals may be taken from any final judgment or decree. *Steiner v. First Nat. Bank*, 22 South. 30, 31, 115 Ala. 379.

#### Attachment distinguished.

The difference between an attachment of personal property and a garnishment is very great. In the former, the property attached is actually taken into the possession of the officer holding the writ, and is under his custody and control, while in garnishment proceedings the property is left in the hands of the garnishee. *Santa Fe Pac. R. Co. v. Bossut*, 62 Pac. 977, 978, 10 N. M. 322.

#### As a form of attachment.

Garnishment is a form of attachment. It is an attachment by means of which money or the property of a debtor in the hands of third persons, which cannot be levied on, may be subjected to the payment of the debtor's claim. To subject the property or credit to attachment, and thus confer jurisdiction, it must be within the jurisdiction, so that the court may obtain legal control of

the res; otherwise it could make no legal disposition of it, because it is an axiom of the law that the courts cannot change rights of property situate without the state. *National Bank of Wilmington & Brandywine v. Furtick*, 42 Atl. 479, 481, 2 Marv. 35, 44 L. R. A. 115, 69 Am. St. Rep. 99 (citing *Insurance Co. of St. Louis v. Hettler*, 37 Neb. 849, 56 N. W. 711).

Garnishment is a species of attachment, and the purging of the conscience of some one having knowledge of the facts is necessary to its successful administration. *Ex parte Cincinnati, S. & M. Ry. Co.*, 78 Ala. 258, 259.

#### **As a notice of attachment.**

Bouvier defines the word "garnishment" to be a warrant to any one for his appearance in a cause in which he is not a party, for the information of the court, and explaining a cause. In other words, it is notice to the party in actual possession of the goods or choses in action of a debtor that an attachment has been issued against the debtor, and that the debtor's property in the hands of the party receiving a notice is to be held subject to the garnishment. *Mathews v. Smith*, 12 N. W. 821, 825, 13 Neb. 178.

#### **As a civil action.**

That a proceeding by garnishment to subject the funds of a defendant in attachment to the judgment or debt of a creditor in a suit is a proposition well sustained by authorities. *Moore v. Stainton*, 22 Ala. 831. The reasoning in support of this proposition is soundly convincing. The proposition of the proceeding is a legal investigation by the same means and through the same instrumentalities employed in an ordinary suit or action. The garnishee is brought into court by a summons. He has his day in court, issues of fact are made up by the pleadings, evidence may be offered, and a trial had by a court or jury as in other actions. Judgment is rendered, costs decreed, and execution issued on the judgment. A suit being a civil action, a garnishment proceeding is a civil action, within the provisions of Laws 1891, § 13, limiting the amount of justices' fees in any civil action. *Nylan v. Renhard*, 49 Pac. 266, 10 Colo. App. 46.

#### **As creating a lien.**

Garnishment is a seizure in the hands of a garnishee by notice to him creating an effectual lien upon the property garnished to satisfy whatever judgment the plaintiff may recover in the suit in which it is issued. *Morawetz v. Sun Ins. Office*, 71 N. W. 109, 110, 96 Wis. 175, 65 Am. St. Rep. 43.

A proceeding by garnishment is in the nature of a proceeding in rem, and, for certain purposes, at least, a lien upon the res is

created by the service of notice of garnishment. Garnishment is also, in effect, an action against the garnishee by the defendant in the name of, and for the benefit of, the plaintiff, and the garnisher may be made personally liable. *Gilmore v. Cohn*, 71 N. W. 244, 245, 102 Iowa, 254.

Garnishment is a mode of attachment. As a general rule, no lien is created on the property in the hands of the garnishee, although it partakes of the nature of a proceeding in rem. Some of the cases seem to hold that it is a matter of attachment, differing in no essential particular from an attachment by levy and seizure, except in the mode of enforcement. *Bowen v. Port Huron Engine & Thresher Co.*, 80 N. W. 345, 109 Iowa, 255.

#### **As an execution or process.**

See "Execution (Writ of)"; "Process."

#### **As a pleading.**

Garnishment is a writ enabling a creditor to appropriate to the satisfaction of the debt due him the property of his debtor in the hands of the garnishee, or a debt owing by the garnishee to the debtor. It is a mere process, not a pleading, and serves its purpose when it brings the garnishee before the court. Consequently it is held that a demurrer to it is frivolous, and should be stricken out on motion. A garnishment may issue to any number of persons, whether they hold property, or are indebted jointly or severally to the debtor. It operates from its service to create a lien on the property in the possession of, or the debt due from, any or all of the garnishees. *Curry v. Woodward*, 50 Ala. 258, 260.

#### **As a collateral proceeding.**

A garnishment is not a separate or independent action, but is incidental to the original or main action against the defendant. *S. E. Olson Co. v. Brady*, 78 N. W. 864, 865, 76 Minn. 8.

Garnishment is simply a proceeding collateral to the main action in law, and is exceedingly informal. It cannot be made use of to compel the construction of a will after probate in the probate court. *Duxbury v. Shanahan*, 87 N. W. 944, 84 Minn. 353.

#### **As a legal proceeding.**

A garnishment is not an equitable proceeding. It is essentially legal, assimilated to an attachment of personal property, and, in its nature and operation, is the institution of a suit by a creditor against the debtor of his debtor. The creditor may reach and condemn by this remedy only such demands as the debtor can enforce by an action at law in his own name. Equitable demands cannot be reached, and, if a legal demand exists,

complicated and involved with matters strictly and purely of equitable cognizance, which must be adjusted if full and complete justice be done, the parties will be remitted to a court of equity. 1 Brick. Dig. 175, §§ 313-314; Toomer v. Randolph, 60 Ala. 356. In accordance with this principle, where there has been a sale of land under a power contained in a mortgage, at which the mortgagee becomes the purchaser at a bid less than the mortgage debt, the portion of the debt covered by the bid is not subject to garnishment, since, though the sale may be disaffirmed by the mortgagee, until so disaffirmed it is binding on the mortgagor, and he cannot maintain an action at law to enforce the same. Harris v. Miller, 71 Ala. 26, 30.

#### **As a proceeding in rem.**

Garnishment is in the nature of a proceeding in rem, since its aim is to invest the plaintiff with the right and power to appropriate to the satisfaction of his claim against the defendant property of the defendant in the garnishee's hands, or a debt due from the garnishee to the defendant. Carter v. Koshland (Or.) 11 Pac. 292.

Garnishment is attachment in the hands of a third person, and is thereby a species of seizure by notice. The effect of garnishment is to place the personal property of the debtor in the garnishee's hands in the custody of the law from the date of service of the notice or summons. It is therefore a proceeding in the nature of an action in rem, as well as in personam. Beamer v. Winters, 41 Kan. 596, 21 Pac. 1078; Barton v. Spencer, 41 Pac. 605, 607, 3 Okl. 270.

Garnishment, like attachment, is a species of proceeding in rem; acquires jurisdiction of the person pro hac vice, by seizing his property, goods, or choses in action. If it cannot acquire jurisdiction or control of the res, it needs must fail to acquire, through such res, jurisdiction of the person. For jurisdiction of the person is acquired only through the res or thing. Louisville & N. Ry. Co. v. Dooley, 78 Ala. 524, 525.

#### **As a statutory proceeding.**

Garnishment is a special and extraordinary remedy, and it can be used only at the times and upon the grounds expressly authorized by statute. Garnishment is not now merely an incident to an attachment. Charles P. Kellogg & Co. v. Hazlett, 43 Pac. 987, 989, 2 Kan. App. 525.

Garnishment is a purely statutory proceeding, aiming to invest the plaintiff with the right and power to appropriate satisfaction of his claim against the defendant for debts due from the garnishee to the defendant. "It is, in fact," says Drake, "a suit of the defendant, in the plaintiff's name, against the garnishee, without reference to

the defendant's concurrence, and, indeed, in opposition to his will." MacKelvey v. Crockett, 2 Pac. 386, 387, 18 Nev. 238 (quoting Drake, Attachm. § 452).

Proceedings in garnishment are statutory. If there be an answer admitting indebtedness, judgment may be entered on the answer, and, if there is no answer, a conditional judgment may be claimed, and under certain conditions made absolute; but where the garnishee answers, and the answer is controverted, default judgment can not be entered on the failure of the garnishee to appear, for the statute makes no such provision, and ordinary default and a writ of inquiry are not adapted to the administration of garnishment. Lehman Durr & Co. v. Hudmon Bros., 79 Ala. 532, 535.

It is generally held in this country that garnishment is a purely statutory proceeding, and cannot be pushed in its operation beyond the statutory authority under which it is resorted to. Duval County v. Charleston Lumber & Mfg. Co. (Fla.) 33 South. 531, 533, 60 L. R. A. 549.

## **GAS.**

See "Natural Gas."

In the construction of a lease providing that the land should be worked for petroleum rock or carbon oil, and should not be used for any other purposes, it was held that "gas" and "oil" are not synonymous terms. Truby v. Palmer (Pa.) 6 Atl. 74.

Within the meaning of Const. art. 207, which declares that capital, machinery, and other property employed in the manufacture of fertilizers and chemicals are exempt from taxation, gas for illuminating purposes is not a chemical entitled to such exemption. The terms implied in the article of the Constitution should not be considered from the scientific point of view. Illuminating gas is not generally understood to be a chemical. Shreveport Gas, Electric Light & Power Co. v. Assessor of Caddo Parish, 16 South. 650, 651, 47 La. Ann. 65.

The word "gas," as used in a gas lease, is neither ambiguous nor uncertain in meaning, and it is well understood; and evidence is inadmissible, in construing the lease, to show that "gas," as so used, means gas derived from a gas well, and not from an oil well. Burton v. Forest Oil Co., 54 Atl. 266, 268, 204 Pa. 349.

The word "gas," as used in an act relating to gas, water, and water power companies, includes and means natural and artificial gas used for heating and illuminating purposes. P. & L. Dig. Laws Pa. 1897, vol. 3, col. 185, § 26.

**GAS COMPANY.**

See "Natural Gas Company."

The term "gas company," as used in the chapter relating to the listing of personal property for taxation, includes any person or persons, joint-stock association or corporations, wherever organized or incorporated, when engaged in the business of supplying artificial gas for lighting or heating purposes to consumers within this state. *Bates' Ann. St. Ohio 1904, § 2780-17.*

"A gas company is a public corporation. It cannot exercise functions without a franchise granted from the commonwealth, for public streets must be occupied, and private rights interfered with." *Sanderson v. Commissioners, 3 Pa. Com. Pl. 1, 6.*

Gas companies are somewhat public in their nature, and owe a duty to supply gas to all. *Hagan v. Fayette Gas Fuel Co., 21 Pa. Co. Ct. R. 503, 508.*

**GAS FITTINGS.**

The distinction between gas fittings and gas fixtures is well stated and explained in *Vaughen v. Halderman, 33 Pa. (9 Casey) 522, 75 Am. Dec. 622.* Houses are considered as finished by the builders when the gas fittings, consisting of the pipes connecting with the street main, and carried up through the walls and ceilings, are completed. The fixtures are put up in more or less expensive style, according to the taste and means of the persons who mean to occupy the houses, whether as tenants or owners. If the tenant puts them in, they are his, and he may remove them, or they may be sold as his personal property on an execution by the sheriff. If the owner sells the house, and there is no agreement to include the fixtures, the purchaser is not entitled to them, and they cannot be the subject of a mechanic's lien under a statute giving a lien for gas fittings. *Jarechl v. Philharmonic Soc., 79 Pa. (29 P. F. Smith) 403, 405, 21 Am. Rep. 78.*

There is a clear distinction between gas fittings and gas fixtures; the former term including all the piping down to the points of opening, where chandeliers, brackets, etc., used for lighting, are designed to be attached, and the latter only covering these attachments. *National Bank v. North, 28 Atl. 694, 697, 160 Pa. 303.*

**GAS FIXTURES.**

Gas fittings distinguished, see "Gas Fittings."

The pipes which connect with the street main, and are carried up through the walls and ceilings of the house, with openings at

the points where it is intended to attach fixtures for the purpose of lighting the rooms and entries, are called "gas fittings," while the chandeliers and other substitutes for lamps and candles are called "gas fixtures," and are screwed onto the pipes and cemented only to prevent the escape of gas, and may be removed at pleasure, without injury either to the fittings or to the freehold. These gas fixtures, whether stoves, chandeliers, hall, and entry lamps, drop lights, or table lamps, are mere personal property, and do not pass by a sheriff's sale of the real estate. *Vaughen v. Haldeman, 33 Pa. (9 Casey) 522, 523, 75 Am. Dec. 622 (cited and approved in Jarechl v. Philharmonic Soc., 79 Pa. [29 P. F. Smith] 403, 405); National Bank of Catasaqua v. North, 28 Atl. 694, 697, 160 Pa. 303.*

Whether the term "gas fixtures" includes gas meters, and therefore whether a contract to furnish gas fixtures includes a meter, is a question of fact, authorizing the admission of evidence of a gas fitter. *Downs v. Sprague (N. Y.) 1 Abb. Dec. 550, 551.*

**GAS LEASE.**

Gas being of a fugitive and volatile nature, a grant of it creates only an inchoate right, which will become absolute only upon its reduction to possession. A lease to mine gas is a mere incorporeal right to be exercised in the land of another. It is a profit à prendre, which may be held separate and apart from the land itself. *Federal Oil Co. v. Western Oil Co. (U. S.) 112 Fed. 873, 875.*

**GAS MAINS.**

Gas mains are merely pipes used for the purpose of distributing the gas and pressure to the point of illumination. *Consolidated Gas Co. v. City of Baltimore, 62 Md. 588, 592, 50 Am. Rep. 237.*

**GAS PUFF.**

A "Gas puff," as used in connection with dangers incident to a furnace stack, is caused by an accumulation of gas near the top of the stack, mixing with the air, taking fire and exploding. *Giles v. Jones & Laughlins, 54 Atl. 280, 281, 204 Pa. 444.*

**GAS WELLS.**

The sinking of gas wells, by the express provisions of Act Feb. 21, 1889, is included within the word "mining." *State v. Indiana & Ohio Oil, Gas & Mining Co., 22 N. E. 778, 780, 120 Ind. 575, 6 L. R. A. 579.*

**GAS WORKS.**

The term "gas works," as used in Rev. St. § 2485, providing that it shall not be

lawful for any council to agree, by ordinance, contract, or otherwise, with any person or persons, for the extension of gas works for supplying the corporation or its inhabitants with gas, etc., if used for supplying gas at the lamp-posts in the village, includes the mains and pipes through which the gas is furnished by a company that owns the whole plant, including the right of way where the same are laid. Gas works used only for manufacturing gas may not, perhaps, include the mains and pipes that convey the gas to the lamp-posts and the consumer. *Cincinnati Gaslight & Coke Co. v. Avondale*, 1 N. E. 527, 531, 43 Ohio St. 257.

### GASOMETER.

A gasometer is a huge, air-tight reservoir for the storage of gas. It works automatically, and rises or falls according to the supply and consumption of gas. *Consolidated Gas Co. v. City of Baltimore*, 62 Md. 588, 590, 50 Am. Rep. 237.

### GASOLINE.

Gasoline is the most volatile of the different oils composing crude petroleum, and consequently the most explosive, and, in the process of distillation of petroleum, is the oil driven off at the lowest temperature, so that a prohibition in an insurance policy against keeping petroleum will include the keeping of gasoline. *Kings County Fire Ins. Co. v. Swigert*, 11 Ill. App. 590, 598.

Puroline and gasoline, as sold and used for illuminating purposes, are both petroleum products, and both are gas-generating fluids. From the testimony of chemists and other experts, and of dealers in such articles, it appears that the difference of danger between puroline and gasoline of 74 deg. gravity is so slight and insignificant that it is hardly measurable or even perceptible. It also appears that, in the trade, orders for puroline are frequently and almost usually filled by delivering 74 deg. gasoline, and circulars issued and distributed all over the state by different dealers in these articles contain the statement that 74 deg. gasoline is of the same gravity as puroline. In both, the danger is not from explosion while burning in lamps, but from handling in the proximity of a light, on account of the gas which they liberate and generate from packages which are not air-tight, and which gas is inflammable. *Socola v. Chess-Carley Co.*, 1 South. 824, 826, 39 La. Ann. 344.

### GATE.

See "Beast Gate"; "Tollgate"; "Safety Gates."

"A gate is a protection. It is a contrivance for passing through a fence. It is a

part of the fence, which is defined to be a protection; an inclosed structure of wood, iron, or other material, intended to prevent intrusion from without, or straying from within. A gate is a necessary part of such inclosing structure. It is a part of the fence." *Per Beck, J.*, in *Mackie v. Central R. of Iowa*, 6 N. W. 723, 54 Iowa, 540; *Payne v. Kansas City, St. J. & C. B. Ry. Co.*, 33 N. W. 633, 634, 72 Iowa, 214; *West v. Missouri Pac. Ry. Co.*, 26 Mo. App. 344, 348; *Poler v. New York Cent. R. Co.*, 16 N. Y. 476, 480; *Fremont, E. & M. V. R. Co. v. Pounder*, 54 N. W. 509, 510, 36 Neb. 247; *Wabash R. Co. v. Kinie*, 42 Ill. App. 272, 274; *Estes v. Atlantic & St. L. R. Co.*, 63 Me. 308, 309.

### GATHER.

A portion of the oath upon which perjury was assigned was that defendant "heard and saw M. getting and carrying away corn," and the negative averment was that defendant "did not see and hear M. gather and carry away corn." Held, that the use of the word "gather" to negative "getting" was not sufficient cause for an arrest of judgment, inasmuch as the substance and effect of the former were equivalent to the latter. *State v. Raymond*, 20 Iowa, 582, 585.

A clause of a lease reserving to the tenant the right to "gather the crop" after the expiration of the term means that the tenant should be entitled to either ingress and egress so far as is necessary to gather and remove the crop, but does not authorize him to hold over and exclude the landlord after the time at which he was to surrender. *Stoddard v. Hewett*, 30 Ark. 156, 159.

A will giving a certain person a tract of land, with the crops thereon, whether "gathered or growing" at the time of testator's death, means the crops made the year the testator died, and those of the preceding year remaining on the land, and those brought thither from other plantations to be stored. *Carnagy v. Woodcock (Va.)* 2 Munf. 234, 239, 5 Am. Dec. 470.

### GAUFFRE LEATHER.

Where the appearance of gauffre leather indicates that it has been advanced from the condition of a skin to the condition of a leather, it is dutiable as leather not specially provided for, under Act Aug. 28, 1894, par. 340. *United States v. Naday (U. S.)* 92 Fed. 40.

### GAVELET.

Gavelet was an ancient process of the common law, in use in the law of landlord and tenant, for the collection of rent from a tenant. It was a form of the writ of ces-

savit, and was in use in Kent and London. By such process the landlord could seize the land itself for rent in arrear, and hold it until payment was made. It has been obsolete for ages, and exists only in the memory of legal antiquaries. *Emig v. Cunningham*, 62 Md. 458, 460.

## GELDING.

A gelding is a castrated male horse. *State v. Royster*, 65 N. C. 539.

"A reference to Webster's Dictionary shows the noun 'gelding,' as used in our language, to be synonymous with the word 'gilding,' as used in the Danish language, and in all probability its meaning was derived from that word, which signifies a castrated animal, rather than the word 'gelding,' which is of Icelandic origin, and means castration." The use of the word "gilding" in an indictment for the theft of such an animal, instead of the word "gelding," does not vitiate the indictment. *Thomas v. State*, 2 Tex. App. 203, 204.

The words "mares, horses, or geldings," in Act March 15, 1821, providing for the payment of a reward to any person who shall pursue and apprehend any person who shall have stolen any mare, horse, or gelding, etc., do not include a mule. *Commonwealth v. Davidson*, 4 Pa. Dist. R. 172.

### Horse synonymous.

A gelding is not included in the term "horse," in a statute making it criminal to sell any horse, mare, or gelding, and therefore a conviction cannot be sustained in an indictment charging the stealing of a horse by evidence of the stealing of a gelding. If the descriptive term "horse" alone had been used, evidence that the gelding had been stolen would have been admissible; but, as the Legislature have thought proper to particularize and define their business, the conclusion is obvious from the reasoning employed that in an indictment under the statute it is necessary to be equally specific. *State v. Plunket* (Ala.) 2 Stew. 11, 12; *State v. Buckles*, 26 Kan. 237, 241.

"Gelding," as used in Pasch. Dig. art. 2409, providing for the punishment of any person who steals any horse, gelding, mare, colt, ass, or mule, specifically describes a particular species of property, discriminating between a horse, gelding, mare, colt, ass, or mule, as different species of property, and an allegation of theft of a gelding is not supported by proof of theft of a horse. "Horse" and "gelding" are not synonymous terms, nor is gelding included in the term "horse." *Johnson v. State*, 16 Tex. App. 402, 409; *Jordt v. State*, 31 Tex. 571, 572, 98 Am. Dec. 550.

In common parlance, the terms "gelding" and "horse" are often used interchangeably, so that, under an indictment charging the theft of a gelding, the refusal of an instruction that, if the proof showed the theft of a horse, the jury must acquit, was not error. *State v. Ingram*, 16 Kan. 14, 19.

The term "gelding" is included within the term "horse," and therefore an indictment for stealing a horse is supported by proof of the theft of a gelding. *Baldwin v. People*, 2 Ill. (1 Scam.) 304; *State v. Donnegan*, 34 Mo. 67; *People v. Butler*, 2 Utah, 504.

A gelding may be properly described in an indictment for larceny as a horse. *Hooker v. State*, 4 Ohio (4 Ham.) 348, 349.

### Ridgling.

An indictment charging the theft of a gelding cannot be construed to include a ridgling, i. e., a half-castrated animal, so as to admit proof that the animal stolen was a ridgling. Webster defines "gelding" to mean a eunuch or castrated animal and the word "gelt" means the same thing. *Brisco v. State*, 4 Tex. App. 219, 221, 30 Am. Rep. 162.

### GELT.

"Gelt" is defined by Webster as a eunuch or castrated animal. *Brisco v. State*, 4 Tex. App. 219, 221, 30 Am. Rep. 162.

## GEM.

Gems are valuable stones kept for curiosity, only, as distinguished from jewels, which are valuable stones set and prepared for wear. *Cavendish v. Cavendish*, 1 Brown, Ch. 409.

## GENERAL.

The term "general" is defined by Webster as follows: "Common to many or the greatest number; widely spread; prevalent; extensive, though not universal." *Platt v. Craig*, 63 N. E. 594, 595, 66 Ohio, 75; *Keon v. State*, 53 N. W. 595, 596, 597, 35 Neb. 676, 678, 17 L. R. A. 821; *McCorkendale v. McCorkendale*, 82 N. W. 754, 111 Iowa, 314; *Van Horn v. Van Horn*, 77 N. W. 846, 848, 107 Iowa, 247, 45 L. R. A. 93; *Duffy v. Duffy*, 87 N. W. 500, 501, 114 Iowa, 581; *Watson v. Richardson*, 80 N. W. 407, 414, 110 Iowa, 673.

"General," as used in the Code, relating to the effect of the general and notorious recognition of illegitimate children by a father, is not equivalent to "universal." Webster says that the word "general" means extensive, though not universal. A limited and partial recognition is a general one, for



everything is limited and partial which is not universal. *Blair v. Howell*, 28 N. W. 199, 200, 68 Iowa, 619.

"General" means not specific, vague, indefinite. *Cribbs v. Benedict*, 44 S. W. 707, 711, 64 Ark. 555.

#### **Notorious distinguished.**

See "Notorious."

#### **Public synonymous.**

The terms "public" and "general" are sometimes used as synonymous, meaning merely that which concerns a multitude of persons. *Stockton v. Williams* (Mich.) 1 Doug. 546, 570 (citing Greenl. Ev. 152).

#### **Unity imported.**

The words "joint" and "general" import unity, as distinguished from the word "separate," which implies division and distribution. *Merrill v. Pepperdine*, 36 N. E. 921, 922, 9 Ind. App. 416.

#### **GENERAL ACCEPTANCE.**

A general acceptance of a bill is an acceptance according to the tenor of the bill, and not qualified by any statement or condition. *Rowe v. Young*, 2 Brod. & B. 180.

By a general acceptance, the acceptor undertakes to pay the bill at any place where he may be called upon. By a special acceptance, he undertakes to pay at the place named in the bill. *Cowie v. Halsall*, 4 Barn. & Ald. 197, 198.

"In Story on Bills, § 239, it is said that an acceptance is general when it imports an absolute acceptance precisely in conformity to the tenure of the bill itself. It is conditional or qualified when it contains a qualification, limitation, or condition different from what is expressed on the face of the bill, or from what the law implies upon a general acceptance. It is qualified when the drawee absolutely accepts the bill, but makes it payable at a different time or place, or for a different firm, or in a different mode from that which is the tenure of the bill." *Todd v. Bank of Kentucky*, 67 Ky. (3 Bush) 626, 628.

An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only, and not elsewhere. *Ann. Codes & St. Or.* 1901, § 4542; *Code Supp. Va.* 1898, § 2841a; *Rev. Codes N. D.* 1899, § 1055.

#### **GENERAL ACT.**

See "General Law."

#### **GENERAL ADMINISTRATOR.**

General administrators are of two kinds: (1) When the grant of administration is un-

limited, and the administrator is required to administer the whole estate under the intestate laws; (2) when the grant is made with the annexation of the will which is the guide to the administrator to administer and distribute the estate. *Clemens v. Walker*, 40 Ala. 189, 198 (quoting *Bouv.*).

#### **GENERAL AFFIRMATIVE CHARGE.**

The "general affirmative charge," strictly speaking, is without hypothesis, and imperatively directs the verdict; but, in the common parlance of the bench and bar, a charge with hypothesis, "if the jury believe the evidence," they will find so and so, is also known as the "general affirmative charge," though the phrase "with hypothesis" is often added in naming such an instruction. Hence an exception that the court refused to give the general affirmative charge in favor of defendant is too indefinite to authorize its consideration on appeal. *Dannelley v. State*, 30 South. 452, 130 Ala. 132.

#### **GENERAL AGENCY OR AGENT.**

A general agent is one who is employed to transact every business of a particular kind. *Gibson v. J. Snow Hardware Co.*, 10 South. 304, 307, 94 Ala. 346; *Edwards v. Home Ins. Co.*, 73 S. W. 881, 885, 100 Mo. App. 695 (citing *Butler v. Maples*, 76 U. S. [9 Wall.] 768, 19 L. Ed. 822); *Lobdell v. Baker*, 42 Mass. (1 Metc.) 193, 202, 35 Am. Dec. 358.

A general agent is an agent who is empowered to transact all the business of his principal of a particular kind or in a particular place. *Baldwin v. Tucker* (Ky.) 65 S. W. 841, 842, 57 L. R. A. 451; *South Bend Toy Mfg. Co. v. Dakota Fire & Marine Ins. Co.*, 52 N. W. 866, 867, 3 S. D. 205; *Sawin v. Union Bldg. & Sav. Ass'n*, 64 N. W. 401, 403, 95 Iowa, 477; *Robinson v. Aetna Ins. Co.*, 30 South. 665, 666, 128 Ala. 477; *British & A. Mortg. Co. v. Cody*, 33 South. 832, 834, 135 Ala. 622; *Pacific Biscuit Co. v. Dugger*, 67 Pac. 32, 40 Or. 362; *Scott v. McGrath* (N. Y.) 7 Barb. 53, 55; *Ruby v. Talbott*, 21 Pac. 72, 77, 5 N. M. 251, 3 L. R. A. 724; *First Nat. Bank of Macon v. Nelson*, 38 Ga. 391, 399, 95 Am. Dec. 400; *Union Stockyard & Transit Co. v. Mallory, Son & Zimmerman Co.*, 157 Ill. 554, 41 N. E. 888, 891, 48 Am. St. Rep. 341; *Halladay v. Underwood*, 90 Ill. App. 130, 132.

"A general agency exists when there is a delegation to do all acts connected with a particular trade, business, or employment." *Great Western Min. Co. v. Woodmas of Alston Min. Co.*, 20 Pac. 771, 773, 12 Colo. 46, 13 Am. St. Rep. 204; *Western Homestead & Irrigation Co. v. First Nat. Bank*, 47 Pac. 721, 724, 9 N. M. 1; *Fishbaugh v. Spunaugle*, 92 N. W. 58, 59, 118 Iowa, 337; *Trundy v. Farrar*, 32 Me. 225, 227.

By "a general agent" is understood not merely a person substituted in the place of another for transacting all manner of business, but a person whom a man puts in his place to transact all his business of a particular kind, as to buying and selling certain kinds of wares, to negotiate certain contracts, and the like. *Jaques v. Todd* (N. Y.) 3 Wend. 83, 90; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. (12 Casey) 498, 78 Am. Dec. 390; *De Turck v. Matz*, 36 Atl. 861, 863, 180 Pa. 347.

General agency implies authority in the agent to act generally in all the business usually conducted by the principal. *Birmingham Mineral R. Co. v. Tennessee Coal, Iron & R. Co.*, 28 South. 679, 682, 127 Ala. 137.

By Comp. Laws, § 3980, a general agent is defined as one who is intrusted by the principal with the possession of the thing sold, and who has authority to receive the price. *Schull v. New Birdsall Co.*, 86 N. W. 654, 655, 15 S. D. 8.

Comp. Laws, § 6463, permitting a summons on a corporation garnishee to be served "on the president, cashier, secretary, treasurer, general or special agent, superintendent, or other principal officer," while very indefinite, does not mean every man who is intrusted with a commission or an employment, but means agents who, either generally or in respect to some particular department of the corporate business, have a controlling authority, either general or special. *Lake Shore & M. S. Ry. Co. v. Hunt*, 39 Mich. 469, 471.

The terms "general agent" and "special agent" are relative. An agent may have power to act for his principal in all matters. He is then strictly a general agent. He may have power to act for him in particular matters. He is then a special agent. But within the scope of such particular matters his powers may be general, and with reference thereto he is a general agent. The term "general agent" includes one authorized to make sales of his principal's machinery in certain localities, and hence notice to him of defects in a machine was notice to the principal. *Springfield Engine & Thresher Co. v. Kennedy*, 84 N. E. 856, 859, 7 Ind. App. 502.

#### **General manager synonymous.**

The terms "general manager" and "general agent," when applied to a railroad company, are synonymous. The general agent of such a company is virtually the corporation itself, and therefore has authority to bind the company for the expenses of board and attendance for an injured brakeman. *Atlantic & P. R. Co. v. Reisner*, 18 Kan. 458, 460.

#### **Insurance company.**

A general agent of an insurance company is one who is authorized to accept risks and settle terms of insurance, and to carry them into effect by issuing and renewing policies. *Walsh v. Hartford Fire Ins. Co.* (N. Y.) 9 Hun, 421, 423.

In the insurance business an agent is termed a general agent rather with reference to the geographical extent of his authority, in contradistinction to a local agent, who may have original powers, though exercising them within more restricted limits. *Syndicate Ins. Co. v. Catchings*, 16 South. 46, 50, 104 Atl. 176.

The extent of territory which is to be the field of agency of an insurance agent is no test of the extent of the agent's authority within that field. His operations may include the whole United States, and yet his powers be special and limited. On the other hand, his field or operations may be confined to a single county or city, and yet his authority within that field be unlimited. *Ermentrout v. Girard Fire & Marine Ins. Co.*, 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481. The fact that a receipt for a premium given by an agent bore the words "district agent" did not show that he was a general agent. *Cyrenius v. Mutual Life Ins. Co.*, 46 N. Y. Supp. 549, 553, 18 App. Div. 599.

A general agent of an insurance company, within the meaning of Acts 1895, p. 80, taxing insurance agents, is one who represents any insurance company in the state, or who exercises general supervision over the business of such insurance company, or over local agents in the state, or subdivision of the state. *Eichlitz v. State*, 46 S. W. 643, 39 Tex. Cr. R. 486.

Agents appointed by an insurance company, and supplied with blank policies properly signed by the company, which they were authorized to fill up, countersign, and deliver to the assured, were constituted the general agents of the insurers in the matter of soliciting and accepting risks, agreeing upon and settling the terms of insurance, and carrying the same into effect by issuing the policies. *Continental Ins. Co. v. Ruckman*, 20 N. E. 77, 79, 127 Ill. 364, 11 Am. St. Rep. 121.

The powers of insurance agents to bind their companies are varied by the character of the functions they are employed to perform. Their powers in this respect may be limited by the companies. The parties dealing with them as to matters within the real or apparent scope of their agency are not affected by such limitations unless they had notice of the same. An insurance agent clothed with authority to make contracts and to issue policies stands in the stead of

the company to the assured. His acts and declarations in reference to such business are the acts and declarations of the company. *Rivara v. Queen's Ins. Co.*, 62 Miss. 720, 728. And such an agent is the general agent of the company. *Phenix Ins. Co. v. Bowdre*, 7 South. 596, 598, 67 Miss. 620, 19 Am. St. Rep. 326.

#### **Partner.**

Where a partnership was engaged in the purchase and sale of sheep, the purchases being intrusted to one of the partners, he was a general agent of the members of the firm, and his knowledge as to the condition of sheep purchased was the knowledge of all the partners; and the fact that he sold out his interest to his associates before they sold the sheep did not divest such associates of their previous knowledge, or affect their responsibility, on its being shown that the sheep were diseased, although they had no actual knowledge of such disease. *Jeffrey v. Bigelow* (N. Y.) 13 Wend. 518, 520, 28 Am. Dec. 476.

#### **Power to sell.**

A general and special agency to transact all manner of business does not necessarily include the power to sell real estate. *Hodge v. Combs*, 66 U. S. (1 Black) 192, 194, 17 L. Ed. 157.

The mere fact that one constitutes another his "general and special agent to do and transact all manner of business" does not necessarily authorize the agent to sell stocks or other property of the principal. If, however, it should appear that the paper was presented as a power of attorney to transfer the stock on the books, and if a transfer had been made on the faith of its sufficiency to one who had paid a valuable and full consideration, a case would have been presented which might have called for a liberal construction of the vague and indefinite instrument. In this case, however, none of these facts appeared, and consequently the court made no definite decision on what construction the paper might be constrained to yield under such circumstances. *Hodge v. Combs*, 66 U. S. (1 Black) 192, 194, 17 L. Ed. 157.

#### **Special distinguished.**

"The distinction between a general and special agent is well settled. The acts of the former bind the principal, whether in accordance to his instructions or not. Those of the latter do not, unless strictly within his authority. *Rossiter v. Rossiter* (N. Y.) 8 Wend. 494, 497, 24 Am. Dec. 62.

"The difference between a general and a special agent is said to be this: The former is appointed to act in the affairs of his principal generally, and the latter to act

concerning some particular object. In the former case the principal will be bound by the acts of his agent within the scope of the general authority conferred on him, although the acts are violative of his private instructions and directions. In the latter case, if the agent exceeds the special authority conferred on him, the principal is not bound by the acts." *Wood v. McCain*, 7 Ala. 800, 804, 42 Am. Dec. 612.

The distinction between general and special agency is sometimes very unsatisfactory. The Supreme Court of the United States, in *Butler v. Maples*, 76 U. S. (9 Wall.) 766, 19 L. Ed. 822, defined the difference in these words: "The distinction between the two kinds of agencies is that the one is created by power given to do acts of a class, and the other by power to do individual acts only." Whether, therefore, an agency is general or special, is wholly independent of the question whether the power to act within the scope of the authority given is unrestricted, or whether it is restrained by instructions or conditions imposed by the principal relative to the mode of its exercise; and, where a general railroad attorney has power to employ local attorneys, he is a general agent, and his act in employing a local attorney at a yearly salary will be binding on his principal. *Cross v. Atchison, T. & S. F. Ry. Co.*, 42 S. W. 675, 679, 141 Mo. 132.

The distinction between a general and special agent, as stated by Wait in his work on *Law and Practice*, vol. 1, p. 215, is: "A general agent is one who is authorized to transact all the business of his principal, or all his business of some particular kind or at some particular place. The principal will be bound by the acts of a general agent, if the latter acted within the usual and ordinary scope of the business in which he was employed, notwithstanding he may have violated the private instructions which the principal may have given him, provided that the person dealing with such agent was ignorant of such violation, and that the agent exceeded his authority. The authority of an agent being limited to a particular business does not make it special. It may be as general in regard to that as though its range were unlimited. A special agent is one who is authorized to do one or more specific acts in pursuance of instructions, or within restrictions necessarily implied from the act to be done. The principal is not bound by the acts of a special agent if he exceeds the limits of his authority. It is the duty of every person who deals with a special agent to ascertain the extent of the agent's authority before dealing with him. If this is neglected, such person will deal at his peril, and the principal will not be bound by any act which exceeds the particular authority given." And hence an agent authorized to purchase wheat for his principal, using sacks

belonging to such principal, and furnished with a warehouse owned or used by the principal, but privately instructed to purchase for cash only, is a general and not a special agent, and his principal is bound by his purchase of wheat on credit of one ignorant of the limitation on his authority. *Cruzan v. Smith*, 41 Ind. 288, 297.

A general agent is usually authorized to do all acts connected with the business or employment in which he is engaged, while a special agent is one authorized to do specific acts in pursuance of particular instructions, or with restrictions necessarily implied from the act to be done; but in either case, if the agent exceeds the authority conferred, his acts will not bind the principal. *Godshaw v. J. N. Struck & Bro.*, 58 S. W. 781, 109 Ky. 285, 51 L. R. A. 688.

A general agency, as used in Code Civ. Proc. 1883, § 40, providing that, in a suit against a corporation, service may be made on the president, cashier, treasurer, or general agent, exists where there is a delegation to the agent to do all the acts connected with a particular trade, business, or employment. A special agency exists where there is a delegation of authority to do a single act, and, while the powers of a general agent may be liberally construed, those of a special agent are limited by the terms in which they are conferred, and he takes nothing by implication. The terms "general or special agent," as used in designating an officer of a corporation on whom service may be made, are very indefinite; but they evidently mean agents who, either generally, or in respect to some particular department of the corporate business, have a controlling authority, either general or special. A person employed by a mining corporation to oversee the laborers and to keep their time, and to perform the duties of shift boss, and who, in the absence of the general agent, employed men, and bought supplies for them, and paid them their wages, and reported his acts and doings to the general agent, but made no communications to the company direct, and kept no books and had no office, and was not held out by the company as an agent, and did not represent himself to be an agent, was not a general agent, within the meaning of the statute, as his duties and powers were limited, and not in any manner connected with the general management and supervision of the affairs of the company. *Great Western Min. Co. v. Woodmas of Alston Min. Co.*, 20 Pac. 771, 773, 774, 12 Colo. 46, 13 Am. St. Rep. 204.

The word "general" has a very broad significance to the layman, and, when we recognize the difficulty which courts experience in their attempts to determine what is a general agent, and the extent and limitations of his powers, it can be very readily

seen that the use of the term "general agency" in an instruction would tend to mislead the jury, and that they would naturally infer that the agent had a greater authority than the law would imply. *Merchants' Insurance Co. v. New Mexico Lumber Co.*, 51 Pac. 174, 180, 10 Colo. App. 223.

#### **Train conductor.**

The conductor of a train, so far as concerns the direct and immediate management of the train when it is out on the road, is, in the absence of some superior officer, the general agent of the company, and, as such agent, is empowered to employ surgical assistance when a brakeman of his train is injured while the train is out on the road, and where there is no superior officer present, and there is an immediate necessity for surgical treatment. *Terré Haute & I. R. R. Co. v. McMurray*, 98 Ind. 358, 368, 49 Am. Rep. 752.

#### **GENERAL APPEARANCE.**

A general appearance waives all question of the service of process. It is equivalent to personal service. *Creighton v. Kerr*, 87 U. S. (20 Wall.) 8, 12, 22 L. Ed. 309. Where defendant stipulated, by its solicitor, to file an answer to an amended bill upon the merits in consideration of an extension of time given it for that purpose, and, in pursuance thereof, to file such answer, it voluntarily submitted itself to the jurisdiction of the court. *Seattle, L. S. & E. R. Co. v. Union Trust Co. (U. S.)* 79 Fed. 179, 187, 24 C. C. A. 512.

A general appearance is not of itself a waiver of the right to object to a defect in a process. *In re Shelton St. Ry. Co.*, 39 Atl. 446, 447, 70 Conn. 329 (citing *Payne v. Farmers' & Citizens' Bank*, 29 Conn. 415).

An appearance to file an affidavit for defense, and argue a rule for judgment, is a general appearance. *Hoffman v. Kramer*, 3 Pa. Dist. R. 238.

Where the transcript of the justice of the peace showed an appearance by an attorney on a motion to quash the attachment, it will be regarded as an appearance in general, and the defendant will be estopped from a motion to dismiss the case when taken to the district court on an appeal for the want of personal service. *Deshler v. Foster (Iowa)* Morris, 403.

Taking an appeal or suing out a writ of error from an inferior court to an intermediate court, which tries the same de novo, constitutes a general appearance in the intermediate court. *Louisville & N. R. Co. v. S. D. Chestnut & Bro. (Ky.)* 72 S. W. 351, 353 (citing 3 Cyc. 510; *Grace v. Taylor*, 4 Ky. [1 Bibb] 330; *Lillard v. Brannin*, 91 Ky. 511, 16 S. W. 349).

Where a defendant appears and asks relief which can be granted only on the hypothesis that the court has jurisdiction, the appearance is general, and he submits to the jurisdiction. But if the granting of the relief would be consistent with a want of jurisdiction, the appearance is special. Therefore an appearance by a defendant in attachment, who has not been served with process, to move to discharge the attachment for want of jurisdiction, on the ground that the action was brought in the wrong county, is a special appearance, and hence is not a waiver of the failure to serve process. *Belknap v. Charlton*, 34 Pac. 758, 759, 25 Or. 41.

A motion to set aside a judgment on the ground that the summons was not served on defendant is not a general appearance, though defendant's attorney did not qualify his signature by saying, "Attorney for the purpose of this motion only." *Noble v. Crandall*, 2 N. Y. Supp. 265, 49 Hun, 474.

#### GENERAL APPRAISERS.

The term "general appraisers" is the name generally used to designate the appraisers appointed under Act Cong. March 8, 1851, directing that four appraisers should be appointed to afford aid and assistance in the appraisement of merchandise imported. *Gibb v. Washington (U. S.)* 10 Fed. Cas. 288, 289.

#### GENERAL ASSEMBLY.

As court, see "Court."

The term "Legislature" is synonymous with "General Assembly." *State v. Gear*, 5 Ohio Dec. 569.

#### GENERAL ASSIGNMENT.

A general assignment is not the conduct or management of the corporate business, but its termination and destruction. It is not the disposition of the corporate property which must be made from time to time to carry on the corporate business, but the termination and destruction of the power to make such disposition. It is not the payment of the corporate deed, but ordinarily it is an assertion that they cannot be paid, and hence does not hold within the implied powers of the board of directors. In re *Bates Mach. Co. (U. S.)* 91 Fed. 625, 628.

##### As a transfer of all property.

The term "general assignment," in its ordinary legal significance, means an assignment by a debtor transferring all of his property in general terms to an assignee in trust for all his creditors. *Royer Wheel Co. v. Fielding*, 101 N. Y. 504, 5 N. E.

431; *Tiemeyer v. Turnquist*, 85 N. Y. 516, 522, 39 Am. Rep. 674; *Brown v. Guthrie*, 18 N. E. 254, 255, 110 N. Y. 435; *Knapp v. McGowan*, 96 N. Y. 75, 87; *People v. Mercantile Credit Guarantee Co.*, 67 N. Y. Supp. 447, 453, 55 Am. Div. 594.

The term "general assignment" means a transfer to an assignee of all the property, or substantially all the property, of a failing or insolvent debtor for the benefit of his creditors at large, making no discrimination or preference among them. *Halsey v. Connell*, 20 South. 445, 111 Ala. 221.

A general assignment is one by which the grantor conveys substantially all his property which is subject to legal process from the courts of the state in which he resides. *Longmire v. Goode*, 38 Ala. 577, 578.

"A general assignment is an assignment of all one's assets to an assignee for the benefit of creditors. It is the completeness of the transfer that gives it character." *Warner v. Littlefield*, 50 N. W. 721, 725, 89 Mich. 329.

A general assignment, as known to the common law, is defined by Burrill as an assignment by which all, or substantially all, the debtor's property is appropriated for the benefit of either one or more preferred creditors, or of the creditors at large, made by a debtor in declining or insolvent circumstances. *Anniston Loan & Trust Co. v. Ward*, 18 South. 937, 938, 108 Ala. 85; *Bank of Opelika v. Kiser*, 24 South. 11, 13, 119 Ala. 194.

It is of the very nature and essence of a general assignment for the benefit of creditors that it shall pass all property and rights of property capable of assignment or transfer, whether the title or interest of the assignor be legal or equitable. If the assignor has property or rights which are legal assets (assets which may be reached by legal process and subject to the payment of debts), and he applies them to pay or to secure particular creditors, having and retaining assets of considerable value, which are equitable, in which he has a beneficial interest, the legal title outstanding in another, in trust for him, the assignment or transfer of the legal assets is but a partial, and not a general, assignment. *Bank of Opelika v. Kiser*, 24 South. 11, 13, 119 Ala. 194.

A general assignment, within the meaning of Pamph. Acts 1896-97, pp. 1089, 1090, entitled "An act to further define general assignments, and prevent fraudulent dispositions of property," is a voluntary transfer by a debtor of all, or substantially all, of his property subject to the payment of debts, for the security of one or more creditors in preference to others. *Builders' & Paint-*

ers' Supply Co. v. Lucas, 24 South. 416, 417, 119 Ala. 202.

The term "general assignment," as used in St. 1843, providing that all general assignments hereafter made by debtors for the benefit of creditors shall be null and void as against debtors of such creditors, means an assignment of substantially all a man's property. It is not needful that an assignment should include absolutely all the debtor's property, but it should be substantially all, so that, for the purpose of continuing his business or paying his debts or future subsistence, he might just about as well include the part omitted. "The term 'general,' as applied to assignments, does not have reference probably so much to the proportion of creditors as to the proportion of property." Burrill, Assignm. § 122, lays down the rule as to the number of creditors thus: "A general assignment is understood to import a provision for a considerable number of creditors, or at least for several or more than one. If the property omitted was insignificant in amount, with reference to the whole, or if it was mainly beyond the reach of process or exempt from process, or of such a character as not readily to be made available either to the creditors or to the debtor, and the great mass of the debtor's available property, which constitute the basis of his business operations, and which could alone form no reliance to himself for support, or to his creditors for payment, was included in the deed, the deed should undoubtedly be regarded as a general assignment." Mussey v. Noyes, 26 Vt. 462, 471.

A conveyance by a debtor to a trustee for distribution of the proceeds among specified creditors, reciting in the conveyance that such goods are only a part of his property, is not a general assignment for the benefit of creditors, within a credit insurance policy insuring against any loss sustained by reason of the insolvency of debtors of the insured, and defining such losses as those arising on sales by the insured persons who have made a general assignment for the benefit of their creditors; and the words "general assignment" will not be held to mean any such disposition by a debtor of his property as induces insolvency, in the ordinary meaning of the term. Goodman v. Mercantile Credit Guarantee Co., 45 N. Y. Supp. 508, 511, 17 App. Div. 474.

An assignment purporting to transfer all the assignor's debts and book accounts for collection, the proceeds to go first toward paying two small debts named, and the balance, if any, to the assignor's wife, is not, in substance, a general assignment, since it does not profess to transfer all the assignor's property, nor to provide for all his debts. Tiemeyer v. Turnquist, 85 N. Y. 516, 522, 39 Am. Rep. 674.

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#### **Bill of sale or deed distinguished.**

There is a broad and well-defined distinction between a general assignment for the benefit of creditors and a deed or bill of sale. The former is a transfer by a debtor of his property to another in trust to sell and convert into money, and distribute the proceeds among his creditors; and it implies a trust, and contemplates the intervention of a trustee. The other imports an absolute sale and transfer of the title, to be held and enjoyed by the purchaser without any attending trust. Young v. Stone, 70 N. Y. Supp. 558, 561, 61 App. Div. 364; Tompkins v. Hunter, 43 N. E. 532, 533, 149 N. Y. 117.

#### **As an act of insolvency.**

See "Act of Insolvency."

#### **Pledge distinguished.**

To constitute a general assignment, it must, in the first place, be general; that is, it must include all of the debtor's property. The assignee must be the trustee, and not the absolute owner, mortgagee, or pledgee. The essential difference between a general assignment to an assignee in trust and a pledge is that in one case the absolute title passes to the assignee, while in the case of a pledge the title remains in the pledgor; and it is the right of possession, and to hold or apply the pledge to secure the debt, that is vested in the pledgee. A transfer of property by a debtor to several creditors, which recites that it is security for the debts, and authorizes the creditor to sell the property, apply the proceeds to the debts, and return excess, if any, to the debtor, is not a general assignment, but a pledge. Maass v. Falk, 24 N. Y. Supp. 448, 450, 70 Hun, 598.

#### **Appointment of receiver.**

A general assignment is the voluntary act of a debtor, whereby he transfers his property to a trustee for the benefit of creditors. The appointment of a receiver to settle up the affairs of a firm which was unable to pay its debts, but the individual partners were not insolvent, is not a general assignment, so as to render it an act of bankruptcy, though the consequences which attached to the appointment of the receiver are similar to those which result to creditors from a general assignment. Vaccaro v. Security Bank (U. S.) 108 Fed. 436, 439, 43 C. C. A. 279.

#### **Transfer to single creditor.**

A transfer by an insolvent of all his property to one of several of his creditors, to be applied to the payment of a bona fide debt, is not a general assignment for the benefit of creditors, within the meaning of Laws 1887, c. 503, providing that, in all general assignments of estates of debtors

for the benefit of creditors, no preference shall be valid, except to the amount of one-third of the value of the assigned estate. *Tompkins v. Hunter*, 43 N. E. 532, 533, 149 N. Y. 117; *Tompkins v. First Nat. Bank*, 18 N. Y. Supp. 234, 235.

#### As creating a trust.

In determining whether an instrument was in legal effect a general assignment, or only a chattel mortgage, it was held that an assignment contemplates the intervention of a trustee, and implies a trust. *May v. Tenny*, 13 Sup. Ct. 491, 494, 148 U. S. 60, 37 L. Ed. 368.

The material and essential characteristic of a general assignment is the presence of a trust; and, while it cannot be said that every transfer of property to trustees for the benefit of creditors is an assignment, yet, when a continuing trust is created, as by the conveyance by partners in failing circumstances of all their individual and partnership property in trust, to be collected, sold, and disposed of, and converted into money, and to be divided equally among certain designated creditors, and the surplus, if any, to be returned to them, in consideration of their release from all liabilities to such creditors, is a general assignment. *Sabichi v. Chase*, 41 Pac. 29, 31, 108 Cal. 81.

The material and essential characteristic of a general assignment is the presence of a trust. The assignee is merely a trustee, and not an absolute owner. He buys nothing and pays nothing, but takes the title for the performance of trust duties. Thus an agreement by defendant with a debtor, who owes him \$980, to take a chattel mortgage on property worth about \$2,500 to secure the debt, and \$600 advanced on the assuming of debts amounting to \$619, and to pay any surplus that might remain to the debtor on selling the property, was not a general assignment. *Brown v. Guthrie*, 18 N. E. 254, 255, 110 N. Y. 435.

#### GENERAL AVERAGE.

General average is a loss arising out of extraordinary sacrifices made or extraordinary expenses incurred for the joint benefit of the ship and cargo. The rule is that, where there is a common danger to the vessel and the cargo, everything which is saved by one continued, unremitted effort, shall pay the expense in proportion to its value. It means that what is given for the general benefit of all shall be made good by the contribution of all. *Louisville Underwriters v. Pence*, 19 S. W. 10, 12, 40 Am. St. Rep. 176. See, also, *Simonds v. White*, 9 E. C. L. 251, 253; *Bargett v. Orient Mut. Ins. Co.*, 16 N. Y. Super. Ct. (3 Bosw.) 885, 895; *Lee v. Grinnell*, 12 N. Y. Super. Ct. (5 Duer) 400, 410; *Wadsworth v. Pacific Ins. Co.* (N. Y.) 4

Wend. 33, 39; *Columbian Ins. Co. v. Ashby*, 38 U. S. (13 Pet.) 331, 342, 10 L. Ed. 186; *McAndrews v. Thatcher*, 70 U. S. (3 Wall.) 347, 370, 18 L. Ed. 155; *Dupond De Memours v. Vance*, 60 U. S. (19 How.) 162, 176, 15 L. Ed. 584; *Williams v. Suffolk Ins. Co.* (U. S.) 29 Fed. Cas. 1406, 1407; *Potter v. Ocean Ins. Co.* (U. S.) 19 Fed. Cas. 1173, 1177; *The Joseph Farwell* (U. S.) 31 Fed. 844; *Bowring v. Thebaud* (U. S.) 42 Fed. 794, 797; *Emery v. Huntington*, 109 Mass. 431, 435, 437, 12 Am. Rep. 725; *Padelford v. Boardman*, 4 Mass. 548, 550; *Wilson v. Cross*, 33 Cal. 60, 69; *Louisville Marine & Fire Ins. Co. v. Bland*, 39 Ky. (9 Dana) 143, 147; *Lyon v. Alvord*, 18 Conn. 66, 74; *Broadnax v. Cheraw & S. R. Co.*, 27 Atl. 412, 413, 157 Pa. 140; *The Bevan v. Bank of United States*, 4 Whart. 301, 308, 33 Am. Dec. 64; *Cheraw & S. R. Co. v. Broadnax*, 109 Pa. 432, 439, 1 Atl. 228, 58 Am. Rep. 733.

In order to constitute a case for general average, three things must concur: (1) A common danger; a danger in which ship, cargo, and crew all participate; a danger imminent and apparently inevitable, except by voluntarily incurring the loss of a portion of the whole to save the remainder. (2) There must be a voluntary jettison or casting away of some portion of the joint concern, for the purpose of avoiding this imminent peril, or, in other words, a transfer of the peril from the whole to a particular portion of the whole. (3) This attempt to avoid the imminent common peril must be successful. *The Congress* (U. S.) 6 Fed. Cas. 277, 278; *British American Assur. Co. v. Wilson*, 31 N. E. 938, 940, 132 Ind. 278; *Son-smith v. J. P. Donaldson* (U. S.) 21 Fed. 671, 674; *Barnard v. Adams*, 51 U. S. (10 How.) 270, 303, 13 L. Ed. 417.

The rule for contribution in general average is older than, and entirely aside from, the common law; is a rule both of equity and policy, which has come down through the centuries from an old Rhodian law, adopted in the Roman jurisprudence, and thence entered into the general maritime law. It appears to have been preserved in England without enforcement by statute. It applies only to shipping, and prescribes that, in all cases of imminent peril to the whole adventure, where release is obtained by intentional sacrifice of any part for the benefit of the residue, contribution shall be made by the saved portions for that which was so sacrificed. The common peril takes from the master of the vessel his paramount obligation to his vessel owners, and charges him with a joint agency for the owners of a cargo and vessel, to act impartially, decide when a sacrifice is necessary, and select for sacrifice that which will best serve the interest of all to avoid the peril. It is the safety of the property, and not of the voyage, which constitutes the true foundation

of general average. The vessel is made to contribute as well as the cargo saved, not because of its undertaking to carry out, or out of any duty as carrier, but because it has encountered peril, and has been saved to the owners by a sacrifice of other property. *The Roanoke* (U. S.) 59 Fed. 161, 163, 8 C. C. A. 67.

"General average contribution is defined to be a contribution by all the parties in a sea adventure to make good the loss sustained by one of their number on account of sacrifice voluntarily made on account of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for ordinary expenses necessarily incurred by one or more of the parties for the benefit and interest of all the parties embarked in the enterprise. Losses which give a claim to general average are usually divided into two grade classes: (1) Those which arise from sacrifice of part of the ship or part of the cargo, purposely made in order to save the whole adventure from perishing. (2) Those which arise out of extraordinary expenses incurred for the joint benefit of ship and cargo." *Star of Hope v. Annan*, 76 U. S. (9 Wall.) 203, 223, 19 L. Ed. 638.

A general average consists in a purpose, a means, and the result. It is a design to avert a common danger by the sacrifice voluntarily made, and a successful issue. *Nimick v. Holmes*, 25 Pa. (1 Casey) 366, 372, 64 Am. Dec. 710.

"General average," in maritime law, means the liability to contribution of the owners of a cargo, which arises when a sacrifice of a part of such cargo has been made for the preservation of the residue, or when money is expended to preserve the whole. Thus the loss occasioned by cutting away the mast or throwing goods overboard to lighten the ship in a storm, or money paid to redeem ship and cargo, which had been captured, are species of general average. Ship, cargo, and freight have been benefited, and therefore all must contribute. "To produce a general average, the agency and consent of man must intervene; but such agency and consent, though in one sense voluntary, are, upon the whole, involuntary. General average always arises from actions produced by necessity." Hence a promise made to the recaptors of a vessel, which prevented a sale of both ship and cargo, falls within the rule of general average, for it was for the benefit of all concerned. *Sanson v. Ball* (Pa.) 4 Dall. 459, 461, 1 L. Ed. 908.

A carrier by water may, when in case of extreme peril it is necessary for the safety of the ship or cargo, throw overboard or otherwise sacrifice any or all of the cargo or appurtenances of the ship. Throwing prop-

erty overboard for such purpose is called "jettison," and the loss incurred thereby is called a "general average loss." Rev. Codes N. D. 1899, § 4214; Civ. Code S. D. 1903, § 1567; Civ. Code Cal. 1903, § 2148.

#### **Sacrifice by stranger.**

A sacrifice of vessel or cargo by the act of a stranger to the adventure, although authorized by the municipal law to make the sacrifice for the protection of his own interests or those of the public, gives no right of contribution either for or against those outside interests, or even as between the parties to the common adventure. *Ralli v. Troop*, 15 Sup. Ct. 657, 660, 157 U. S. 386, 39 L. Ed. 742.

#### **Salvage distinguished.**

"General average is commonly understood to arise from some voluntary act done, or sacrifice or expense incurred, for the benefit of all concerned in the voyage or adventure; and then it is apportioned on all the interests which partake of the benefit. But the mere fact that an apportionment is made of a loss between the different parties in interest, if the loss itself does not arise from some act or sacrifice or expense voluntarily incurred for the common benefit, does not make it necessarily a case of general average, by our law. Salvage is properly a charge apportionable upon all the interests and property at risk in the voyage which derive any benefit therefrom. But though it is often in the nature of general average, it is far from being universally true that, in the sense of our law, all salvage charges are to be deemed a general average. On the contrary, these charges are sometimes a simple average or partial loss." *The Queen of the Pacific* (U. S.) 18 Fed. 700, 701; *Peters v. Warren Ins. Co.* (U. S.) 19 Fed. Cas. 370, 371.

#### **Voluntary stranding.**

General average, for which the property of a ship saved is bound to contribute, should be construed to include a voluntary stranding of a ship in a case of imminent peril for the preservation of the crew, the ship, and cargo, followed by a total loss of the ship. *Columbian Ins. Co. v. Ashby*, 38 U. S. (13 Pet.) 331, 341, 10 L. Ed. 186.

In order that the doctrine of general average may apply, a sacrifice of ship or cargo must be purely voluntary. Where a vessel, being in a position where she is certain to run ashore and be wrecked, is voluntarily headed for the shore and beached by the captain, in order that the lives of the crew and the cargo may be better saved, no case of general average can arise. *Meech v. Robinson* (Pa.) 4 Whart. 860, 363, 34 Am. Dec. 514.



**GENERAL BAD CHARACTER.**

"General bad character," as used in reference to the impeachment of a witness, means that his general character for truth and veracity is bad. "A general bad character in other respects is of no consequence. All experience shows that the general characters of many men are bad, in the common acceptance of the word, while their veracity is unimpeachable. Indeed, most men term that man's general character bad who has one cardinal vice, although in other respects he may be irreproachable. In short, proof of general bad character, as the term is generally understood and used in society, does not necessarily and legally prove the fact that the witness' character for veracity was bad." *Gilbert v. Sheldon* (N. Y.) 13 Barb. 623, 626.

**GENERAL BENEFITS.**

The general benefits derived by the owner of a lot from the erection of an elevated railroad in the street are such as are bestowed upon other lands of similar character and situation in the same vicinity. *Lake Roland El. Ry. Co. v. Frick*, 37 Atl. 650, 651, 86 Md. 259 (citing 3 Elliott, R. R. § 989).

Within the rule that, in appraising the amount to be paid to the owner where a portion of a tract of land is taken by the exercise of the right of eminent domain for a railroad, there may be deducted from the damages the value of the special benefits of the improvement to the remainder of the tract, but not the value of any general benefits, a general benefit is an advantage conferred by the public work upon all property within range of its utility, while a special benefit is an advantage conferred upon a tract by reason of the maintenance of a public work upon it. *Rand. Em. Dom.* §§ 269, 270. As defined by Lewis, "General benefit consists of an increase of the value of land common to the neighborhood or community generally, arising from the supposed advantages which will accrue to the community by reason of the work or improvement in question." *Lewis, Em. Dom.* § 471. Switching privileges, such as are required by the statute to be provided, are only of advantage to those who own land near or within a reasonable distance of the railroad. The benefits are not common to all the land in the community generally, but are special to the land which is so situated that they can be used. *St. Louis, O. H. & C. Ry. Co. v. Fowler*, 44 S. W. 771, 775, 142 Mo. 670.

Benefits accruing from the construction of a railroad to an owner of lands through which it passes may properly and conveniently be divided into two classes, to wit: (1) General benefits, or such as accrue to the community or the vicinage at large, such as

increased facilities for transportation and travel, and the building up of towns, and consequent enhancement of the value of lands and town lots. (2) Special benefits, or such as accrue directly and solely to the owner of the lands from which the right of way is taken, as when the excavation of the railroad track has the effect to drain a morass, and thus to transform what was a worthless swamp into valuable, arable land, or to open up and improve a water course. As to the first of these classes, we know from the debates of the convention which formed the Constitution, and from the discussions which preceded and followed the calling of that convention, as well as from the language of the Constitution itself, that it was the express design of the framers of the Constitution to exclude that class of benefits from the consideration of jurors in their assessment of compensation for rights of way appropriated by corporations. In adopting the language that "no right of way shall be appropriated to the use of any corporation until compensation therefor be first made in money or first secured by a deposit of money to the owner irrespective of any benefit from any improvement proposed by such corporation," whether the second class of special benefits are included within such provision has not been decided, and does not arise in this case. *Little Miami R. Co. v. Collett*, 6 Ohio St. 182, 184, 185.

**GENERAL BUSINESS.**

The general and ordinary business of a railroad is that of building and keeping in repair its road, furnishing rolling stock for the road, and operating it for the transportation of property and passengers; and hence an injunction restraining a holder of stock in a railway corporation from voting on such stock at an election of directors for the company did not restrain the ordinary business of the corporation. *Reed v. Jones*, 6 Wis. 680, 690.

*Rev. St. c. 129, § 7*, which provides that an "injunction to suspend the general and ordinary business of a corporation" shall not be granted, except by the court or judge, does not include an injunction to restrain the treasurer of a village from executing and delivering deeds of certain lots in such village which have been sold for the nonpayment of taxes. *Doty v. Village of Menasha*, 14 Wis. 75, 76.

An injunction to restrain a town from laying out and constructing a highway, without any funds in the treasury, and without authority to contract an indebtedness for that purpose, is not "an injunction to suspend the general and ordinary business of a corporation," which *Rev. St. § 2730*, declares "shall not be granted except by the court or presiding judge thereof." *Bay Land & Imp.*

Co. v. Town of Washburn, 48 N. W. 492, 79 Wis. 423.

### GENERAL BUSINESS MANAGER.

The term "general business manager," as used in reference to corporations, does not furnish a fixed legal standard by which the powers of the party can be measured, and it does not put any definite limitations on such powers, and a general manager does not hold an office known to the law, the duties of which are prescribed with such certainty as to enable a court to assume judicial knowledge of them. The extent of the powers of a general manager to bind a corporation depends, in part, on its by-laws, and in part on the language of the vote of the directors appointing him, and in part on their knowledge and approval of, or the acquiescence of the corporation in, the acts performed by him, and in part on usages which may be shown to exist, controlling the matter. *Swasey v. Union Mfg. Co.*, 42 Conn. 556, 559.

### GENERAL CHARACTER.

#### Of building.

A city ordinance provided that no building should be erected without a permit being first obtained, and that the building should conform, in size, general character, and appearance, to the buildings previously erected in the same locality. It was held that the expression "general character of the buildings previously erected" was too vague and indefinite to render the ordinance valid, since there was nothing to define or fix this, and there was nothing to determine the locality as to the bounds of which the conformity of buildings provided for by the ordinance is required. *Bostock v. Sams*, 52 Atl. 665, 668, 95 Md. 400, 59 L. R. A. 282, 93 Am. St. Rep. 394.

"General character," as used in Code Civ. Proc. § 1183, requiring statements for mechanics' liens to state the general character of the work to be done, does not mean a special, particular minute, or detailed description of the work to be done. "General" means relating to a genus or kind; pertaining to a whole class or order; belonging to a whole rather than to a part; not restrained or limited to a precise or detailed import; and character means account; description. Hence a statement giving a size of the lot, and stating that a frame building already thereon is to be raised, repaired, and additions made thereto, and converted into flats for the purpose of being used as tenements, is sufficient. *Joost v. Sullivan*, 43 Pac. 896, 899, 111 Cal. 286.

#### Of individual.

General character is the estimation in which a person is held in the community

where he has resided. *Douglass v. Tousey* (N. Y.) 2 Wend. 352, 354, 20 Am. Dec. 616.

"General character," as referring to the impeachment of a witness by proof of his general character, is used in contradistinction to particular facts or parts of character. *Cline v. State*, 10 S. W. 225, 226, 51 Ark. 140.

"General character," as used with reference to the impeachment of witnesses by evidence as to their general character, is not a term of absolutely definite meaning, but is sometimes vague and undefined, depending on the habits, condition of life, age, sex, etc., of the person referred to. As, for instance, no one would expect so high a degree of truthfulness from a child of tender years as from an adult person. General character may be regarded as the general view or opinion of the community in which a party lives. *State v. Turner*, 15 S. E. 602, 604, 36 S. C. 534.

"The general character of an accused is not what the majority of his neighbors think of him, and therefore a witness to such fact is not required to know what a majority of defendant's neighbors say or think of him, but the only test of his competency is whether he knows the general character of accused among his neighbors or those acquainted with him. The word 'majority' is usually understood in a less comprehensive sense than the word 'general,' and in case of doubtful reputation a bare majority might be sufficient to make the reputation good, when by regular rule it would be equivocal only. On the other hand, a person's position in a community may be so obscure that very few of his neighbors know anything of him, though his general character may be very circumscribed. To hold that he could not prove his general character, except by witnesses who could swear as to what the majority of his neighbors said or thought of him, would be to deprive him of the benefit of this species of testimony." *Dave v. State*, 22 Ala. 23, 38.

"General moral character," as used in the Code, providing that the general moral character of a witness may be proved for the purpose of testing his credibility, means general reputation, and not particular immoral acts. In *Greenl. Ev.* 1, § 461, it is said: "In impeaching the character of a witness, the examination must be confined to his general reputation, and not be permitted as to particular acts, for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared to answer to the other without notice." A person cannot be said to have a good moral character who has a reputation for any vice. The word "general," as used in the section of the statute, was designed to indicate the mode of proof, and not as im-

plying that a person's general moral character is good, which is bad only in one respect. The moral character of a witness is to be shown in a general way, and that is by his general reputation. *State v. Woodworth*, 21 N. W. 490, 492, 65 Iowa, 141.

### GENERAL CIRCULATION.

Under Cr. Code, § 47, the publication of a libel is a misdemeanor punishable by fine or imprisonment in the county jail, unless the libel is published in a newspaper having a general circulation, in which case the offender is punishable by imprisonment in the penitentiary. To constitute "general circulation," within the meaning of this statute, it is not necessary that the newspaper circulate to any considerable extent, if at all, out of the state, nor that it circulate in every county of the state, but it must extend beyond the county where it is published, and have a general circulation. *Keon v. State*, 35 Neb. 676, 678, 53 N. W. 595, 596, 17 L. R. A. 821.

A newspaper of general circulation is a newspaper published for the dissemination of local or telegraphic news, and intelligence of a general character, having a bona fide subscription list of paying subscribers, and which shall have been established, printed, and published in the state, county, city, and county, or town where such publication, notice of publication, or official advertising, is given or made, for at least one year. A newspaper devoted to the interests or published for the entertainment of a particular class, profession, trade, calling, race, or denomination, or any number thereof, is not a newspaper of general circulation. Pol. Code Cal. 1903, § 4459.

### GENERAL CONTRACT.

The words "general contract," as used in Gen. St. 1894, § 6235, providing that whenever a contractor furnishes labor, etc., and erects two or more buildings on contiguous lots, pursuant to the purposes of one general contract, it is not necessary to file a separate statement upon each building, nor to apportion the amount of the entire lien between the several buildings, do not mean an entire and indivisible contract, as to its consideration. The contract must be entire, in that it includes all of the buildings, and provides for the erection of all of them, or some portions of all of them, pursuant to the purposes of the one contract. *Johnson v. Salter*, 72 N. W. 974, 975, 70 Minn. 146, 68 Am. St. Rep. 516.

### GENERAL CONTRACTOR.

The term "general contractor," as used in the mechanic's lien act of July 11, 1870,

in reference to the means by which a general contractor may obtain a lien, "is one who contracts directly with the owner of the property, and whether his contract is to construct a part or the whole of a building, if his contract is made with the owner, he is a general contractor, in the meaning of the act." *Merchants' & Mechanics' Sav. Bank v. Dashiell (Va.)* 25 Grat. 616, 622.

### GENERAL COUNT.

A general count is one stating in a general way the plaintiff's claim. *Wertheim v. Fidelity & Casualty Co.*, 47 Atl. 1071, 72 Vt. 326.

### GENERAL COURSE.

A line in a deed described as running from a certain place on the edge of a branch to another certain point, the general course being up the said branch, should be construed to mean that the line followed the windings of the stream, and that it was not governed by a single straight line between the two points. *Wharton v. Brick*, 6 Atl. 442, 443, 49 N. J. Law, 289.

### GENERAL COURT.

The term "general court" is used in Massachusetts to designate the legislative body of the state. *Citizens' Sav. & Loan Ass'n v. Topeka*, 87 U. S. (20 Wall.) 655, 666, 22 L. Ed. 455.

### GENERAL CREDIT.

The general credit of a witness in a legal proceeding, which the opposing counsel may assail for purposes of impeachment, means the character of the witness as a credit-worthy man. *Bemis v. Kyle (N. Y.)* 5 Abb. Prac. (N. S.) 232, 233.

### GENERAL CREDITOR.

General creditors are persons who have given credit, and who have no lien or security for the payment of the debts so created. *King v. Fraser*, 23 S. C. 543, 545, 548.

A "general creditor" is one who has not procured a lien on the property by some legal process, as distinguished from a creditor who has obtained some process by which the property may be lawfully seized, and by which it is made liable either immediately or ultimately to be appropriated in satisfaction of his debt. *Wolcott v. Ashenfelter*, 23 Pac. 780, 784, 5 N. M. 442, 8 L. R. A. 691.

The term "general creditors," in the rule that general creditors cannot attack an unrecorded mortgage and obtain a preference over it, does not include general creditors after their debtor has made an assignment

for creditors. *Dempsey v. Pforzheimer*, 49 N. W. 465, 468, 86 Mich. 652, 13 L. R. A. 388.

A holder of a claim against a city, who is entitled to payment only from and out of the funds appropriated to the payment of such claim, is not a general creditor of the city. *Johnson v. City of New Orleans*, 15 South, 100, 101, 46 La. Ann. 714.

Plaintiffs held both a secured claim and an unsecured claim against the defendant, and joined with other creditors of the defendant in a composition agreement in which they all designated themselves as general creditors, and agreed to take from the defendant a certain consideration for their respective claims, the amount of each of which claims was stated; the plaintiffs stating only the amount of their unsecured claim. Held, the term "general creditors" meant unsecured creditors, and by executing the agreement the plaintiffs did not release their secured claim. *Noyes v. Chapman-Drake Co.*, 61 N. W. 901, 60 Minn. 88.

#### GENERAL CUSTOM.

A custom is general when the method of dealing is the universal method of those engaged in the business where the usage exists. *Chicago & A. R. Co. v. Harrington*, 61 N. E. 622, 628, 192 Ill. 9.

A general custom which is binding is one that is followed in all cases by all persons in the same business in the same territory, and which has been so long established that the persons sought to be charged thereby, and all others living in his vicinity, may be presumed to have known of it and acted upon it as they had occasion. A general custom existing among those forwarding farmers' produce to New York, and selling it on commission, that when the property is delivered in casks, other casks than those given shall be returned to the farmer, and those given pass to the purchaser, is a reasonable custom, and, when established, will be binding. *Sturges v. Buckley*, 32 Conn. 265, 267.

A statement that the court takes notice of the general customs of the country, does not imply that the usages of business, as a general rule, lay within the judicial notice. Those customs that have been incorporated as part of the common laws, as defined by adjudicated cases, are, beyond question, subjects of judicial notice. It is not to be denied that customs may and do become so incorporated that they had their origin since the period of time to which the common law looks as the test of antiquity. It may well be questioned whether any modern question becomes incorporated in the common law until it has been established as a matter of fact by judicial authority. The change of status of such a question from one of fact to one of law is by gradual and almost insensi-

ble steps. *Bonham v. Charlotte, C. & A. R. Co.*, 13 S. O. 267, 276.

A usage or custom must be certain and uniform and general. A custom is general when the method of dealing is the universal method of those engaged in business where the usage exists. When the custom of railroad companies in delivering cars to foreign yards to push the cars clear of the main track and close the switch is the universal method in making such deliveries, it may be said to be a general custom. *Chicago & A. R. Co. v. Harrington*, 61 N. E. 622, 628, 192 Ill. 9.

#### As a general law.

A general custom is a general law, and forms the law of a contract on the subject matter. Though at variance with its terms, it enters into and controls its stipulations, as an act of Parliament or state Legislature. *Addison v. Otway*, 2 Mod. 233, 238; *Dagget v. Snowdon*, 2 W. Bl. 1224, 1225; *Harlan v. People (Mich.)* 1 Doug. 207; *Rex v. Inhabitants of Cliviger*, 2 Term R. 263, 264; *Carson v. Blazer (Pa.)* 2 Bin. 475, 486, 487, 4 Am. Dec. 403; *Stultz v. Dickey (Pa.)* 5 Bin. 285, 287, 6 Am. Dec. 411; *Biggs v. Brown (Pa.)* 2 Serg. & R. 14, 17; *Johnson v. McIntosh*, 21 U. S. (8 Wheat.) 543, 591, 592, 5 L. Ed. 681; *Renner v. Bank of Columbia*, 22 U. S. (9 Wheat.) 581, 584, 591, 6 L. Ed. 106; and the cases there cited from *Jones v. Fales*, 4 Mass. 245, 252; *Lincoln & Kennebeck Bank v. Page*, 9 Mass. 155, 6 Am. Dec. 52; *Halsey v. Brown (Conn.)* 3 Day, 346; *Smith v. Wright (N. Y.)* 1 Caines, 43, 2 Am. Dec. 162; *Bank of Utica v. Smith (N. Y.)* 18 Johns. 230; *Cutter v. Powell*, 6 Term R. 320; *Peck v. Woodbridge (Conn.)* 3 Day, 508, 511; *McKeen v. Delancy's Lessee*, 9 U. S. (5 Cranch) 22, 33, 3 L. Ed. 25.

The courts not only may, but are bound, to notice and respect general customs and usages, as the law of the land, equally with the written law; and, when clearly proved, they will control the general law. This necessarily follows from its presumed origin—an act of Parliament or legislative act. *United States v. Arredondo*, 31 U. S. (6 Pet.) 691, 715, 8 L. Ed. 547; *Drew v. Chesapeake (Mich.)* 2 Doug. 33, 37.

General customs are such as prevail throughout a country, which, by virtue of their prevalence and long existence, become the law of that country. *Bodfish v. Fox*, 23 Me. (10 Shep.) 90, 95, 39 Am. Dec. 611.

#### GENERAL DAMAGES.

General damages are such as the law implies or presumes to have accrued from the wrong complained of. *W. O. Loftus & Co. v. Bennett*, 68 App. Div. 128, 131, 74 N. Y. Supp. 290; *Woodruff v. Bradstreet Co. (N.*

Y.) 35 Hun. 16, 17; *Brown v. Hannibal & St. J. R. Co.*, 99 Mo. 310, 318, 12 S. W. 655; *Barrett v. Western Union Tel. Co.*, 42 Mo. App. 542, 550; *Nicholson v. Rogers*, 31 S. W. 290, 261, 129 Mo. 136; *State, to Use of McCracken, v. Blackman*, 51 Mo. 319, 321; *Bibb County v. Ham*, 110 Ga. 340, 341, 35 S. E. 656; *Bateman v. Blake*, 45 N. W. 831, 833, 81 Mich. 227; *Oldfather v. Zent*, 14 Ind. App. 89, 100, 41 N. E. 555; *Herfort v. Cramer*, 4 Pac. 896, 901, 7 Colo. 483; *Atchison, T. & S. F. R. Co. v. Rice*, 14 Pac. 229, 234, 36 Kan. 593; *Tyler v. Salley*, 19 Atl. 107, 82 Me. 128; *Treadwell v. Whittier*, 22 Pac. 266, 268, 80 Cal. 574, 5 L. R. A. 498, 13 Am. St. Rep. 175; *Root v. Butte, A. & P. Ry. Co.*, 51 Pac. 155, 156, 20 Mont. 354. They are such as naturally and necessarily result from the wrong. *Thompson v. Webber*, 29 N. W. 671, 673, 4 Dak. 240; *Atchison, T. & S. F. R. Co. v. Rice*, 14 Pac. 229, 234, 36 Kan. 593; *Young v. Scheu*, 9 N. Y. Supp. 349, 56 Hun. 307. This, however, does not mean that general damages must, a priori, inevitably and always result from a given wrong. It is enough in the particular instance that they did in fact result from the wrong, directly and approximately, and without reference to the special character, condition, or circumstances to the person wronged. The law then, as a matter of course, implies or presumes them as the effect which in a particular instance necessarily results from the wrong. *Smith v. St. Paul, M. & M. Ry. Co.*, 14 N. W. 797, 798, 30 Minn. 169; *Hunter v. Stewart*, 47 Me. 419, 421.

General damages are such as the law presumes to flow from any tortious act, and may be recovered without proof of any amount. Civ. Code Ga. 1895, § 3910.

Damages which are probable, and traceable to and necessarily result from the injury, are termed "general damages." *North Point Consol. Irr. Co. v. Utah & S. L. Canal Co.*, 63 Pac. 812, 814, 23 Utah, 199.

Damages necessarily resulting from an injury, such as the loss of the value of an article of property which is carried away or destroyed, or of a sum of money which is not paid to the plaintiff according to the contract, or the loss of time and the endurance of pain consequent of having one's limb fractured, are called "general damages," and may be shown under *ad damnum*, and may be called "general damages." *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201, 212.

General damages are those which the law in itself implies for the reason that they are the immediate, direct, and proximate result of the act complained of—as, for instance, injury to property or its value by its detention, deterioration, etc.; but damages caused by the neglect to deliver a telegram, resulting in plaintiff's loss of a fee, are not general damages. *Mood v. Western Union Tel. Co.*, 19 S. E. 67, 68, 40 S. C. 524.

General damages are such as reasonably flow from the injuries complained of, and may be recovered under a general allegation that damages were sustained. General damages are such damages as the law implies upon proof of the injury. *Lynch v. Third Ave. R. Co.*, 13 N. Y. Supp. 236, 238, 59 N. Y. Super. Ct. (27 Jones & S.) 71.

General damages for a breach of contract of sale of lumber are measured by the difference between what they had agreed to pay, and the sum for which they could have supplied themselves with lumber of the same character at the place of delivery, or, if not obtainable there, then at the nearest available market plus any additional freight resulting from the breach. The plaintiffs are entitled only to indemnity to a sum equal to the loss they have sustained as a consequence of the breach. *Lawrence v. Porter* (U. S.) 63 Fed. 62, 64, 11 O. C. A. 27, 26 L. R. A. 167.

#### Libel or slander.

The term "general damages," when applied to a libel suit, includes the damage which the law presumes from a publication of an article which is libelous per se. If such a libel be of such a character as to touch the person libeled in his business or profession, then, under a general allegation of damage thereto, evidence of a general falling off of business or income is admissible. This is so because the law presumes that a libel per se, which touches one in his business or profession, will cause such general damage, and therefore such evidence may be given to help to show its extent. *Smid v. Bernard*, 63 N. Y. Supp. 278, 281, 31 Misc. Rep. 35.

General damages, in an action for libel, are damages not pecuniary in their nature, such as to reputation, etc. *Clementson v. Minnesota Tribune Co.*, 47 N. W. 781, 45 Minn. 303.

To distinguish between general damages and special damages is sometimes difficult. In an action for defamatory words not actionable per se, special damages must be alleged and proved. Injury to the credit and reputation of any lawyer is not only a natural, but a necessary, consequence of his arrest and imprisonment for disorderly conduct, and the publicity given thereto. And this is within the allegation of a complaint that plaintiff "was greatly injured in his health, credit, and reputation," and may be considered general damages. *Evins v. Metropolitan St. Ry. Co.*, 47 App. Div. 511, 524, 62 N. Y. Supp. 495.

#### GENERAL DEBILITY.

In denying specific performance of an agreement to take care and provide for com-

plainant in case of her general debility or sickness. It is said that the court could not from time to time determine what is meant by "general debility or sickness." *Mowers v. Fogg*, 17 Atl. 296, 297, 45 N. J. Eq. 120.

### GENERAL DEMURRER.

A general demurrer is one going to the merits of the case intended to be made by the bill, and, when no particular cause is assigned, except the formula required by the practice or rules of the court, that there is no equity in the bill, and it is always proper where the bill is defective in substance. *Shaw v. Chase*, 77 Mich. 436, 439, 43 N. W. 883; *Taylor v. Taylor*, 87 Mich. 64, 68, 49 N. W. 519, 521.

A general demurrer is one which excepts to the sufficiency of a previous pleading in general terms, without showing specifically the nature of the objection, and such demurrer is sufficient when the objection is on a matter of substance. *Reid v. Field*, 1 S. E. 395, 397, 83 Va. 26.

A general demurrer presents objections to the equities of the case, depending upon the facts alleged in the bill, and must be determined upon the assumption of truth in such allegations, and all legal inferences and conclusions of law are matters for the judicial notice of the court. *United States v. National Bank* (U. S.) 73 Fed. 379, 381.

The office of a general demurrer is not to make a petition more definite and certain, but goes to the question of whether any cause of action is stated, or whether the plaintiff is entitled to any relief. *Darr v. Berquist*, 89 N. W. 256, 257, 63 Neb. 713.

A general demurrer enables the party to assail every substantial imperfection in the pleadings of the opposite side after particularizing any of them in his demurrer. *Martin v. Bartow Ironworks* (U. S.) 16 Fed. Cas. 888, 889.

A general demurrer, in chancery practice, is a demurrer which only raises the question of the equity of a bill. Such a demurrer does not exist in Alabama, but it is necessary to set forth the ground of the demurrer specially. An assignment that there is no equity in the bill is nothing more than a general demurrer. It is not an assignment of a special cause of demurrer. *McGuire v. Van Pelt*, 55 Ala. 344, 349.

A general demurrer reaches defects in substance only, and not in form. *Darcey v. Lake*, 46 Miss. 109, 117.

A demurrer is general when no particular cause is alleged. *Christmas v. Russell*, 72 U. S. (5 Wall.) 290, 303, 18 L. Ed. 475.

### GENERAL DENIAL.

A general denial is one which puts in issue all the material averments of the complaint or petition, and permits the defendant to prove any and all facts which tend to negative those averments, or some one or all of them. *Mauldin v. Ball*, 1 Pac. 409, 411, 5 Mont. 96.

A general denial traverses all material averments of the pleading to which it is addressed. Hence, under an answer of a general denial, the defendant may prove any fact independent of those alleged in the complaint which is inconsistent therewith, and tends to overthrow plaintiff's cause of action. *Goode v. Elwood Lodge*, No. 166, K. P., 66 N. E. 742, 743, 160 Ind. 251 (citing *Johnson v. Schloesser*, 146 Ind. 508, 45 N. E. 702, 36 L. R. A. 59, 58 Am. St. Rep. 367).

### GENERAL DEPOSIT.

A general deposit is where the money deposited is not to be returned itself, but an equivalent of money is to be returned. Such deposit is said to be equivalent to a loan. *Talladega Ins. Co. v. Landers*, 43 Ala. 115, 138.

A general deposit in a bank is so much money to the depositor's credit. It is a debt due to him by the bank, payable on demand to his orders; not property capable of identification and specific appropriation. *Florence Min. Co. v. Brown*, 8 Sup. Ct. 531, 534, 124 U. S. 385, 31 L. Ed. 424.

The mere deposit of money in a commercial bank on account of the depositor, without being complicated by any other transaction than that of the depositing and withdrawing of the money by the customer from time to time, is a general deposit. *Collins v. State*, 15 South. 214, 217, 83 Fla. 429.

"All sums paid into a bank on general deposit by the same or different depositors, form one blended fund. As soon as the money has been handed over to the bank, and the credit given to the payor, it is at once the proper money of the bank. It enters into the general fund and capital, and is indistinguishable therefrom. Thereafter the depositor has only a debt owing him from the bank. He has no right to any specific money, and, though the identical money deposited be stolen before it is in fact mingled with the other moneys of the bank, still the bank must make up the loss, and ordinarily, unless otherwise stated, a deposit of the current money of the country where the deposit is made will be assumed a general deposit." *State v. Carson City Sav. Bank*, 30 Pac. 703, 704, 17 Nev. 146.

A general deposit is one which is to be repaid on demand in money, and the title to the money deposited passes to the bank.

Prima facie every deposit is general. Bank of Blackwell v. Dean, 60 Pac. 228, 9 Okl. 628.

A general deposit is, in effect, a loan which a bank is obliged to pay when called upon by the draft of the customer, and there can be no default until the payment has been demanded and refused. Tobias v. Morris, 28 South. 517, 520, 126 Ala. 535.

"Deposits made with bankers are either general or special. Money received by a bank on general deposit becomes the property of the bank, and can be loaned or otherwise used by it as other money belonging to it. The bank becomes the debtor of the depositor, and its obligation is satisfied by honoring the depositor's checks to the amount of his deposit. The depositor's claim is a mere chose in action for so much money. He becomes a creditor of the bank." Alston v. State, 9 South. 732, 92 Ala. 124, 13 L. R. A. 659.

General deposit in bank is where money is deposited and entered on the books of the bank to the depositor's credit; such money not being returnable specifically, but a similar amount being payable to the depositor's order. Ruffin v. Orange County Com'rs, 69 N. C. 498, 509.

A general deposit amounts to a mere loan, and the bank is to restore not the same money, but its equivalent sum, whenever it is demanded. Keene v. Collier, 58 Ky. (1 Metc.) 415, 417.

In case of a general deposit the money deposited is mingled with the other money of the bank, and the entire amount forms a single fund, from which depositors are paid. The relation of debtor and creditor is created, and, in the event of a failure of the bank, all such creditors stand on an equality. A general deposit differs from a loan in that the money is left with the bank for safe-keeping, subject to order, and payable, not in the specific money deposited, but in an equal sum. Officer v. Officer, 94 N. W. 947, 948, 120 Iowa, 339.

Where money is left for safe-keeping with the understanding not that the identical money shall be kept and returned to the depositor, but only that a like sum shall be repaid, such a transaction does not constitute a bailment or a special deposit, but a general deposit in the nature of a loan. Shoemaker v. Hinze, 53 Wis. 116, 10 N. W. 86.

#### Special deposit distinguished.

The same deposit cannot be both general and special. The distinction between a general and a special deposit is manifest and material. A special deposit in a bank is where the whole contract is that the thing

shall be safely kept, and the identical thing returned to the depositor. When the deposit is a general one, the bank has a right to mingle the money deposited with its own, and treat it as a debt due the depositor. Consequently, proof that an officer of the bank received money as a general deposit, knowing the bank to be insolvent, will not sustain a charge that he received it on deposit for safe-keeping. Koetting v. State, 60 N. W. 822, 823, 88 Wis. 502.

There is a wide difference between a special and general deposit, as those terms are understood not only by bankers but by the public, who are transacting business daily with banks. Thus, where money of any description is deposited in a bank, and the identical gold, silver, or bank bills which were deposited are to be returned to the depositor, and not the equivalent, the deposit will be special; while a general deposit is one which is to be returned to the depositor in kind. Mutual Acc. Ass'n of the Northwest v. Jacobs, 81 N. E. 414, 416, 141 Ill. 261, 16 L. R. A. 516, 33 Am. St. Rep. 302.

#### GENERAL DEPOSITOR.

A general depositor is merely a general creditor of a bank, and is not entitled to any priority of payment over other creditors in case of an assignment for the benefit of creditors or bankruptcy. Bank of Blackwell v. Dean, 60 Pac. 228, 9 Okl. 628.

#### GENERAL DEVISE.

The gift of a parcel of land, and not the estate in it, is called a "general devise" where no words are superadded to show how great an estate is meant to be given, such as a devise of "all the tract parcel of land belonging to or that I am possessed of." In such case the law holds the language to mean or import nothing but a life estate. Hitch v. Patten (Del.) 16 Atl. 558, 560, 8 Houst. 334, 2 L. R. A. 724.

#### GENERAL ELECTION.

See "Last General Election."

The words "general election," as used in the title relating to elections, shall mean any election of state and county officers, representative to the General Assembly, representative to Congress, or electors. V. S. 58.

The term "general election," as used in the chapter relating to elections, shall apply to any election held for the choice of national, state, judicial, district, county, or township officers. Code Iowa, 1897, § 1089.

The Ballot Law of 1891, § 2, defined the term "general election," as used in the act, as applying to any election held for the choice of a national, state, judicial, district,

or county officer. *Village of Ridgway v. Gallatin Co.*, 181 Ill. 521, 526, 55 N. E. 146.

The Missouri act of 1849 organizing McDonald county, and authorizing the immediate election of county officers, to serve until the general election, means the next general election for officers throughout the state, and not the several elections of the same county officers in other counties of the state. *State ex rel. McGee v. King*, 17 Mo. 511, 514.

Code, art. 51, § 61, providing that the clerk of county commissioners shall file with the clerk of the circuit court, not less than 20 days before the beginning of the second regular term of the court after each and every general election, a fair and complete list of the male taxable inhabitants of the county not under 25 years of age, means a general election for representatives of the state in the Congress of the United States and for President and Vice President of the United States, though it was not an election for members of the General Assembly and state officers generally. *Downs v. State*, 26 Atl. 1005, 78 Md. 128.

An election general throughout the state for both members of Congress and for judges was a general election within the meaning of a statute requiring a certain question to be submitted to the people at a general election, though it was not a general election as the term was used in the Constitution. *Mackin v. State*, 62 Md. 244, 247.

#### **Election on expiration of full term.**

A general election is an election to fill an office on the expiration of the full term thereof, as used in contradistinction from the term "special election" employed in the Political Code, relating to elections to fill vacancies. *Kenfield v. Irwin*, 52 Cal. 164, 169.

#### **November election.**

The term "general election," when used in statutes, refers to the election required to be held on the Tuesday succeeding the first Monday of November in each year. *Gen. St. Kan.* 1901, § 7342, subd. 26; *State v. Cobb*, 2 Kan. 32, 54; *Bond v. White*, 8 Kan. 333, 341; *McIntyre v. Iliff*, 68 Pac. 633, 634, 64 Kan. 747.

In determining the constitutionality of an act providing that there should be no election of certain officers in one specified year, it was contended that such act was in violation of the Constitution, which provided that a general election should be held annually on the Tuesday succeeding the first Monday in November, but it was held that a November election provided for in the Constitution is the general election, whether few or many offices are to be filled, and is independent of the terms of the offices or the number of officers to be elected. *Wilson v.*

*Clark*, 63 Kan. 505, 65 Pac. 705, 706 (citing *Morgan v. Pratt County Com'rs*, 24 Kan. 71; *State v. Foster*, 36 Kan. 504, 13 Pac. 841).

The words "general election," when used in the statutes, shall be construed to mean the election required by law to be held in the month of November. *Comp. Laws Mich.* 1897, § 50, subd. 19.

Const. art. 20, which provides that, when amendments have been agreed to in proper manner by the Legislature, the same shall be submitted to the electors at the next "general election" thereafter, etc., means the November elections, at which are elected all of the state officers. *Westinghausen v. People*, 6 N. W. 641, 643, 44 Mich. 265.

Under *How. Ann. St.* § 2, providing that the term "general election" means the election held in November, "unless such construction would be inconsistent with the manifest intent of the Legislature," a spring election cannot be regarded as a general election in determining the right to place a ticket in the first column of an official ballot, which is assigned to the ticket which received the highest number of votes at the last preceding general election. *Edgar v. Board of Election Com'rs of Livingston County*, 76 N. W. 972, 118 Mich. 418.

#### **GENERAL EXECUTION.**

A general execution is a writ commanding an officer to satisfy judgment out of any personal property of the defendant. An order commanding him to satisfy the judgment out of certain named personal property is not general execution. *Pracht v. Pister*, 1 Pac. 638, 30 Kan. 568.

#### **GENERAL EXPECTATION.**

The expression "general expectation," as used in an instruction that if a son remained at home and performed services and expended money under a general expectation that his father would make it right by will or otherwise when he died, and left to his father's judgment what would be right, and what provision should be made, and how it should be made, and the father did in fact make provision for his son, the son was bound by such provision, means an expectation that arose from no express understanding between the father and son in relation to the son's compensation for his services, but grew out of all the circumstances of the case, and from no one in particular. *Appeal of Lee*, 2 Atl. 758, 759, 53 Conn. 363.

#### **GENERAL FORBEARANCE.**

The term "general forbearance," when used in speaking of a general forbearance to sue, in which there is no time specified,



means a perpetual forbearance. *Clark v. Russell*, 3 Watts, 213, 216, 27 Am. Dec. 348 (citing *Hamaker v. Eberley*, 2 Bin. 506, 510, 4 Am. Dec. 477); *Sidwell v. Evans* (Pa.) 1 Pen. & W. 383, 385, 21 Am. Dec. 387.

#### GENERAL FINDING.

A general finding in favor of the party is to be treated as a general verdict. *Humphreys v. Third Nat. Bank* (U. S.) 75 Fed. 852, 856, 21 C. C. A. 538.

#### GENERAL FUND.

##### Of city.

The general fund of a city is a miscellaneous fund for the payment of claims which will arise, and for which it is impossible to remit the exact amount which will be required. *Kelley v. Broadwell* (Neb.) 92 N. W. 643, 645.

##### Of county.

The general fund of a county, as its name implies, is one devoted to a variety of uses, and its expenditure is left mainly to the discretion of the county commissioners. *Burlington & M. R. R. Co. v. Lancaster County Com'rs*, 12 Neb. 324, 327, 11 N. W. 332; *Kansas City, Ft. S. & G. R. Co. v. Scammon*, 25 Pac. 858, 859, 45 Kan. 481.

##### Of fraternal order.

A "general fund" is the term applied to a fund within the control and management of the respective lodges of a fraternal order, raised in each lodge by contributions from its members, or donations made thereto, from which are paid the general expenses of the lodge, and benefits which the lodge may by its by-laws prescribe to be paid to members disabled by sickness or other disability from following their usual business or occupation. *Lady Lincoln Lodge v. Falst*, 28 Atl. 555, 52 N. J. Eq. 510.

##### Of state.

The term "general fund," as used to define a fund belonging to a state, is a fund created for the purpose of paying the salaries of state officers and defraying the general expenses of the state government. *State v. Bartley*, 58 N. W. 172, 173, 89 Neb. 353.

"General fund," as used in Laws 1855, directing that the money raised by a certain tax be paid into the treasury to the credit of the general fund of the state, is the collective designation of all the assets of the state which furnish the means for the support of the government and the defraying the discretionary appropriations of the Legislature; in other words, the necessary and contingent expenses of the government. *People v. Orange County Sup'rs* (N. Y.) 27 Barb. 575, 582.

#### GENERAL GUARANTY.

A general guaranty is a security for all persons who deal upon its credit. *Everson v. Gere* (N. Y.) 40 Hun, 248, 250.

A general guaranty is a guaranty in which none of the terms are fixed in writing, and therefore the law adds the usual conditions that there shall be due and unsuccessful diligence used by the creditor to collect the claim from the principal, unless it appears that all diligence would be hopeless. *Ritchie v. Walter*, 31 Atl. 334, 166 Pa. 604.

A general guaranty is one open for acceptance by the public generally. Thus a guaranty to a bank, which recited that they guaranteed payment of all indebtedness now due or hereafter to become due to the bank or its assigns occasioned by any act of the F. Co., was general, and inured to the benefit of plaintiffs, to whom notes discounted by F. Co. at the bank had been transferred. *Tidioute Sav. Bank v. Libbey*, 77 N. W. 182, 183, 101 Wis. 193, 70 Am. St. Rep. 907.

#### GENERAL GUARDIAN.

A general guardian is a guardian of the person or of all of the property of the ward within the state, or of both. *Civ. Code Cal.* 1903, § 239; *Rev. Codes N. D.* 1899, §§ 2810, 2811; *Civ. Code S. D.* 1903, §§ 142, 143; *Rev. St. Okl.* 1903, §§ 3811, 3812; *Civ. Code Mont.* 1895, § 333; *Rev. St. Utah* 1898, § 3983.

#### GENERAL IMPARLANCE.

A general imparlance is a prayer for time to plead, without reserving special exceptions. *Colby v. Knapp*, 13 N. H. 175, 177 (citing *Com. Dig. Abatement*; 1 Chit. Pl. 420).

A general imparlance in pleading at common law was the time allowed by a party for pleading upon an application in which no right of exception was reserved. *Mack v. Lewis*, 31 Atl. 888, 889, 67 Vt. 833.

#### GENERAL IMPROVEMENT.

The Austin city charter authorizes the raising of money on the credit of the city for current expenses and the general improvement of the city. Held, that "general improvement" meant ordinary improvement—that is, improvement which ordinarily recurs—but did not include all improvements of every character, so as to cover the expenses of the city for every purpose. *City of Austin v. Nalle*, 22 S. W. 668, 673, 85 Tex. 520.

#### GENERAL INDORSEMENT.

A general indorsement of a negotiable instrument is one by which no indorsee is

named. Rev. St. Wyo. 1899, § 2347; Civ. Code Idaho 1901, § 2874; Rev. Codes N. D. 1899, § 4872; Civ. Code S. D. 1903, § 2187; Rev. St. Okl. 1903, § 3611; Civ. Code Cal. 1903, § 3112; Civ. Code Mont. 1895, § 4024.

### GENERAL INSANITY.

A man may be mad on all subjects; and then, though he may have glimmerings of reason, he is not a responsible agent. This is general insanity. To excuse him of crime, the degree of it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action. *Commonwealth v. Wireback*, 42 Atl. 542, 545, 190 Pa. 138, 70 Am. St. Rep. 625; *Commonwealth v. Mosler*, 4 Pa. (4 Barr) 264.

If the prisoner at the bar at the time he committed the act had not sufficient capacity to know whether his act was right or wrong, and whether it was contrary to law, he is not responsible. That is in fact general insanity, so far as the act in question is concerned. And it must be so great in extent and degree as to blind him to the natural consequences of his moral duty, and must have utterly destroyed his perception of right and wrong. The test is the power or capacity of the prisoner to distinguish between right and wrong in reference to the particular act in question. *Commonwealth v. Sayre* (Pa.) 5 Wkly. Notes Cas. 424.

### GENERAL INSURANCE.

A general insurance is where the perils insured against are such as the law would imply from the nature of the contract of a maritime insurance considered in itself and supposing none to be expressed in the policy. *Vandenheuvel v. United Ins. Co.*, 2 Johns Cas. 127, 150

### GENERAL ISSUE.

The general issue in common-law pleading operates as a denial of the whole substance of the declaration, and puts upon the plaintiff the necessity of establishing all the essential allegations in the narr. *McAllister v. State*, 50 Atl. 1046, 94 Md. 290; *Eastern Advertising Co. v. McGaw*, 42 Atl. 923, 924, 89 Md. 72.

The general issue is the denial of the allegation upon which a recovery is sought. It has a form, which varies with each action, but in any given action it is always the same. In debt on a simple contract it is *nil debit*; in debt on a specialty it is *non est factum*; in detinue, *non detinet*; in trover, trespass, and trespass on the case it is *not guilty*; in replevin it is *non cepit*; and in assumpsit it is *non assumpsit*. *Standard Loan & Accident Ins. Co. v. Thornton*, 40 S. W. 136, 138, 97 Tenn. (13 Pickle) 1.

### GENERAL JUDGMENT.

A general judgment is a judgment in personam. *Smith v. Colloty*, 55 Atl. 805, 806, 69 N. J. Law, 365.

The phrase "general judgment of reasonable men" means a general judgment which is the common result of the reflection and reasoning of reasonable men. *Patterson v. Nutter*, 7 Atl. 273, 275, 78 Me. 509.

### GENERAL JURISDICTION.

General means that which comprehends all; the whole. *Webst. Dict.* When applied to jurisdiction, it indicates legal authority extending to the whole, or to the particular subject; and when applied to a term of court means a term at which the entire authority or jurisdiction of the court may be exercised. *Gracie v. Freeland*, 1 N. Y. (1 Comst.) 228, 232.

### GENERAL LAW.

The term "general laws" is one which has been employed to designate different classes of laws. Examples of its various signification are given in *Bouvier's Law Dictionary*, where it is shown that its use is common with reference to the subject-matter of statutes, as well as to the extent of territory over which statutes are intended to operate. There it is shown to be in use as the antithesis of "private," also of "local," and also of "special" statutes, and it is said that, "in deciding whether or not a given law is general, the purpose of the act and the objects on which it operates must be looked to." Legal writings abound with instances where enactments of the general law-making department are mentioned as general laws by way of distinguishing them from municipal laws. *Southern Express Co. v. City of Tuscaloosa*, 31 South. 460, 461, 132 Ala. 326.

A law may take its general nature either from its territorial comprehensiveness, or from the nature of its subject-matter, or from both. A law may be of a general nature notwithstanding its subject-matter is of a local nature; its general nature being alone due to its territorial comprehensiveness. A law which is general by reason of its territorial comprehensiveness only can no more be limited in its operation territorially by a subsequent special law than one which is general in the nature of its subject-matter. *Mathis v. Jones*, 11 S. El. 1018, 1019, 84 Ga. 804.

Const. art. 11, § 6, declaring that cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution shall be subject to and controlled by general laws, does not mean the general laws, the Leg-

lature is commanded to pass for the incorporation, organization, and classification in proportion to population of cities and towns, or amendments thereto, because it is by the Constitution left optional with cities and towns in existence when the Constitution was adopted to become organized under such general acts of incorporation or not, as they shall elect. It means such general laws as shall be passed by the Legislature other than those for the incorporation, organization, and classification of cities and towns. *Thompson v. Ruggles*, 11 Pac. 20, 26, 69 Cal. 465.

#### As relating to all of a class.

The word "general" comes from "genus," and relates to a whole genus or kind; or, in other words, to a whole class or order. Hence a law which affects a class of persons or things less than all may be a general law. *Brooks v. Hyde*, 37 Cal. 366, 376.

A statute which relates to persons or things as a class is a general law. *Clark v. Finley*, 54 S. W. 343, 345, 93 Tex. 171; *Ewing v. Hoblitzelle*, 85 Mo. 64, 78; *State ex rel. Maggard v. Pond*, 93 Mo. 606, 641, 6 S. W. 469, 471 (citing *State ex rel. Lionberger v. Tolle*, 71 Mo. 645); *State ex rel. Harris v. Herrmann*, 75 Mo. 340, 353; *Hamman v. Central Coal & Coke Co.*, 56 S. W. 1091, 1092, 156 Mo. 232 (quoting *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774); *Van Riper v. Parsons*, 40 N. J. Law (11 Vroom) 1, 8; *Sawyer v. Dooley*, 32 Pac. 437, 440, 21 Nev. 390; *Central R. Co. v. State Board of Assessors*, 2 Atl. 789, 793, 48 N. J. Law (19 Vroom) 1, 57 Am. Rep. 516; *Cox v. State*, 8 Tex. App. 254, 289, 34 Am. Rep. 746; *In re New York Elevated R. Co.* (N. Y.) 3 Abb. N. C. 401, 417, 422.

The number of persons upon which the law shall have any direct effect may be very few, by reason of the subject to which it relates, but it must operate equally and uniformly upon all brought within the relations and circumstances for which it provides. A statute, in order to avoid a conflict with the prohibition against special legislation, must be general in its application to the class, and all of the class within like circumstances must come within its operation. *Daily Leader v. Cameron*, 41 Pac. 635, 639, 3 Okl. 677; *Gay v. Thomas*, 46 Pac. 578, 586, 5 Okl. 1.

A general act is one which has room within its terms to operate on all of a known class of things, present and prospective, and not merely on one particular thing, or on a particular class of things, existing at the time of its passage. *City of Topeka v. Gillett*, 4 Pac. 800, 803, 32 Kan. 431.

A general law is one framed in general terms, restricted to no locality, and operating equally upon all of a group of objects,

which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves. *Trenton Iron Co. v. Yard*, 42 N. J. Law (13 Vroom) 357, 363; *Van Riper v. Parsons*, 40 N. J. Law (11 Vroom) 123, 125, 29 Am. Rep. 210.

A law is general when it applies equally to all persons embraced in a class founded upon some natural or extrinsic or constitutional distinction. It is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome condition in the exercise of a common right upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law. *Robinson v. Southern Pac. Co.*, 38 Pac. 94, 98, 105 Cal. 526, 28 L. R. A. 773 (citing *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604).

General laws are those which relate to or bind all within the jurisdiction of the lawmaking power, limited as that power may be in its territorial operation or by constitutional restraints. A law applicable to all the counties of a class as made or authorized by the Constitution is neither a local nor a special law. If it applies to all the counties of a class authorized by the Constitution to be made, it is general law; and whether there may be few or many counties to which its provisions will apply is a matter of no consequence. *Cody v. Murphey*, 26 P. 1081, 1082, 89 Cal. 522.

While it is true that a law which applies to all of a class in a state is held to be a general law, it is equally true that one which applies to only a part of a class is a special law. Thus, in *Dundee Mortg. & Inv. Co. v. School Dist. No. 1 of Multnomah County* (U. S.) 19 Fed. 359, it was said that an act providing for the assessment of mortgages is so far a general act; it comprehends the genus. But an act providing for the assessment of all mortgages for a sum exceeding \$500, or not payable within one year from the date of their execution, is special; it comprehends only a species of mortgage. Hence a statute relating to the taxation of railroads, which does not comprehend all, but only two county railroads, is not a general law. *People v. Central Pac. R. Co.*, 23 Pac. 303, 309, 83 Cal. 393.

A statute for the assessment and collection of taxes which applies to all incorporated cities and towns in the state is a general, and not a special, law within the meaning of the Constitution. *People v. Wallace*, 70 Ill. 680, 681.

A law embracing all cities or all townships is a general law within the meaning of the Constitution, because of their marked peculiarities. They are by common con-

sent regarded distinct forms of municipal government, and so constitute a class by themselves. *State v. City of Trenton*, 42 N. J. Law (13 Vroom) 487. But where an act authorizing township trustees to pay for macadamizing streets, etc., excepts from its operation certain townships, it is not a general law. *Dobbins v. Northampton Tp.*, 14 Atl. 587, 589, 50 N. J. Law, 496.

#### **As relating to all in like circumstances.**

A law is general and uniform if all persons in the same circumstance are treated alike. *D. H. Davis Coal Co. v. Polland*, 62 N. E. 492-496, 158 Ind. 607.

Laws are general and uniform not because they operate upon every person in the state, for they do not, but because every person that it brought within the relations and circumstances provided for is within the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of those within the scope of their operation. *Arms v. Ayer*, 61 N. E. 851, 855, 192 Ill. 601, 58 L. R. A. 277, 85 Am. St. Rep. 357; *McAumich v. Mississippi & M. R. Co.*, 20 Iowa, 338; *Iowa R. Land Co. v. Soper*, 39 Iowa, 112, 116.

A law is to be regarded as general only when its provisions apply to all objects of legislation distinguished alike by qualities and attributes which necessitate the legislation, or to which the enactment has manifest relation. Such law must embrace all and exclude none whose conditions and wants render such legislation equally necessary or appropriate to them as a class. *Warner v. Hoagland*, 51 N. J. Law (22 Vroom) 66, 68, 16 Atl. 166; *Randolph v. Wood*, 7 Atl. 286, 49 N. J. Law (20 Vroom) 85, on error, 15 Atl. 271, 275, 60 N. J. Law (21 Vroom) 175; *Helper v. Simon*, 53 N. J. Law (24 Vroom) 550, 22 Atl. 120; *Dexheimer v. City of Orange*, 86 Atl. 706, 707, 60 N. J. Law, 111; *Hoas v. O'Donnell*, 37 Atl. 447, 449, 60 N. J. Law, 35.

#### **Character of subject-matter.**

"Without undertaking to discriminate nicely or define with precision, it may be said that the character of a law as general or local depends on the character of its subject-matter. If that be of a general nature, existing throughout the state in every county, a subject-matter in which all the citizens have a common interest, . . . then the laws which relate to and regulate it are laws of a general nature, and, by virtue of the prohibition referred to, must have uniform operation throughout the state." *State v. Davis*, 44 N. E. 511, 512, 55 Ohio St. 15 (quoting *Kelley v. State*, 6 Ohio St. 269).

A law framed in general terms, restricted to no locality, and operating equally up-

on all of a group of objects which, having regard to the purposes of legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, "but a general law." *Van Riper v. Parsons*, 40 N. J. Law (11 Vroom) 123, 29 Am. Rep. 210. To justify separate legislation for town or counties, there must be something in the subject-matter of the enactment to call for and necessitate such legislation. In re *Cleveland*, 19 Atl. 17, 19, 52 N. J. Law (23 Vroom) 188 (citing *Hammer v. State*, 44 N. J. Law [18 Vroom] 667).

#### **Form or declaratory provision.**

The term "general law" in Const. art. 7, § 21, providing that no general law shall be enforced until it is published, includes all public laws which are such by their own nature, but not laws which, by their own nature, are private, but by a provision therein are declared to be public. *Burhop v. City of Milwaukee*, 21 Wis. 257, 259.

An act is nevertheless general, though it may not operate on all cities of the state. If it is general and uniform throughout the state, operating on all of a certain class, or on all who are brought within the relations and circumstances provided in the act, it is not within the constitutional inhibition against special legislation. The form or profession of an act does not control; and although it is general in form or pretense, if it necessarily produces a special result, it can not be upheld. *State v. Hunter*, 17 Pac. 177, 184, 38 Kan. 578.

#### **Number in class.**

A law is general if nothing be excluded that should be contained. If the only limitation contained in a law is a legitimate classification of its objects, it is a general law. Hence, if the object of the law has characteristics so distinct as reasonably to form, for the purpose legislated upon, a class by itself, the law is general, notwithstanding it operates upon a single object only; for a law is not general because it operates upon every person in the state, but because every person that can be brought within its predicament becomes subject to its operation. *Budd v. Hancock*, 48 Atl. 1023, 1024, 66 N. J. Law, 133.

The fact that an act is really applicable to but one municipal corporation, or, in other words, that there is but one which, at the time of its enactment, comes under its provisions, is not sufficient to make a law special, and not general. But the question presents itself whether or not the Legislature can create a class on the basis of indebtedness, and define the amount and character of the indebtedness which shall characterize the class. We are unable to

see any reason why it cannot do so equally as well as on the basis of population; and an act by its terms applicable only to a city having an indebtedness to the amount of \$200,000, in the payment of which it has defaulted, is a general law. *Ex parte Wells*, 21 Fla. 280, 318.

Within the meaning of the Constitution forbidding the Legislature to pass special or local laws for the assessment and collection of taxes, and providing that all such laws shall be general and of uniform operation throughout the state, an act which is general in its terms, embracing all railroads in a similar condition in the state, is a general act, although there may not be but one railroad in the state to which the act applies. A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special. The word "general," as distinguished from "special," means all of a class, instead of part of a class. *Bloxham v. Florida Cent. & P. R. Co.*, 35 Fla. 625, 733, 17 South. 902, 924, 925.

Laws are general if they apply to a class, though the class may be very limited, or even where there is but one of the class; but the law must be general in its application, and embrace all of the given class, and not be specific in its application to a particular person or thing. In *State v. Cooley*, 58 N. W. 150, 56 Minn. 540, it is said another proposition that may be laid down as beyond the question is that, if the basis of the classification is valid, it is wholly immaterial how many or how few members there are in the class. One may constitute a class as well as a thousand, although, of course, the fewer the numbers, the closer the courts will scrutinize the act to see that it is not an evasion of the Constitution. *Guthrie Daily Leader v. Cameron*, 41 Pac. 635, 639, 3 Okl. 677.

A law formed in general terms, restricted to no locality, broad enough to reach every portion of the state, and abating legislative commissions for the regulation of municipal affairs wherever they exist, and operating equally upon all of them, is a general law without regard to the consideration that within the state there happens to be but one individual of a class or one place where it produces effects. *Van Riper v. Parsons*, 40 N. J. Law (11 Vroom) 123, 125, 29 Am. Rep. 210.

General laws are those which relate to a whole class of persons, places, relations, or things, grouped according to some specified class characteristic, binding all within the jurisdiction of the lawmaking power, limited, as the power may be, by territorial operation or by constitutional restraint. It is none the less general though at the time

of its passage there may be but one, or in fact not one, individual of the class thus created, provided it be reasonable, and not illusory in its generalization, and provided that the circle or ring of classification be such as to remain open to receive the potentials which may arise bearing the peculiar marks of the class. *Groves v. Grant County Court*, 26 S. E. 460, 463, 42 W. Va. 587.

#### As public act or law.

A general act is one which regards the whole community, and is used as synonymous with "public act." *Ex parte Burke*, 59 Cal. 6, 11, 43 Am. Rep. 231.

Statutes relating to all the municipal corporations of the state are general laws. *Thomason v. Ashworth*, 14 Pac. 615, 618, 73 Cal. 73.

Any statute which affects the public at large, though operating within the limits of a particular locality, is generally declared to be a public statute. The terms "general" and "public" law are frequently used synonymously, but they are not the equivalent of each other. Every general law is necessarily a public law, but every public law, as defined, is not a general law. A general law is a law which operates throughout the state alike upon all the people or all of a class. Any law affecting the public within the limits of the county or community would be a public law, though not a general law. The effect of the statute, more than its wording or phraseology, must determine its character as a public, general, special, or local statute. *Holt v. City of Birmingham*, 19 South. 735, 736, 111 Ala. 369.

A law is general, in the broad sense of the term, if it extends to the whole state, or the whole of a legislative class of localities legitimately created for the purpose of general legislation. A law is general in the restricted sense of the term as it is used in Const. art. 7, § 21, not only when it is general in the broad sense thereof, but also when it is of that character in the sense of being public; but if it applies only to a single subdivision of the state, as a county, town, city, or village, or a collection of such localities not constituting a legitimate class thereof for the purposes of legislation, it is local in character. Where a law is general and public in the sense indicated, the two terms are synonymous. *Milwaukee County v. Isenring*, 85 N. W. 131, 133, 135, 109 Wis. 9, 53 L. R. A. 635.

General law is synonymous with public law, and in this country means those laws that relate to and bind all within the jurisdiction of the lawmaking power, limited as that power may be in its theory or operation or by constitutional restrictions. As used in Const. art. 11, § 1, which provides that corporations without banking powers

or privileges may be terminated under general laws, but shall not be created by special act, it is used only as opposite to special, and without any design of indicating the public or private character of the law; that is, it means those laws which relate to all of a class, instead of to one or a part of that class. But as used in Const. Wis. art. 171, § 21, which provides that no general law shall be enforced until published, it is used, not as contradistinguished from local or special, but in its usual meaning, namely, public law; the object of the prohibition being the protection of the people by preventing their rights and interests from being affected by laws of which they have no means of knowing. *Clark v. City of Janesville*, 10 Wis. 136, 179.

#### **Territorial comprehensiveness.**

A general act is one applicable to every part of the commonwealth; one that applies to the whole state. *Davis v. Clark*, 106 Pa. 377, 384, 15 Wkly. Notes Cas. 209, 210.

A general act is one which regulates the common good of all the inhabitants within the state. *State v. Murray*, 17 South. 832, 834, 47 La. Ann. 1424.

In *Lorentz v. Alexander*, 87 Ga. 444, 13 S. E. 632, it is said a law, to be general, must operate uniformly throughout the whole state upon the subject or class of subjects with which it purports to deal; so that an act relating to the power of municipalities and counties to grant liquor licenses, from which numerous places are excepted, is not a general law. *Sasser v. Martin*, 29 S. E. 278, 285, 101 Ga. 447.

In order that a law may be general, it must be of force in every county in the state, and while it may contain special provisions making its effect different in certain counties, those counties cannot be exempt from its entire operation. *Carolina Grocery Co. v. Burnet*, 39 S. E. 381, 384, 61 S. C. 205, 58 L. R. A. 687 (citing *Dean v. Spartanburg Co.*, 59 S. C. 110, 37 S. E. 226).

A statute is not special or local merely because it authorizes or prohibits the doing of a thing in a certain locality. It is, notwithstanding this fact, a general law, if it applies to all the citizens of the state, and deals with a matter of general concern. *State v. Corson*, 50 Atl. 780, 785, 67 N. J. Law, 178.

#### **Authorization of city to issue bonds.**

A legislative act authorizing a city to issue bonds for stock in a railroad company is not a general law within a constitutional provision requiring that all general laws shall be published before going into effect. *Luling v. Racine* (U. S.) 15 Fed. Cas. 1105.

#### **Classification of municipal corporations.**

A law framed in general terms, restricted to no locality, and operating equally upon all of a group of objects, which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law. The classification must be just and reasonable, and not arbitrary. Under these principles the act of March 29, 1882, authorizing incorporated villages having within their limits a college or university, to provide against the evils resulting from the sale of intoxicating liquors therein, is not repugnant to the provisions of the Constitution that acts relating to municipal corporations must be of a general nature. *Bronson v. Oberlin*, 41 Ohio St. 476, 481, 52 Am. Rep. 90.

In discussing the validity of a law as being a general law organizing courts or a local and special one, the court said: "It is plain, therefore, that any change in the jurisdiction or practice of these courts must be made by general law, operative not in one county or state, but in all the counties and all the states in the commonwealth; and so confusion seems to exist in regard to the definition of 'general law,' and the theory has been advanced in several recent cases that the division of the cities of a state into classes, which was recognized as a necessary classification, requires us to hold any law to be general which embraces all cities without regard to the subject to which it relates. This theory overlooks the object and purpose of the classification set forth in the act. These are to make provision for municipal needs of cities which differ greatly in population. Difference in population makes it necessary to provide different machinery for the administration of certain corporate powers and duties of certain corporate officers corresponding with the needs of the population to be provided for. But an act relating to improvement of streets, which is limited to cities of second class, having no peculiar provisions which would not be applicable to other cities, is not a general law." *Appeal of Wilbert*, 21 Atl. 74, 75, 137 Pa. 494.

Act June 28, 1879 (Pub. Laws 1879, p. 182), providing for liens for labor and material on oil wells, and "that the act does not apply to counties having a population of over 200,000 inhabitants," is a local or special law, within the meaning of the Constitution prohibiting the passage of any local or special law authorizing the creation, extension, or impairing of liens. There is no dividing line between a local and a general statute. It must be either the one or the other. If it apply to the whole state, it is general; if to a part only, it is local. As a legal principle, it is as effectually local when it applies to

sixty-five counties out of the sixty-seven as if it applied to one county only. The exclusion of a single county from the operation of the act makes it local. A general statute must be applicable to every part of the commonwealth. *Davis v. Clark*, 106 Pa. 377, 384.

A law is none the less general and uniform because it divides the subjects of its operation into classes, and applies different rules to the different classes. With respect to political subdivisions of the state, the Supreme Court of Pennsylvania lays down the rule that the only proper classification is by population. We are satisfied the rule is altogether too narrow. A general law for the incorporation of villages that conferred certain powers and privileges on villages lying on rivers, but not on inland villages, if it operated alike upon all villages in that situation, could not be called special legislation. A law general in form, but special in operation, violates a constitutional inhibition of special legislation as much as though special in form. A law is general and uniform in its operation which operates equally upon all the subjects within the class of subjects for which the rule is adopted. *Nichols v. Walter*, 37 Minn. 264, 271, 33 N. W. 800.

An act providing for listing and assessing personal property in Indian reservations and unorganized territory at a different time from that fixed for listing and assessing such property in organized counties is a general law. *Gay v. Thomas*, 46 Pac. 578, 586, 5 Okl. 1.

By the provision of article 11, § 6, of the Constitution, cities are subject to control by the general laws. This includes the power to provide that in cities having a certain number of inhabitants every justice of the peace shall be provided by the city authorities with a suitable office in which to hold his court. *Bishop v. Council of City of Oakland*, 58 Cal. 572, 575.

An act providing that passenger railways in cities of the first class may use other than animal power whenever authorized by the city council, and repealing all limitations contained in charters of passenger railway companies restricting them to the use of horse power, is a general law. *Reeves v. Philadelphia Traction Co.*, 25 Atl. 516, 517, 152 Pa. 153.

A bill that embraces all the villages of the state which may elect to take advantage of its provisions is a general, and not a local, act. *Arthur v. Village of Glens Falls*, 21 N. Y. Supp. 81, 83, 66 Hun, 136.

Laws 1881, c. 554, giving to the board of supervisors of any county containing an incorporated city of over 100,000 inhabitants, where contiguous territory in the county has been mapped out into streets and avenues, power to lay out, open, grade, and construct

the same, and to provide for the assessment of damages on the property benefited, is not a local or private act, but a general law. It applies to a class, and not to the selected or particular elements of which it is composed. The class consists of every county in the state having within its boundaries a city of 100,000 inhabitants and territory beyond the city limits mapped into streets and avenues. How many such counties there are now or may be in the future we do not know, and it is not material that we should. Whether many or few, the law operates upon them all alike, and reaches them, not by a separate selection of one or more, but through the general class of which they are individual elements. In *re Church*, 92 N. Y. 1, 4, 5.

#### **Establishment of courts.**

A general law must be one that operates uniformly throughout the whole state upon a subject or class of subjects with which it proposes to deal. Thus an act dealing with the establishment of county courts, in order to be general, and have uniform operation throughout the state, must affect each county in the state; so that an act providing for the establishment of a city court upon the recommendation of the grand jury of any county having a population of 10,000 or more, where a city court does not now exist, is not a general law. *Thomas v. Austin*, 30 S. E. 627, 628, 103 Ga. 701.

Section 20, art. 6, of the Constitution, provides that the General Assembly may provide for the establishment of a probate court "in each county having a population of over 50,000." Section 1 of article 6 provides that "all laws relating to the courts shall be general and of uniform operation and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade so far as regulated by law \* \* \* shall be uniform." Held, that section 20 of article 6 authorized the General Assembly to establish probate courts in such counties having a population over 50,000 as it might deem best. The only effect intended to be given by the framers of the Constitution to section 1, art. 6, was to require that all laws relating to "the organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grades" should be uniform. Therefore neither section operated to render unconstitutional a law providing for the establishment of probate courts only in counties of over 70,000 population. *Knickerbocker v. People*, 102 Ill. 218, 222, 229.

#### **Regulation of disposal of public funds.**

An act regulating the disposal of a portion of the public funds of the state previously regulated and disposed of by a general law of the state is itself a general law. *State v. Hoeflinger*, 31 Wis. 257, 262.

**Regulation of liability of employers.**

An act providing that railroad corporations shall be liable to their employes for any neglect of their agents or any mistakes of the engineer or other employes is general and uniform within the meaning of the constitutional provision. *McAunich v. Mississippi & M. R. Co.*, 20 Iowa, 338, 342.

**Regulation of municipal elections and officers.**

A statute which changes the powers and duties of municipal officers in important respects is a general law, and has uniform operation if it is made applicable to all citizens or to all of a class. *Hellman v. Shoulters*, 44 Pac. 915, 918, 114 Cal. 186.

An act entitled "An act relating to cities of the first class in this state, and providing for the holding of municipal or charter elections therein, and regulating the terms of elective and appointive officers therein," approved March 18, 1897, is a local and special law regulating the internal affairs of towns, and is not a general law, and for that reason is unconstitutional. *Hoos v. O'Donnell*, 37 Atl. 447, 449, 60 N. J. Law, 35.

Act Feb. 28, 1901, providing that all municipal officers required to be elected shall be voted for and elected on the first Tuesday after the first Monday of November in each year, and on the same official ballots required by law for the election of state and county officers, and not otherwise, and fixing the terms of officers elected or appointed in cities and the manner of their appointment, is not unconstitutional as being special and local, regulating the internal affairs of cities, in contravention of Const. art. 4, § 7, par. 11, prohibiting private, local, or special laws regulating the internal affairs of towns and counties, since cities are a distinct class, and within the common-law classification laws relating to their internal affairs are general. *Boorum v. Connelly*, 48 Atl. 955, 958, 66 N. J. Law, 197, 88 Am. St. Rep. 469.

**Regulation of oyster beds.**

An act regulating the cultivation of oysters in certain tidal water lying wholly within the counties of the state is not special or local within the prohibition of Const. art. 4, § 7, par. 11, the matter regulated being of general concern, and applying to all citizens. *State v. Corson*, 50 Atl. 780, 785, 67 N. J. Law, 178.

**Regulation of private corporations.**

An act authorizing the incorporation of benevolent societies, and providing that corporations formed under this act shall be capable of taking real or personal property by devise or bequest, not applying to corporations previously organized or effected under other acts, is not a general law of the state.

*Cole v. Frost*, 4 N. Y. Supp. 308, 310, 51 Hun, 578.

A law applicable to existing and future corporations would be general, and one confined to existing corporations would also be general. Both laws would at the time of their enactment apply to precisely the same existing subjects, and until further companies came into existence would have precisely the same control. In *re New York El. R. Co.*, 70 N. Y. 827, 850.

A statute which imposes certain legal duties upon corporations in general and makes provision intended to secure the performances of these duties by corporations is a general law. *Skinner v. Garnett Gold Min. Co.* (U. S.) 96 Fed. 735, 743.

**Regulation of taxation.**

The property of railroad and canal companies constitute a legitimate class of property for the purpose of taxation, and the law which extends to and operates equally upon all such property is a general law. *State Board of Assessors v. State*, 4 Atl. 578, 584, 48 N. J. Law (19 Vroom) 310.

Where various counties, school districts, and other municipal corporations owning judgments had levied special taxes to pay the same, a law declaring such judgment taxes to be legal and valid was a general law operating on every municipal corporation which had levied special taxes to pay such judgments. *Iowa R. Land Co. v. Soper*, 89 Iowa, 112, 116.

**Regulation of saloons.**

An act making it a misdemeanor for the proprietor or superintendent of a public house where liquor is sold to permit games of cards, dice, etc., to be played in his premises, is a general statute. *Territory v. Outinola*, 14 Pac. 809, 810, 4 N. M. (Johns.) 160.

**Repeal of general law.**

The repeal of a public or general law can of necessity only be by a public or general law. *State v. Hoeflinger*, 31 Wis. 257, 262.

**GENERAL LEGACY.**

A general legacy is one so given as not to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind. *Tift v. Porter*, 8 N. Y. 516, 518; *Crawford v. McCarthy*, 54 N. E. 277, 278, 159 N. Y. 514; *Osborne v. McAlpine* (N. Y.) 4 Redf. Sur. 1, 4; *Scofield v. Adams* (N. Y.) 12 Hun, 366, 369; *Graham v. Graham's Ex'r*, 45 N. C. 291, 297; *Kenday v. Sinnott*, 21 Sup. Ct. 233, 237, 179 U. S. 606, 45 L. Ed. 389; *Perrine v. Perrine*, 6 N. J. Law (1 Halst.) 133, 139, 10 Am. Dec. 892; *Appeal of Smith*, 103 Pa. 559, 561;



New Albany Trust Co. v. Powell, 64 N. E. 640, 641, 29 Ind. App. 494; Harper v. Bibb, 47 Ala. 547, 554.

A general legacy is one which does not necessitate delivering any particular thing, or paying money out of any particular portion of the estate. Evans v. Hunter, 53 N. W. 277, 86 Iowa, 413, 17 L. R. A. 308, 41 Am. St. Rep. 503; Getman v. McMahon (N. Y.) 80 Hun, 531, 533.

A legacy is general when it is so given as not to amount to a specific part of the testator's personal estate; as of a sum of money generally, or out of the testator's personal estate, and the like. Pell v. Ball (S. C.) 1 Speers, Eq. 48, 51, 56.

A general legacy is a bequest chargeable on the general estate, and not so given as to be distinguishable from other parts of the estate of the same kind. As otherwise defined, it is one of quantity merely, and includes all legacies not embraced within the definitions of specific and demonstrative legacies. Kelly v. Richardson, 13 South. 785, 790, 100 Ala. 584.

A legacy is said to be general when it is not answered by any particular portion of or article belonging to the estate, the delivery of which will alone fulfill the intent of the testator; and when it is so answered it is said to be a specific legacy, because it consists of some specific thing belonging to the estate, which is by the legacy intended to be transferred in specie to the legatee. Smith v. McKittrick, 2 N. W. 390, 392, 51 Iowa, 548.

#### **Specific legacy distinguished.**

A legacy is general where its amount or value is a charge upon the general assets in the hands of the executors, and where, if these are sufficient to meet all the provisions in the will, it must be satisfied. It is specific when it is limited to a particular thing, subject, or chose in action so identified as to render the bequest inapplicable to any other; as a bequest of a horse, a picture, or a jewel, or a debt due from a person named, and in special cases even of a sum of money. Langdon v. Astor's Ex'rs, 10 N. Y. Super. Ct. (3 Duer) 477, 543.

A specific legacy differs from a general legacy or pecuniary legacy in this respect: that, if the thing secured or money bequeathed is lost, paid, or destroyed in the lifetime of the testator, the legatee will not be entitled to any recompense or satisfaction out of his personal estate; whereas a general legacy is to be paid out of the assets of the testator when converted into money, if the same is sufficient for that purpose, and in the order prescribed in the will. Humphrey v. Robinson, 5 N. Y. Supp. 164, 166, 52 Hun, 200.

One of the attributes of a specific, as distinguished from a general, legacy, or a demonstrative legacy, is that, if the property given in specie does not exist at the death of the testator, there is nothing upon which the gift can take effect, and the legacy is necessarily lost. Johnson v. Conover, 35 Atl. 291, 293, 54 N. J. Eq. 333.

#### **All personality.**

A bequest of all testator's personality, with certain specific exceptions, is a general legacy. Kelly v. Richardson, 13 South. 785, 790, 100 Ala. 584. See, also, Appeal of Crone, 103 Pa. 571, 576.

#### **Proceeds of realty.**

A bequest in trust of a certain sum of money first to be taken out of the proceeds of the realty makes a general legacy; that is, one to be raised out of the proceeds of the realty first, or, if that fund be not enough, then the balance of the estate, except specific legacies, must supply the balance of such bequest. Hutchinson v. Fuller, 75 Ga. 88, 92.

#### **Stock or bonds.**

A legacy of so many shares of stock is a general legacy per se, Purse v. Snaplin, 1 Atk. 414; certainly when the number of shares given does not coincide with the number owned. Slade v. Talbot, 65 N. E. 374, 182 Mass. 256, 94 Am. St. Rep. 653 (citing Metcalf v. First Parish in Framingham, 128 Mass. 370, 373).

A mere bequest of quantity, whether of money or of any other chattel, is a general legacy—as of a quantity of stock; and where the testator has not such stock at his death such bequest amounts to a direction to the executor to procure so much stock for the legatee. Rankin v. Rankin, 36 Ill. 293, 300, 87 Am. Dec. 205.

A legacy is general when it is so given as not to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind. Thus a bequest of the sum of "\$50,000 of the capital stock of B. & P. Co., or, in case I shall not hold that amount of such stock, I direct the executors to take from my other personal property to an amount sufficient to equal said sum," is a general, and not a specific, legacy. In re Pease's Estate, 43 N. Y. Supp. 1146, 1148, 19 Misc. Rep. 210.

Where testator gave his grandchild a certain number of shares of stock, and at the time of the making of the will he owned more than that number of shares of the stock, but at his death did not own such number, such legacy was not a general legacy, but a specific one. New Albany Trust Co. v. Powell, 64 N. E. 640, 641, 29 Ind. App. 494.

Where a testator bequeathes a sum of money, or of shares of stock, without further description or reference, and which may be satisfied by the delivery to the legatee of any stock of the kind designated, such a legacy is general. *Kunkel v. Macgill*, 56 Md. 120, 122.

A bequest of a certain sum of money in "Confederate state bonds" is a general legacy. It is not specific, for the words do not designate any particular bonds specified and distinguished from all others. Had the legacy been of a certain sum of money "in my Confederate state bonds" it would have been specific, but the mere fact that the testator at the time of making his will had an amount of that which was given equal or greater than the bequest would of itself be insufficient to change the class of legacy from general to specific. Neither is it a demonstrative legacy. It designates the article in which payment is to be made, not the source or fund from which the means of payment are to be derived. *Gilmer's Legatees v. Gilmer's Ex'rs*, 42 Ala. 9, 16.

#### GENERAL LETTER OF CREDIT.

A general letter of credit is one to any and all persons, without naming any one in particular, while a special letter of credit is addressed to a particular individual or firm by name. *Birckhead v. Brown* (N. Y.) 5 Hill, 634, 642.

A letter of credit is either general or special. When the request for credit in a letter is addressed to a specified person by name or description the letter is special. All other letters of credit are general. Rev. Codes N. D. 1899, § 4667; Civ. Code S. D. 1903, § 2011.

#### GENERAL LIEN.

A general lien is the right to detain property for a general balance due from the owner, and arises by the usage of trade, the usage of the parties, or by express contract. *Crommelin v. New York & H. R. Co.*, 23 N. Y. Super. Ct. (10 Bosw.) 77, 80.

A general lien is a right to retain a thing not only for charges specifically arising out of or connected with that identical thing, but also for a general balance of accounts between the parties in respect to other dealings of like nature. *McKenzie v. Nevius*, 22 Me. 138, 150, 38 Am. Dec. 291.

A general lien exists when the debt results from a general balance of account. It differs from a particular lien, which exists when the claim arises in respect to the very property retained. *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing &*

*Slaughter-House Co.*, 6 South. 503, 511, 41 La. Ann. 516.

A general lien by a judgment on land only confers a right to levy on the same to the exclusion of other interests subsequent to the judgment. *Ashton v. Slater*, 19 Minn. 347, 351 (Gil. 300, 303).

A general lien of a factor is the right to hold all the goods of his principal which come into and remain in his hands as such factor until the general balance—that is to say, all debts which his principal owes him, and which have arisen and become payable in the course of his business as factor—have been paid; whereas a particular lien is confined to the debt due for the specific article, as in ordinary sales for cash. *Brooks v. Bryce* (N. Y.) 21 Wend. 14, 16.

A general lien is one which the holder thereof is entitled to enforce as a security for the performance of all the obligations or all of a particular class of obligations which existed in his favor against the owner of the property. Civ. Code Idaho 1901, § 2787; Rev. Codes N. D. 1899, § 4675; Civ. Code S. D. 1903, § 2019; Rev. St. Okl. 1903, § 3440; Civ. Code Cal. 1903, § 2874.

#### GENERAL MALICE.

General malice is wickedness and disposition to do wrong against mankind; a black and diabolical heart regardless of social duty, and fatally bent on mischief. Particular malice, as contradistinguished from general malice, means ill will, grudge, a desire to be revenged on a particular person. *Brooks v. Jones*, 33 N. C. 260, 261; *State v. Long*, 23 S. E. 431, 117 N. C. 791; *Neal v. Nelson*, 23 S. E. 428, 431, 117 N. C. 993, 53 Am. St. Rep. 590.

#### GENERAL MANAGER.

As laborer, see "Laborer."

The general manager of a corporation is "the person who really has the most general control over the affairs of a corporation, and who has knowledge of all its business and property, and who can act in emergencies on his own responsibility, and who may be considered the principal officer." *Robert Lee Silver Min. Co. v. Omaha & Grant Smelting & Refining Co.*, 26 Pac. 326, 327, 16 Colo. 118; *Kansas City v. Cullinan*, 68 Pac. 1099, 1102, 65 Kan. 68.

"The term 'general manager' of a corporation, according to the ordinary meaning of the term, indicates one who has the general direction and control of the affairs of the corporation, as contradistinguished from one who may have the management of some particular branch of the business." *Louis-*

ville, E. & St. L. Ry. Co. v. McVay, 98 Ind. 391, 398, 49 Am. Rep. 770.

A general manager of a business corporation is a person having general charge of those business matters for the carrying on of which the company was incorporated. These might include the buying of material, the employment of laborers, the supervision of their labor, and the manufacture and distribution of the articles contemplated in the organization of the company. Merely from the use of the term, a general manager of a gas company cannot be presumed to have had authority to write letters in behalf of the company to the publisher of a periodical in relation to testimony given by a witness before a congressional committee regarding the cost of producing gas, nor to authorize the publication of anything in such periodical. Washington Gaslight Co. v. Lansden, 19 Sup. Ct. 290, 301, 172 U. S. 534, 43 L. Ed. 543.

The term "general manager" imports that the person bearing that title is a general executive officer for all the ordinary business purposes of the corporation, but no presumption of law can be indulged in that he has power to bind his principal to contracts of an extraordinary nature, and of such character as would involve the corporation in enormous obligations, and for long periods of time. Camacho v. Hamilton Bank-Note & Engraving Co., 37 N. Y. Supp. 725, 727, 2 App. Div. 369.

The terms "general manager" and "general agent," when applied to a railroad company, are synonymous. The general agent of such a company is virtually the corporation itself, and therefore has authority to bind the company for the expenses of board and attendance for an injured brakeman. Atlantic & P. R. Co. v. Reisner, 18 Kan. 458, 460.

### GENERAL MEETING.

#### Of creditors.

One of the definitions of the word "general" is "common to many," or "the greatest number." Another is "having relation to all," "common to the whole." A meeting of the creditors of a debtor is not general if it be confined to a particular class, those only of a particular class, and perhaps few in number. In re Bonnaffe, 23 N. Y. 169, 177.

#### Of corporation.

General meetings of a corporation are those at which any business may be transacted, subject only to such restrictions as the charter may impose. Mutual Fire Ins. Co. v. Farquhar, 39 Atl. 527, 528, 86 Md. 668.

In the case of Warren v. Mower, 11 Vt. 385, 387, 391, 392, 394, the court said that: "A manifest distinction obtains between general stated meetings of a corporation and

special meetings. Stated meetings of a corporation are usually general; i. e., for the transaction of all business within the corporate powers." Jones v. Concord & M. R. R., 38 Atl. 120, 126, 67 N. H. 119.

### GENERAL MERCHANDISE.

"General merchandise," as used in an insurance policy covering the goods in a country store, does not embrace gunpowder. Western Assur. Co. v. Rector, 3 S. W. 415, 416, 85 Ky. 294.

A policy of insurance on "general merchandise consisting of dry goods, clothing, and groceries" excluded all things not within the terms "dry goods, clothing, and groceries," and would not include articles such as gunpowder, which might be included within the term "general merchandise." Liverpool & L. & G. Ins. Co. v. Van Os, 63 Miss. 431, 442, 56 Am. Rep. 810.

### GENERAL MORTGAGE.

A general mortgage is that which binds all property, present and future, of the debtor. Barnard v. Erwin (La.) 2 Rob. 407, 415.

### GENERAL NOTORIETY OR INTEREST.

Facts of general notoriety or interest are facts of a public nature, either at home or abroad, not existing in the memory of men, as contradistinguished from facts of a private nature, existing within the knowledge of living men, and as to which they may be examined as witnesses. It is of such public facts, including historical facts, facts of the exact sciences, and of literature or art, when relevant to a cause, that proof may be made by the production of books of standard authority. Such facts include the meaning of words and allusions, which may be proved by ordinary dictionaries and authenticated books of general literary history, and facts in the exact sciences, founded upon conclusions reached from certain and constant data, by processes to be elucidated by witnesses when on examination. Bixby v. Omaha & C. B. Ry. & Bridge Co., 75 N. W. 182, 185, 105 Iowa, 293, 43 L. R. A. 533, 67 Am. St. Rep. 299 (citing Gallagher v. Market St. Ry. Co., 67 Cal. 13, 6 Pac. 869, 51 Am. Rep. 680, note; Union Pac. R. Co. v. Yates, 25 C. C. A. 103, 79 Fed. 584, 40 L. R. A. 553; Van Skike v. Potter, 73 N. W. 285, 53 Neb. 28).

### GENERAL OBJECTION.

A general objection to evidence is an objection which goes to its competency or relevancy. Hicks v. Deemer, 58 N. H. 252, 253, 187 Ill. 164.

A general objection to an instrument offered in evidence raises questions of its rele-

vancy or materiality only. It is not sufficient to raise the objection that it is not properly authenticated, as required by statute. *Cantwell v. Welch*, 58 N. E. 414, 415, 187 Ill. 275.

#### GENERAL OFFICERS.

The president, vice president, general manager, secretary, and treasurer of a railroad corporation, selected by it, through its board of directors, under Burns' Rev. St. 1894, §§ 5145, 5147 (Rev. St. 1881, §§ 3895, 3897), and invested with ostensible authority, are general officers, and may make any contract within the scope of the corporation. *Bedford Belt Ry. Co. v. McDonald*, 48 N. E. 1022, 17 Ind. App. 492, 60 Am. St. Rep. 154.

#### GENERAL OFFICES.

"General offices," as used in Sp. Laws 1879, c. 182, authorizing the issuance of bonds to a railroad, provided its eastern terminus, general offices, and headquarters should be in a certain city, should be construed to mean the general offices maintained for the purpose of operating the railroad. *State v. City of Minneapolis*, 21 N. W. 722, 723, 82 Minn. 501.

#### GENERAL OPPOSITION.

Defendant signed an instrument agreeing to pay a certain sum to the plaintiff as her contribution to the fund for the general opposition to the confirmation of the report of the commissioners of estimate and assessment in the matter of the opening of the Bowery in the city of New York. Held, that the term "general opposition" meant litigation brought in behalf of the property holders as a whole, and did not include any litigation which was peculiar to any one or more of the essential parties less than the whole. Hence defendant was not liable for the amount named in the instrument, where the opposition to the confirmation of the report of the commissioners both on the part of the plaintiff and of the defendant was brought separately, and not jointly, and at their individual expense, and for their individual benefit, and not by way of general opposition in behalf of property holders associated for the purpose of making such opposition. *Dodge v. Gardiner*, 31 N. Y. 239, 245.

#### GENERAL ORDER.

A general order is an order whereby the collector of customs allows the unlading of goods and the taking of possession of them before any entry of them is made by the individual owners or consignees. In re *The Egypt* (U. S.) 25 Fed. 820, 832.

#### GENERAL OWNER.

A general owner is one who has such dominion over a thing that he has the right to enjoy or do with it as he pleases, even to spoiling or destroying it, or that he has that right in it by which it belongs to him in particular to the exclusion of all others. To constitute ownership there must be at some time a right as ample and unrestricted as that. When that right once exists, he who has it is a general owner. He may then burden or limit that right, or subject it to rights created by him in others, and cease not to be the general owner, but he has not become the general owner, though he may have an interest in the property, until he has a right as great as that stated. *Farmers' & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568, 581.

#### GENERAL PARTNERSHIP.

General partnerships are properly such where the parties carry on their trade or business for their joint benefit and profit, and it is not material whether the capital stock be limited or not, or the contributions of the parties be equal or unequal. *Bigelow v. Elliot*, 3 Fed. Cas. 349, 351 (citing *Willett v. Chambers*, Cowp. 814).

To constitute a general partnership nothing more is necessary than that the parties agree to carry on or conduct a specified business and to share in its profits and losses. The business may be of a general nature, or it may relate and be confined to certain designated transactions. In every case the partnership is general; and hence, where parties agreed to carry on a business between Calcutta and New York on joint account, and the particular kind of business was the shipment of goods from Calcutta for sale in New York, and they provided for the mode of payment and the manner of sale, division of profits, and sharing of losses, but no period of duration was prescribed, and there was no limit to the amount or number of shipments, the partnership was general. *Eldridge v. Troost* (N. Y.) 3 Abb. Prac. (N. S.) 20, 23.

Every partnership that is not formed in accordance with the law concerning special partnership, and every special partnership so far only as the general partners are concerned, is a general partnership. Rev. Codes N. D. 1899, § 4385; Civ. Code S. D. 1903, § 1738; Rev. St. Okl. 1903, § 3877; Civ. Code Cal. 1903, § 2424; Civ. Code Mont. 1895, § 3220.

#### GENERAL PLEA.

General plea of non est factum, see "Non Est Factum."

**GENERAL POWER.**

A power is general when it authorizes the alienation in fee, by means of a conveyance, will, or charge of the lands embraced in the power, to any alienee whatever. Rev. St. Wis. 1899, § 2105; Comp. Laws Mich. 1897, § 8860; *Coster v. Lorillard* (N. Y.) 14 Wend. 265, 324; *Jennings v. Conboy*, 73 N. Y. 230, 234; *Syracuse Sav. Bank v. Porter*, (N. Y.) 86 Hun, 168, 170.

A power is general when it authorizes the alienation or incumbrance of a fee in the property embraced therein by grant, will, or charge, or any of them, in favor of any person whatever. Rev. St. Okl. 1903, § 4103; Civ. Code S. D. 1903, § 324.

A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, but because it enables him to give the fee to whom he pleases. *Thompson v. Garwood* (Pa.) 8 Whart. 287, 305, 31 Am. Dec. 502.

**GENERAL POWER IN TRUST.**

A general power is in trust when any person or class of persons other than the grantee of such power is designated as entitled to the proceeds or any portion of the proceeds or other benefits to result from the alienation. *Cutting v. Cutting* (N. Y.) 20 Hun, 260, 264; *Dana v. Murray*, 122 N. Y. 604, 612, 26 N. E. 21, 23.

A general power is in trust when any person or class of persons other than its holder is designated as entitled to the proceeds or disposition or charge authorized by the power or to any portion of the proceeds or other benefits to result from its execution. Rev. St. Okl. 1903, § 4107; Rev. Codes N. D. 1899, §§ 3411, 3412; Civ. Code S. D. 1903, §§ 327.

A power given by a testatrix to her executor to sell at public or private sale, on such terms and for such price as he might deem expedient, and upon such sale to execute all necessary proper deeds and conveyances to the purchaser, which sale and conveyance should be a complete bar to all claims to the estate or interest in the said premises of her children and heirs, or any person claiming by or through them, was a general power in trust, as defined by the statute. *Dana v. Murray*, 122 N. Y. 604, 612, 26 N. E. 21, 23.

**GENERAL PROPERTY.**

The terms "general property" and "special property" are constantly used in the books to denote not the chattel itself, but the different interests which several persons may

have in it. *Stief v. Hart*, 1 N. Y. (1 Comst.) 20, 24.

At common law the property of the wife was divided into two general classes—her general property and her separate property. The goods and personal chattels of the wife, which were actually beneficially possessed by her in her own right at the time of her marriage, and such other goods and personal chattels as come to her during her coverture, belong to the first class, and these, at common law, vested absolutely in the husband. The separate property of the wife is that of which she has the absolute control, independent of her husband, and the proceeds of which she may dispose of as she pleases. A gift of personal property to the wife is presumed, in the absence of testimony to the contrary, to be a gift, and as her general property. *Alston v. Rowles*, 13 Fla. 117, 126.

**GENERAL PUBLIC LAW.**

"Due process of law" is synonymous with 'law of the land,' and 'the law of the land' is 'general public law,' binding upon all the members of the community under all circumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals." *Eden v. People*, 43 N. E. 1108, 1109, 161 Ill. 296, 32 L. R. A. 659, 52 Am. St. Rep. 365 (quoting *Millett v. People*, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869).

**GENERAL PURPOSES.**

A municipal charter authorizing the city to borrow money for general purposes on the credit of the city should be construed to limit the power to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation; and the presumption is that the grant of the power was intended to confer the right to borrow money in anticipation of the receipt of revenue taxes, and not to plunge the municipal corporation into a bonded debt on which interest must be paid at the rate of 10 per cent. per annum, semiannually, for at least 10 years. The Legislature may confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds, and any doubt as to the existence of such power should be determined against its existence. *City of Brenham v. German-American Bank*, 12 Sup. Ct. 559, 562, 144 U. S. 173, 36 L. Ed. 890.

**GENERAL RECEIVER.**

A general receiver is one appointed by a court of chancery independent of any statute. His authority is derived from, and his duty prescribed by, the order of appointment, and he is called a common-law receiver.

Boonville Nat. Bank v. Blakey (U. S.) 107 Fed. 891, 894, 47 C. C. A. 43.

### GENERAL RECOGNITION.

Under Code 1873, § 2466, providing that illegitimate children may inherit from their father when they have been recognized by him as his children, but such recognition must have been general, or notorious, or else in writing, where a father generally called and treated a person as his son, and he was generally so recognized in the community, such recognition will be held general and notorious. *Van Horn v. Van Horn*, 77 N. W. 846, 848, 107 Iowa, 247, 45 L. R. A. 98. Thus where the child was born after the father's death, and during his life the mother and father endeavored most strenuously not only to conceal from the public and their relatives and acquaintances the fact that he was the father of the child, but also the fact that a child was to be born to her, there was not a "general and notorious" recognition, though by his acts he acknowledged to the persons with whom she boarded that he was the father. *Duffy v. Duffy*, 87 N. W. 500, 501, 114 Iowa, 581.

### GENERAL REPLICATION.

A general replication, which alone is now used in equity, is a general denial of the truth of defendant's plea or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. Formerly replications were either general or special, as they still are at law. *Vanbibber v. Belrne*, 6 W. Va. 168, 180 (citing *Coop. Eq. Pl.* 329, 330); *Stewart v. Conrad's Adm'r*, 40 S. E. 624, 626, 100 Va. 128.

### GENERAL REPUTATION.

The general reputation of a person is what is generally said of him by those amongst whom he dwells, or with whom he is chiefly conversant. *Sloan v. Edwards*, 61 Md. 89, 103; *State v. Miller*, 6 S. W. 57, 61, 93 Mo. 203; *State v. Conlan* (Del.) 50 Atl. 95, 3 Pennewill, 218; *Coates v. Sulau*, 46 Kan. 341, 342, 26 Pac. 720.

The general reputation of a person is the estimate in which he is held by the community. *Cunningham v. Underwood* (U. S.) 116 Fed. 803, 811, 53 C. C. A. 99.

There must be general concurrence in an estimate of one's reputation to make it general reputation, or a reputation which is general. *Pickens v. State*, 61 Miss. 563, 566.

General reputation of a person is a fact. The question is a simple one of fact. Is there a general reputation? Has the subject been so much discussed and considered that

there is in the public mind a uniform sentiment, which can be stated as a fact? By the public mind of course is not meant the mind of the whole public, but of that portion of the public which is interested. *Walker v. Moors*, 122 Mass. 501, 504.

According to common usage, the phrase "general reputation" refers to the general moral character of the person referred to. In an action for libel, a question as to whether a witness was acquainted with the plaintiff's general reputation was not objectionable as embracing other than moral traits of character. The expressions "bad character" and "general reputation" are constantly used to signify character and reputation with regard to morals. *O'Brien v. Frasier*, 1 Atl. 465, 469, 47 N. J. Law (18 Vroom) 349, 54 Am. Rep. 170.

As used in the rule that a common-law marriage cannot be presumed from evidence of cohabitation as husband and wife and general repute or reputation, by general reputation is meant the understanding among the neighbors and acquaintances with whom they associate in their daily life that they are living together as husband and wife, and not in meretricious intercourse. In its application to the fact of marriage it is more than mere hearsay. It involves and is made part of social conduct, recognition, giving character to an admitted and unconcealed cohabitation. *Taylor v. Taylor*, 50 Pac. 1049, 1050, 10 Colo. App. 303 (citing *Badger v. Badger*, 88 N. Y. 55, 42 Am. Rep. 263; *In re Yardley's Estate*, 75 Pa. [25 P. F. Smith] 211).

The words "general reputation," in reference to the admission of general reputation to prove boundaries, etc., in common sense and in law must mean that which is derived from the declarations of those who live or were living at a time, if not ancient, at least comparatively remote. Thus evidence that a certain tree was understood to be a corner tree in 1886 is not admissible as general reputation. *Westfelt v. Adams*, 42 S. E. 823, 825, 131 N. C. 379.

### GENERAL RESIDUUM.

Testator, whose heirs at law were one son and two married daughters, in the first clause of his will devised and bequeathed to his son, subject to the limitations afterwards made in the will, one equal one-third part of all his estate, to wit, certain real estate particularly described, and so much of his other property not specifically devised as, with advancements to the son, should amount to such third part. In a subsequent clause he devised and bequeathed the general residuum of his estate, not before specifically devised, equally to be divided among his three children, their heirs and assigns. Held, that

the phrase "general residuum" meant testator's personal estate, or any other estate he might acquire. *Homer v. Shelton*, 43 Mass. (2 Metc.) 194, 208.

#### GENERAL RESTRAINT.

A general restraint is defined to be an agreement not to carry on a certain business anywhere. It is against public policy, and void. *Kellogg v. Larkin* (Wis.) 3 Pin. 123, 138, 56 Am. Dec. 164.

A general restraint of trade is in England defined to be one which forbids a person from employing his talents, industry, or capital in any undertaking within the kingdom. An agreement in general restraint of trade is utterly void. *Holbrook v. Waters* (N. Y.) 9 How. Prac. 335, 337.

#### GENERAL RETAINER.

A general retainer merely gives a right to expect professional services when requested, but none which is not requested. It binds the person retained not to take a fee from another against his retainer, but to do nothing except what he is asked to do; and for this he is to be paid. *Rhode Island Exch. Bank v. Hawkins*, 6 R. I. 198, 206.

#### GENERAL REVENUE PURPOSES.

The words "general revenue purposes" in Gen. St. 1889, par. 788, authorizing the levy and collection for general revenue purposes of not to exceed 10 mills on the dollar in any one year on certain property, means the same as "ordinary purposes." *Stevens v. Miller*, 43 Pac. 439, 441, 3 Kan. App. 192.

#### GENERAL REVENUES.

"General revenues," as used in a will, by which the testator directed that his estate should not be divided and no devise or bequest should take effect until all his just debts were paid and fully discharged from the general revenues of his estate, means the rents and profits of the testator's real estate and the interest or profits arising out of the personal estate. *Whitehead v. Gibbons*, 10 N. J. Eq. (2 Stockt.) 230, 232.

#### GENERAL RULES OF PRACTICE.

The rules established by the justices assigned to the Appellate Division of the Supreme Court in convention, which rules are binding upon all the courts in the state and all the judges and justices thereof, except the court for the trial of impeachments and the Court of Appeals, are styled "the general rules of practice." Code Civ. Proc. N. Y. 1899, § 17.

#### GENERAL SELLING PRICE.

The general selling price is not to be shown in condemnation proceedings by evidence of particular sales of alleged similar lots, but is to be fixed in the mind of the witness from a knowledge of the price at which lots are generally held for sale, and at which they are sometimes actually sold, in the ordinary business in the neighborhood. *Friday v. Pennsylvania R. Co.*, 54 Atl. 339, 204 Pa. 405.

#### GENERAL SERVICES.

By general services of an attorney are meant services not embraced in suits or in their settlement. *People v. Bond St. Sav. Bank* (N. Y.) 10 Abb. N. C. 15, 25.

#### GENERAL SHIP.

"A general ship is defined to be one in which the masters or owners engage separately with a number of persons unconnected with each other to convey their respective goods to the place of the ship's destination." *Ward v. Green* (N. Y.) 6 Cow. 173, 176, 16 Am. Dec. 437.

#### GENERAL STORE.

Where a policy was issued on a general store, it covered a limited quantity of gunpowder and petroleum to the extent that it was customary for such stores to carry in stock, though the policy provided against such articles. *Barnard v. National Fire Ins. Co.*, 27 Mo. App. 26, 35.

#### GENERAL STRIKE.

Where a contract provided for the extension of the time for completion of a building if the contractors were unavoidably delayed by any "general strike," there was a general strike where operatives of planing mills in the city were on a strike from January 15 to August 8, 1892, only three out of twenty-eight of such mills being in operation, and such three being unable to secure skilled labor. *Weber v. Collins*, 41 S. W. 249, 250, 139 Mo. 501.

#### GENERAL SUPERINTENDENCY.

A contract providing different wages for general and special superintendencies "imports a superintendence which would be necessary and continuous throughout the whole duration of the agreement." *Pressy v. H. P. Smith Mach. Co.*, 19 Atl. 618, 620, 45 N. J. Eq. (18 Stew.) 872.

#### GENERAL SUPERVISION.

A city ordinance giving the board of health a "general supervision over the health

of the city" should be construed to grant an active efficient power to be exercised for the public good, and in its scope to reach to whatever may be necessary to the preservation of the public health. It should not be limited to devising measures which are reported to the council, or comprehend nothing more than a mere authority to examine into the condition of the health of the city, and advise the measures necessary for its preservation; hence the ordinance included the power to rent a building to be used as a hospital to protect the city from the infection of cholera. *Anll v. City of Lexington*, 18 Mo. 401, 402.

### GENERAL SURFACE.

"General surface," in a deed providing that the grantee should have the right to flow the lands and privileges of the grantor on a river to the extent which a dam erected 28 feet high above the general surface of the bed of the river at the point where the excavations were made for the dam to flow the river, the term "general surface" refers to the bed of a river, and not to the narrow ridge of sandstone of the dam, so as to authorize the grantee to erect flashboards on the top of the dam. "General" refers to a surface more extended than a narrow ridge. *Ludlow Mfg. Co. v. Indian Orchard Co.*, 58 N. E. 181, 177 Mass. 61.

### GENERAL TAX.

A general tax is one imposed on all persons within the territorial limits according to the value of their property in consideration of the protection which the government affords alike to all. *Gould v. City of Baltimore*, 59 Md. 378, 380.

General taxes are defined to be a burden imposed on property for the common good and for the purpose of raising the ordinary revenues of the country, without regard to any special benefit to the owner except such as may be anticipated from the general administration of the laws for individual protection and the general good. They are exactions from a person for the purpose of either carrying on the general government or some subordinate department thereof. *Meier v. Kelly*, 25 Pac. 73, 76, 20 Or. 86.

General taxes are the exactions placed upon the citizens for the support of the government, paid to the state as a state, the consideration of which is protection by the state. They are to be distinguished from special taxes or special assessments, which are imposed on property within a limited area for the payment of all local improvements supposed to enhance the value of all property within that area. General taxes proceed upon the theory that the existence of the government is necessary, and that it cannot

continue without means to pay its expenses; that for those expenses it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no special benefit to any property, but only secures to citizens that general benefit which results from protection to his person and property and the promotion of those various schemes which have for their object the welfare of all. *Illinois Cent. R. Co. v. City of Decatur*, 13 Sup. Ct. 293, 147 U. S. 190, 87 L. Ed. 132.

General taxes are levied on the ground of general public benefits, while special assessment is a peculiar species of taxation to pay for local improvements, which recognizes the general public interest and benefit, but rests upon the supposition that a portion of such public are specially benefited in the increase of value to their property. *Shurtleff v. City of Chicago*, 60 N. E. 870, 871, 190 Ill. 473.

The words "general tax," as used in Laws 1891, c. 124, § 108, providing that all special assessments shall be carried out on the tax roll in a separate column, and the city treasurer shall have the same authority with reference thereto as if the kind of such lien was a general tax, is used with reference to the manner of imposing the tax upon the property in that it is levied upon it generally by a uniform percentage according to the value thereof. Taxes are spoken of as special if levied for a special purpose, general if levied for some ordinary purpose of municipal government; but, whether taxes be levied for a general or special purpose, if placed upon property as a whole in proportion to the value thereof, they are in the proper sense general taxes as distinguished from special assessments. *State v. Hobe*, 82 N. W. 336, 338, 106 Wis. 411.

A tax to defray the costs of laying water pipes, levied by a city upon adjacent property, is an assessment for local improvements, and not a general tax for municipal purposes. *City of Philadelphia v. Union Burial Ground Soc.*, 86 Atl. 172, 178, 178 Pa. 533.

### GENERAL TAXATION.

General taxation implies a distribution of the burden upon some general rule of equality. So a local assessment or tax for a local benefit should be distributed among and imposed upon all equally standing in like relation. But the equality can never be but an approximation. *Allen v. Drew*, 44 Vt. 174, 186.

Under Act Va. March 6, 1847, which was accepted by the Baltimore & Ohio Railroad Company, and under which it completed its road through Virginia, the provision that the stock, property, and profits of said company



shall be subject to general taxation, does not, by the use of the word "general," or the phrase "general taxation," limit the right of taxation to general taxation for such purposes, and exempt it from liability for local or county taxes. To give the word "general" its plain and literal signification, its meaning is exactly the reverse. The definition of the word "general" found in Burrill's Law Dictionary is "that which comprehends all, the whole, as distinguished from 'special,' which signifies something designed for a particular purpose." *Baltimore & O. R. Co. v. Marshall County Sup'rs*, 3 W. Va. 819, 332.

### GENERAL TENANCY.

The words "general tenancies," as used in 2 Rev. St. 1876, p. 338, § 2, providing that all general tenancies in which the premises are occupied by the consent of the landlord shall be deemed tenancies from year to year, means such tenancies only as are not fixed and made certain in point of duration by the agreement of the parties. *Rothschild v. Williamson*, 83 Ind. 387, 389; *Brown's Adm'rs v. Bragg*, 22 Ind. 122, 123.

### GENERAL TERM.

Rev. St. 1889, p. 2147, § 10, defines a general term as when the court sits as a court in bank. *State ex rel. McCaffery v. Eggers*, 54 S. W. 498, 499, 152 Mo. 485.

### GENERAL TERMS.

In construing the statute permitting all matters of defense to be given in evidence under the general issue on the defendant filing a notice of all matter in avoidance and of any defense, "stating in general terms, and without unnecessary prolixity, and in a manner intelligible to a person of ordinary understanding, the true ground and substance of the defense relied upon," the court said: "The expression in 'general terms, concisely, comprehensively,' and the expression without 'unnecessary prolixity,' i. e.—unnecessary minuteness of detail—is unmeaning, for that is equally a fault in a special plea, although not demurrable in either, and the expression 'intelligible to a person of ordinary understanding,' evidently refers to the kind of language, and was doubtless intended to prevent the use of technical phrases. They all refer to the manner of stating the defense, and do not excuse an omission of substance." *Merrill v. Everett*, 38 Conn. 40, 48.

### GENERAL TICKET.

Within the meaning of Const. art. 4, § 3, providing that when a township or city

shall contain a population which entitled it to more than one representative, "then such township or city shall elect by general ticket the number of representatives to which it is entitled," the term "general ticket" is opposed to partial or special, and signifies that the whole number of representatives to which the town or city is entitled shall be placed upon the ticket. This signification corresponds with the primary meaning of the word "general" as defined by lexicographers. It is, moreover, consistent with the provision for electing representatives when only one is to be chosen, making the whole proceedings uniform throughout the state. *Maynard v. Board of District Canvassers*, 47 N. W. 756, 760, 84 Mich. 228, 243, 11 L. R. A. 332.

### GENERAL VACCINATION.

St. 1889, p. 32, entitled "An act to encourage and provide for a general vaccination in the state of California," though sufficient in itself to apply to all the people in the state, is to be construed in connection with the general classes to which the statute is made to apply by the body of the act, and hence it is not in conflict with Const. art. 4, § 24, requiring that the subject of every act shall be expressed in its title, by the fact that the body of the act only applies to the vaccination of children in the public schools. *Abeel v. Clark*, 24 Pac. 383, 84 Cal. 226.

### GENERAL VERDICT.

See "Separate General Verdict."

A general verdict is that by which the jury pronounced generally upon all or any of the issues, either in favor of the plaintiff or defendant. *McCormack v. Phillips*, 34 N. W. 39, 55, 4 Dak. 506; *Egan v. Estrada* (Ariz.) 56 Pac. 721, 722; *Settle v. Alison*, 8 Ga. 201-208, 52 Am. Dec. 393; *Shipp v. Snyder*, 25 S. W. 900, 901, 121 Mo. 155; *Shadbolt & Boyd Iron Co. v. Camp*, 45 N. W. 1062, 1063, 80 Iowa, 539; *Childs v. Carpenter*, 32 Atl. 780, 781, 87 Me. 114; *Glenn v. Sumner*, 10 Sup. Ct. 41, 132 U. S. 152, 33 L. Ed. 301; *People v. Board of Police* (N. Y.) 14 Abb. Prac. 151, 155; *Witty v. Chesapeake, O. & W. R. Co.*, 83 Ky. 21, 27; *Ballinger's Ann. Codes & St. Wash.* 1897, § 5019; *Code Civ. Proc. S. C.* 1902, § 282; *Rev. Codes N. D.* 1899, § 5444; *Code Civ. Proc. S. D.* 1903, § 270; *Rev. St. Okl.* 1903, § 4472; *Ann. Codes & Sts. Or.* 1901, § 152; *Bates' Ann. St. Ohio* 1904, § 5200; *Rev. St. Utah* 1898, § 3162; *Code Civ. Proc. Cal.* 1903, § 624; *Code Civ. Proc. N. Y.* 1899, § 1186.

A general verdict covers all the issues of the case. *McCullough v. Martin*, 89 N. E. 905, 906, 12 Ind. App. 165.

A general verdict determines the entire issue in favor of either plaintiff or defendant. *Risemann v. Swan*, 19 N. Y. Super. Ct. (6 Bosw.) 668, 671.

A general verdict settles in favor of the prevailing party every question of fact. *Soria v. Davidson* (N. Y.) 9 Civ. Proc. R. 23, 27.

A general verdict is the jury's deduction from all the issuable facts in the case. *Lake Erie & W. R. Co. v. Charman* (Ind.) 67 N. E. 923, 926.

A general verdict directly finds or negatives all the facts in issue in a general form. *Day v. Webb*, 28 Conn. 140, 144.

A "general verdict" is a finding that all the facts necessary to establish the cause of action are true. *American Tin-Plate Co. v. Guy*, 58 N. E. 738, 739, 25 Ind. App. 588.

A general verdict necessarily includes the decision of every material fact well pleaded touching the prevailing party's right to recover. *Wells v. Barnett*, 7 Tex. 584, 586; *Ackermann v. Ackermann*, 55 S. W. 801, 803, 22 Tex. Civ. App. 612.

A general verdict embodies both the law and the facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be, and express their conclusions in the verdict. *Walker v. New Mexico & S. P. R. Co.*, 17 Sup. Ct. 421, 422, 165 U. S. 593, 41 L. Ed. 837.

A general verdict is a direct statement of a conclusion of law and an indirect statement of the facts from which the conclusion is drawn. It expressly affirms the law and inferentially the facts. The jury are directed by the court to indicate the facts found from the evidence by the statement of a conclusion of law. The court states the law applicable to the facts which the evidence tends to prove, and, if the jury finds the facts, they state the conclusion as charged. *Smith v. Ireland*, 7 Pac. 749, 750, 4 Utah, 187.

A general verdict is the verdict upon the issues presented, and is sustainable, though some of the paragraphs were justified, if the justification did not cover all of them. *Holmes v. Jones* (N. Y.) 50 Hun, 345, 346, 3 N. Y. Supp. 156, 157.

Separate findings on separate causes of action are general verdicts. *Robinson & Co. v. Berkeley*, 69 N. W. 434, 436, 100 Iowa, 136, 62 Am. St. Rep. 549.

Simple responses of yes or no to issues submitted constitute general, not special, verdicts, and in case of inconsistency between such responses the rule which requires a special verdict to prevail over a general one has no application. *Porter v. Western North Carolina R. Co.*, 97 N. C. 63, 71, 2 S. E. 580.

#### In criminal proceeding.

A general verdict is defined by the Code of Criminal Procedure to be the verdict of guilty or not guilty. *People v. McClure*, 42 N. E. 523, 524, 148 N. Y. 95.

A general verdict upon a plea of not guilty is either "Guilty" or "Not guilty," which imports a conviction or acquittal of the crime charged in the indictment; and upon a plea of former conviction or acquittal of the same crime, the verdict is either "for the state" or "for the defendant." Ann. Codes & St. Or. 1901, § 1413.

At common law there was a settled distinction between a general verdict in civil and criminal proceedings. In the former case, if some of the counts were bad, when entire damages were given, it was necessary to arrest the judgment, because the court could not apportion the damages; while in the latter the court ascertained the penalty, and could apply it to the good counts which were supported by the bill; and therefore, where the defendant was found guilty of the charge in general, if there were any good counts the verdict was sufficient, and an entire judgment might have been given. *Shiffet v. Commonwealth* (Va.) 14 Grat. 652, 671 (citing 1 Chit. Cr. Law, 249, 640).

#### GENERAL WARRANTY.

See "Covenant of General Warranty."

#### GENERAL WELFARE.

The term "general welfare," when applied to the right of a municipal corporation to provide by ordinance for the general welfare, is synonymous with "corporate purposes." A statute authorizing the municipality to pass ordinances for the good government or good order or the suppression of vice is not an authority to pass all ordinances tending to the general welfare, as many things are essential to the public or general welfare which belong neither to the government or good order of, nor to the suppression of vice in, a municipality. *City of Red Wing v. Chicago, M. & St. P. Ry. Co.*, 75 N. W. 223, 224, 72 Minn. 240, 71 Am. St. Rep. 482.

#### GENERALLY.

A contract of sale, whereby the complainant agreed to give defendants immediate possession, and use of the woodland generally, and of all the wood they cut and corded in the woods, should be concluded to mean "all the woodland." *Dale v. Smith*, 1 Del. Ch. 1, 10, 12 Am. Dec. 64.

#### GENERALLY IMPROVE.

"Generally improve the property," as used in a covenant by a lessee of a farm to

repair the buildings, build all fences, and to generally improve the property, "refers to the treatment of the lands in their use for agricultural purposes. The mode of cultivation, the proper and sufficient use of manures in enriching the land, and matters of this sort, are within the terms and meaning of this stipulation. To hold it to relate to improvements of any other character would leave the obligations of the tenant under it unbounded." *Naye v. Noezel*, 14 Atl. 750, 751, 50 N. J. Law (21 Vroom) 523.

#### GENERALLY KNOWN.

A person may universally be known—that is, by all who know him at all—by two names; and then, of course, he is generally known by each. It is sufficient if the party be as well known by the name mentioned in the indictment as by the true name. Whenever that is the case, it may properly be said that the party is generally known by both names. *Taylor v. Commonwealth* (Va.) 20 Grat. 825, 831.

#### GENERATION.

In Acts 1885, c. 51, as amended by Acts 1889, c. 60, providing separate schools for Indians, from which all negroes to the fourth generation are to be excluded, the word "generation" "means a single succession of living beings in natural descent. As the word 'generation' has no technical meaning, we must consider it as used in the sense of a succession—its ordinary import—rather than a degree of removal in computing descents." *McMillan v. School Committee of Dist. No. 4*, 12 S. E. 830, 832, 107 N. C. 609, 10 L. R. A. 823.

#### GENERIC.

Terms are generic which pertain to a class of related things, and which are of general application. *Continental Ins. Co. v. Continental Fire Ass'n* (U. S.) 96 Fed. 846, 848.

The words "generic" and "specific" are relative words. A name which is said, by comparison with some other name, to be specific, is so said because the definition given of the name alleged to be specific limits the subject under consideration more or further than the definition which is assigned to that name which is called "generic." *Curiel v. Beard* (U. S.) 44 Fed. 551, 553.

#### GENOESE LOTTERY.

The American Encyclopædia says that lottery may be distinguished into the Genoese or numerical and the Dutch or class lottery.

The former is described as a scheme by which, out of ninety consecutive numbers, five are to be selected or drawn by lot; the players having fixed on certain numbers, wagering that one, two, or more of them would be drawn among the five, or that they would appear in a certain order. In the Dutch or class lottery the number and value of the prizes are regularly estimated. All the ticket holders are interested at once in the play, and chance determines whether a prize or a blank shall fall to a given number. *Fleming v. Bills*, 3 Or. 286, 291.

#### GENTLE.

The word "gentle" in a warranty of a horse imports that he is docile, tractable, and quiet. It does not, in its ordinary legal sense, import that the horse has received any particular training or teaching. *Bodurtha v. Phelon*, 84 Mass. (2 Allen) 847, 848.

#### GENTLEMAN.

A gentleman, according to Dr. Johnson, is, first, a man of birth, but not noble; second, a man raised above the vulgar by his character or post. *Cresson v. Cresson*, 6 Fed. Cas. 807, 809.

#### GENTLEMEN OF THE LAW.

A rule of court providing that no person shall be admitted to the bar unless he has served a regular clerkship to some practicing attorney, or gentleman of the law of known abilities, includes a judge of the Supreme Court or a judge of the court of common pleas. *Commonwealth v. Judges of Court of Common Pleas* (Pa.) 1 Serg. & R. 187, 192.

#### GENUINE.

As the word "genuine" is used when describing a note, it means that the note is not false, fictitious, simulated, spurious, counterfeit, or, in short, that the apparent maker did make and deliver the note. It imports nothing in regard to the collectibility or in regard to the legal effect or operation of the note. *Baldwin v. Van Deusen*, 37 N. Y. 487, 492.

A warranty of county bonds in a sale thereof by a private citizen that they were "genuine and regularly issued" does not merely mean that they are not forgeries and were not issued without consideration, and that they were ordered by the proper officers, but means that they are not subject to any defense founded on a want of legal form in the signature or seals. *Smeltzer v. White*, 92 U. S. 390, 392, 23 L. Ed. 508.

Where, in an action on a promissory note, there is evidence that the note was shown to the defendant to ascertain if his signature was genuine, and he informed the holder that his name had been forged to a number of notes, but to have no uneasiness as to this note, as it was all right, and would be paid when due, an instruction that it devolved on the plaintiff to prove that the signature of the defendant was genuine was erroneous, if it was intended thereby to signify that the name must have been written by the defendant himself with his own hand. It is competent for a person to make a note his own either by signing it with his own hand, or by adopting the signing made by another in his name, although without previous authority. *Dow's Ex'r v. Spenny's Ex'r*, 29 Mo. 386, 390.

#### GENUINENESS.

"Genuineness," as used in Civ. Prac. Act, §§ 53, 54, providing that when an action is brought on a written instrument, or a defense to an action is founded on a written instrument, and a copy thereof is contained in the complaint or answer, its genuineness and due execution shall be deemed admitted, unless the answer denying the same be verified in the one case, and unless the plaintiff file with the clerk an affidavit denying the same in the other case, goes to the question of its having been the act of the party, as represented, or, in other words, that the signature is not spurious, and that nothing has been added to it or taken away from it which would lay the party changing the instrument, or signing the name of the person liable for forgery. *Cox v. Northwestern Stage Co.*, 1 Idaho, 376, 379.

The use of the word "genuineness," in an instruction that the defendant cannot be estopped from denying the genuineness of the alleged warehouse receipts unless the jury find, etc., "might suggest the question of authority of an agent to issue the receipts, to the mind of a trained lawyer; but it would not be apt to convey that impression to the jury, or lead them to suppose that such question was submitted to them to pass on." *Corn Exchange Bank v. American Dock & Trust Co.*, 43 N. E. 915, 917, 149 N. Y. 174.

#### GENUS.

"Genus" signifies a class, embracing many species. The expression "an animal of the horse species" would therefore only include animals known as horses, mares, fillies, and colts, and it would not include an animal belonging to a distinct species, though of the same genus. The word "species" means a sort; a kind; a class subordinate to a genus. *Smythe v. State*, 17 Tex. App. 244, 251.

#### GEO.

"Geo." represents "George," by common consent. *People v. Ferguson* (N. Y.) 8 Cow. 102, 106.

#### GERMAN CYLINDER GLASS.

In an action for breach of a contract to furnish German cylinder glass, it would be competent to show that the article furnished was such as would be known in the market, and among those conversant with the trade, as glass of that description; but a question whether the glass furnished was merchantable, and not whether it was such as would be recognized by the trade as German cylinder glass, or in what respect it was defective or failed to conform to that description, would not be admissible. *Mixer v. Coburn*, 52 Mass. (11 Metc.) 559, 562, 45 Am. Dec. 230.

#### GERMAN EDUCATION.

A German education is one acquired through the medium of the German language. *Powell v. Board of Education*, 97 Ill. 375, 381, 37 Am. Rep. 123.

#### GERMANE.

"Literally, 'germane' means akin; closely allied. It is only applicable to persons who are united to each other by the common tie of blood or marriage. When applied to inanimate things, it is, of course, used in a metaphorical sense, but still the idea of a common tie is always present. Thus, when properly applied to a legislative provision, the common tie is found in the tendency of the provision to promote the object and purpose of the act to which it belongs. Any provision not having this tendency, which introduces a new subject-matter into the act, is not germane to it. It is an error to suppose that two things are, in a legal sense, germane to each other, merely because there is a resemblance between them, or because they have some characteristic common to them both." Legislation affecting the boundaries of cities and villages is not germane to that affecting the boundaries of townships. Where the Legislature had the right to provide for the change of township boundaries, this right did not carry with it, as an incident, the power to change the boundaries of cities and villages; the change of the latter not being necessary to effectuate a change of the former, or at least to promote such object. *Dolese v. Pierce*, 16 N. E. 218, 220, 124 Ill. 140.

#### GERRYMANDER.

"Gerrymander" is the unsavory but expressive name for a method of creating civil

divisions of the state for improper purposes, as, for instance, creating school districts, so that children of certain religious beliefs or of the same nationality should be brought within one district, and those of a different nationality or different religion brought within another. *State v. Whitford*, 11 N. W. 424, 428, 54 Wis. 150.

## GET.

"The word 'get,' in its common and ordinary sense, signifies to procure, obtain, according to Dr. Johnson. It may sometimes mean, he says, by force, where the attack will justify that meaning." The word "got," in a publication charging that plaintiff was a United Irishman, and got the money of the United Irishmen into his hands, and ran away with it, does not import a felony, but rather a breach of trust, and therefore such charge is not slanderous. *McClurg v. Ross* (Pa.) 5 Bin. 218, 222.

## GET OFF.

The phrase "get off quickly," as used by the conductor of a railroad train to a party who assisted another onto the train, which started before he could alight, were words of advice, and did not constitute a requirement to leave the train. *Evansville & T. H. R. Co. v. Athon*, 33 N. E. 469, 472, 6 Ind. App. 295, 51 Am. St. Rep. 303 (citing *Lindsey v. Chicago, R. I. & P. Ry. Co.*, 20 N. W. 737, 64 Iowa, 407).

An instruction that, if an accident occur to a passenger while he was in the act of getting off the car while it was in motion, then he could not recover, must be understood to have meant the act of the passenger in not merely going on the steps of the platform of the car, but jumping or alighting from the steps to the ground. *Butler v. St. Paul & D. R. Co.*, 60 N. W. 1090, 59 Minn. 135.

## GETTING OUT.

Within the meaning of a statute which gives a lien to tradesmen and others for "labor done in building, repairing, getting out, furnishing, or equipping a boat," the expression "getting out" is broad enough to cover all those services or expenses which might be necessary to put the boat afloat when finished, and to place her in a situation that would enable her to begin her business of navigating the river. They are not necessarily confined to building or repairing. *Madison County Coal Co. v. The Colona*, 36 Mo. 446, 449. Work and labor done, or services rendered, in unloading a boat in port, by persons not regularly employed on the vessel, was not labor done in "getting out"

the boat within the meaning of the statute. *Gibbons v. The Fanny Barker*, 40 Mo. 253, 254.

## GIANT UMBRELLA.

Giant umbrellas are many-colored, fantastically decorated articles imported from Japan and China, of huge size, the frames of which are covered with paper. They resemble ordinary umbrellas, substantially as the miniature ones similarly made and imported from the same countries, which are used by women for hairpins, resemble parasols. They are not the umbrella of trade and commerce, and dealers in these articles do not keep them. They are called umbrellas merely for convenience. *United States v. China & Japan Trading Co. (U. S.)* 71 Fed. 864, 865, 18 C. C. A. 335.

## GIFT.

See "Absolute Gift"; "Original Gift"; "Pious Gift"; "Proper Gift."

Charitable gift, see "Charity."

Substitutional gift, see "Substitutional—Substitutionary."

Gift, grant, purchase, devise, or otherwise, see "Otherwise."

Gifts are of five kinds: (1) Absolute to the donee; (2) to one for delivery to another; (3) to one as a trustee; (4) inter vivos; and (5) causa mortis. *Flaherty v. O'Connor*, 54 Atl. 376, 377, 24 R. I. 587.

Three things are essential to every gift—a donor, a donee, and a thing to be given. *Crawford v. Lockwood* (N. Y.) 9 How. Prac. 547, 548.

A gift of a chattel is the act of transferring the right and possession thereto, whereby one man renounces and another acquires the right or title thereto. *McWillie v. Van Vacter*, 35 Miss. 428, 447, 72 Am. Dec. 127.

The word "gift," as used in a provision in the Penal Code prohibiting certain persons from accepting any gift, shall not be taken to include property received by inheritance, by will, or by gift in view of death. *Rev. Codes N. D. 1899, § 6940; Pen. Code S. D. 1903, § 137.*

### Acceptance.

A gift, to be complete, includes the element that it be accepted by the donee. *Mace v. Thayer*, 64 N. Y. Supp. 315, 318, 51 App. Div. 121; *Crouse v. Judson*, 84 N. Y. Supp. 755, 757, 41 Misc. Rep. 388; *Appeal of Calburn*, 51 Atl. 139, 140, 74 Conn. 463, 92 Am. St. Rep. 231.

To constitute a valid gift, there must be an assent of both parties. The necessary

acceptance may often be presumed, but such presumption is founded not only on the beneficial character of the gift, but also on either the absence of dissent to the gift, or the presence of incapacity to assent or dissent. *Carter v. Carter*, 53 Atl. 160, 165, 63 N. J. Eq. 728.

#### **Advancement synonymous.**

See "Advancement."

#### **Consideration.**

A gift is a voluntary transfer of property by one to another, without any consideration or compensation therefor. *Ingram v. Colgan*, 38 Pac. 315, 316, 106 Cal. 113, 28 L. R. A. 187, 46 Am. St. Rep. 221 (citing 2 Bl. Comm. 440; 2 Steph. Comm. 102; 2 Kent, Comm. 437); *Knight v. Tripp*, 54 Pac. 267, 268, 121 Cal. 674; *Calkins v. Equitable Building & Loan Ass'n of the United States*, 59 Pac. 30, 31, 126 Cal. 531; *Kirchner v. Lenz*, 87 N. W. 497, 498, 114 Iowa, 527; *Hatfield v. State*, 36 N. E. 664, 9 Ind. App. 296; *Seymour v. Seymour*, 51 N. Y. Supp. 130, 131, 28 App. Div. 495; *Gray v. Barton*, 55 N. Y. 68, 72, 14 Am. Rep. 181; *Pickslay v. Starr*, 27 N. Y. Supp. 616, 617, 76 Hun, 10; *Civ. Code S. D. 1903*, § 953; *Civ. Code Mont. 1895*, § 1550; *Civ. Code Cal. 1903*, § 1146.

A gift is a voluntary conveyance not founded on consideration of money or blood. *Livingston v. Livingston*, 45 N. W. 233, 236, 29 Neb. 167 (citing 1 Bouv. Law Dict. 633).

To discharge an obligation which rests upon full value received is not a gift or donation. *Erskine v. Steele County (U. S.)* 87 Fed. 630, 635.

A gift is a voluntary, gratuitous transfer of property by one to another. *Williamson v. Johnson*, 62 Vt. 378, 22 Am. St. Rep. 117. It is essential that it should be without a consideration. *Martin v. Martin*, 67 N. E. 1, 3, 202 Ill. 382.

A gift is a gratuity. *Riddle v. Stewart (Pa.)* 4 Penny. 113, 123.

The term "gift" signifies a gratuitous transfer, without any equivalent, and is not included within the word "sale" in Const. art. 16, § 20, requiring the Legislature to enact a law by which the qualified voters of any county, etc., may from time to time determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits, as the word "sale" means a transfer for valuable consideration. *Holley v. State*, 14 Tex. App. 505, 512.

The power given to a married woman by St. 1857, c. 249, § 2, to convey, with the assent of her husband, any real or personal property which might thereafter come to her by gift of any person, except her husband, includes land conveyed to her by a third

person for a pecuniary consideration. The words "give" and "gift," as applied to conveyances of real estate, have never been limited to gratuitous conveyances. *Chapman v. Miller*, 128 Mass. 269, 270.

*Parker, J.*, announcing the opinion of the court in *Orton v. Orton*, 42 N. Y. (3 Keyes) 486, approves the definition of a legacy which is to be found in Bacon's Abridgment, namely, a gift or bequest by testament, and declares that the word "gift" is not limited in its meaning to a gratuity, but has the more extensive signification of a thing given either as a gratuity or a recompense. In re *Thompson's Estate*, 7 N. Y. St. Rep. 762, 763.

#### **As a contract.**

"The civil law considers a gift as a contract, but the common law does not place it on any such ground, though it would be difficult generally to perceive the reason of the distinction, for an executed gift certainly contains all the essential requisites of a contract." *Hynson v. Terry*, 1 Ark. (1 Pike) 83, 87.

#### **Debt distinguished.**

See "Debt."

#### **Dedication distinguished.**

See "Dedication."

#### **Delivery.**

To constitute a valid gift, there must be a delivery of the property to the donee, or to some person for his use. A gift is a contract executed. The act of execution is the delivery of possession. Without delivery, it is only a contract to give, and not binding, for the want of consideration. *Scott v. Lauman*, 104 Pa. 593, 595; *Osthaus v. McAndrew (Pa.)* 8 Atl. 436, 438; *Clapper v. Frederick*, 49 Atl. 218, 220, 199 Pa. 609; *Appeal of Mechling (Pa.)* 2 Grant, Cas. 157, 167; *Crouse v. Judson*, 84 N. Y. Supp. 755, 757, 41 Misc. Rep. 338; *Commonwealth v. Williams*, 72 Mass. (6 Gray) 1, 9; *Spooner's Adm'r v. Hilbish's Ex'r*, 23 S. E. 751, 753, 92 Va. 333; *Appeal of Colburn*, 51 Atl. 139, 140, 74 Conn. 463, 92 Am. St. Rep. 231.

A gift is a contract executed, and, as the act of execution is delivery or possession, it is of the essence of a title. It is the consummation of a contract, which without it would be no more than a mere contract to give, and without efficacy for the want of a consideration. In re *Schlehl's Estate*, 36 Atl. 181, 185, 179 Pa. 308 (citing In re *Campbell's Estate*, 7 Pa. [7 Barr] 100, 47 Am. Dec. 503).

To consummate a gift, there must be such a delivery to the donee as places the property under his dominion, with the intent and purpose on the part of the donor to

transfer the title absolutely. *Simpson v. Harris*, 21 Nev. 353, 382, 31 Pac. 1009 (citing *Ide v. Pierce*, 134 Mass. 264).

In all gifts, a delivery of the thing given is essential to their validity, for, although every other step be taken that is essential to the validity of a gift, if there is no delivery the gift must fail. Intention cannot supply it. Words cannot supply it. Actions cannot supply it. It is an indispensable requisite, without which the gift fails, regardless of the consequences. *Kulp v. March*, 13 Montg. Co. Law Rep'r, 17, 23 (citing *Thornton*, Gifts, § 131, p. 105).

Delivery of possession of the thing given, or of the means of obtaining it, so as to make the disposal of it irrevocable, is indispensable to a valid gift. *Spooner's Adm'r v. Hilbish's Ex'r*, 23 S. E. 751, 753, 92 Va. 333.

Delivery is essential, both at law and in equity, to the validity of a parol gift of a chattel or chose in action; and it is the same, were it by a gift inter vivos or a gift causa mortis, for without legal delivery the title does not pass. *Dickeschied v. Exchange Bank*, 28 W. Va. 340, 359.

A gift is a voluntary transfer of a chattel, completed by the delivery of possession. By whatever name called, the elements necessary to a complete gift are not changed. There must be a purpose to give, expressed in words or signs, and executed by the actual delivery to the donee, or some one for his use. In every valid gift, a present title must vest in the donee, revocable only in gifts causa mortis. *Appeal of Walsh*, 15 Atl. 470, 471, 122 Pa. 177, 9 Am. St. Rep. 83, 1 L. R. A. 535; *Flanagan v. Nash*, 39 Atl. 818, 819, 185 Pa. 41.

A gift is accomplished in one of two ways—by actual or symbolic delivery of the subject of the gift, with intent to give, or by deed delivered conveying the subject of the gift upon a good, as distinguished from a valuable, consideration. A promise to make a gift is not a gift. *Thompson v. Hudgins*, 22 South. 632, 633, 636, 116 Ala. 93.

It is essential to constitute a valid gift that the delivery must be such as to vest the donee with the control and dominion over the property, and to absolutely divest the donee of his possession and control, and the delivery must be made with the intent to vest the title of the property in the donee. The only distinction between the two classes of gift is that a gift causa mortis is liable to revocation by the donee if he survives. *Partridge v. Kearns*, 53 N. Y. Supp. 154, 156, 32 App. Div. 483.

There must be a delivery by the donor such as will place the property or thing given under the control of the donee, and there

must be an intent to vest the title in him. Actual and personal delivery by the donor is not always necessary, for, when another person is the custodian, an order of the donor to deliver to the donee will constitute a gift. *McKenzie v. Harrison*, 120 N. Y. 260, 265, 24 N. E. 458, 8 L. R. A. 257, 17 Am. St. Rep. 638.

It is essential to a valid gift by parol that there should be an actual or symbolical delivery, and that title does not pass unless possession, or the means of obtaining it, is conferred by the donor and accepted by the donee. The situation, relation, and circumstances of the parties and of the subject of the gift may be taken into consideration in determining the intent to give, and the fact as to the delivery. A total exclusion of the power or means of resuming possession by the donor is not necessary. *Waite v. Grubbe*, 78 Pac. 206, 207, 43 Or. 406.

It is well settled that, to establish a valid gift, a delivery of the subject of the gift must be shown to some person so as to divest the possession and title of the donor. *Young v. Young*, 80 N. Y. 422, 36 Am. Rep. 634; *Beaver v. Beaver*, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531. But a transfer of a claim or chose in action by a written instrument under seal, duly executed, has the effect to divest the title of the donor in the assigned property, and has the same effect as actual delivery. The delivery of the assignment is deemed a delivery of the property conveyed. *Matson v. Abbey*, 24 N. Y. Supp. 284, 286, 70 Hun. 475.

If delivery must be proven in order to establish a valid gift of personalty, the very use of the term "gift," or "I have given," may sometimes be intended to include the delivery; and where, therefore, such declarations had been used by the donor, and they are admitted by the court as competent, it ought to be left to the jury to say whether the gift has been proved, including the delivery, and ought not to be laid down as a rule of law that such declarations in themselves are insufficient to prove the gift. *Sprouse v. Littlejohn*, 22 S. C. 358 (approvingly cited in *Lord v. New York Life Ins. Co.*, 66 S. W. 290, 293, 95 Tex. 216, 56 L. R. A. 596, 93 Am. St. Rep. 827).

#### Donation distinguished.

A donation usually means a gift, but it need not have all the elements of a gift. A gift must be without consideration, but a donation may be for a consideration. A gift must be entirely executed; a donation need not be. *Spires v. Woodhill*, 71 Mo. App. 373.

#### Fraudulent transfer.

A fraudulent delivery of goods is not necessarily a gift or transfer, within the meaning of bankruptcy acts. Hence, when

goods are removed with intent to delay a creditor, but the party to whose custody they are given has no claim given to him over them, this is not an act of bankruptcy. *Cotton v. James*, 1 Moody & M. 273, 277.

#### **Inducement for the sale of property.**

Under an act (St. 1884, c. 277) entitled "An act to prevent the sale or exchange of property under the inducement that a gift or prize is to be a part of the transaction," and prohibiting a sale upon any representation that anything other than what is specifically stated to be the subject of the sale is to be delivered, it is held that the sale of packages of tobacco under a promise to give a photograph to each purchaser of a package is not within the prohibition of the statute, though the purchaser is allowed to select his photograph from among a number. *Commonwealth v. Emerson*, 42 N. E. 559, 185 Mass. 146.

#### **Intent.**

To constitute a valid gift, there must be an intent to give on the part of the donor. *Crouse v. Judson*, 84 N. Y. Supp. 755, 757, 41 Misc. Rep. 338; *Knight v. Tripp*, 54 Pac. 267, 268, 121 Cal. 675; *Pullen v. Placer County Bank*, 71 Pac. 83, 188 Cal. 169, 94 Am. St. Rep. 19; *Osthaus v. McAndrew* (Pa.) 8 Atl. 436, 438.

The delivery of a gift must be made with an intent to give. *Spooner's Adm'r v. Hilbush's Ex'r*, 23 S. E. 751, 753, 92 Va. 333.

A gift, whether in the form of a trust or otherwise, always involves the intention of the donor. *Farleigh v. Cadman*, 159 N. Y. 169, 53 N. E. 808; *Green v. Sutherland*, 82 N. Y. Supp. 878, 879, 40 Misc. Rep. 559.

To constitute a gift, there must be a purpose to give, expressed in words or signs. *Appeal of Walsh*, 15 Atl. 470, 471, 122 Pa. 177, 9 Am. St. Rep. 83, 1 L. R. A. 535; *Flanagan v. Nash*, 39 Atl. 818, 819, 185 Pa. 41.

#### **Particular words.**

To constitute a gift, no formula or set phrase is necessary, as "I give," or "I have given." It is sufficient if there was delivery, and any words importing an intention to give. Handing bonds to a person with the words, "These bonds are for you," or words of such import, constitute a gift. *Vandor v. Roach*, 15 Pac. 354, 355, 73 Cal. 614.

#### **Realty.**

Strictly speaking, a gift is not a devise, nor a devise a gift; and property which came by descent could not have come either by gift or devise. To give is to transfer the ownership of property from one person to another gratuitously—without an equivalent or consideration. A gift is the thing transferred. The word "gift" ordinarily applies to

personal property only, but in its larger signification it applies to either realty or personalty. *Rountree v. Pursell*, 39 N. E. 747, 749, 11 Ind. App. 522.

A statute exempting from taxation gifts to a certain institution means donation of chattels. *Appeal of Wagner Free Institute of Science*, 11 Atl. 402, 404, 116 Pa. 555.

#### **Voluntary trust distinguished.**

The only important difference between a gift and a voluntary trust is that in the one case the whole title, legal as well as equitable—the thing itself—passes to the donee, while in the other the actual, beneficial, or equitable title passes to the cestui que trust, while the legal title is transferred to a third person, or is retained by the person creating it, to hold for the purposes of the trust. *Norway Sav. Bank v. Merriam*, 33 Atl. 840, 841, 88 Me. 143.

#### **GIFT CAUSA MORTIS.**

A gift causa mortis is defined to be a gift of personal property made by a party in expectation of death that is imminent, and upon an essential condition that the property shall belong fully to the donee in case the donor dies as anticipated, leaving the donee surviving him, and the gift is not in the meantime revoked, but not otherwise. *Roberts v. Draper*, 18 Ill. App. (18 Bradw.) 167, 171 (citing 2 Schouler, Per. Prop. § 135); *Reed v. Barnum*, 36 Ill. App. 525, 535; *Dickschled v. Exchange Bank*, 28 W. Va. 340, 359.

A gift causa mortis is a gift of personalty made by a party in contemplation of the approach of death, subject to the following implied conditions, which are attached by the law, and the occurring of any one of which will operate as a defeasance of the gift: First, if the danger of death pass without the donor dying; second, if the donor revoke the gift before death; third, if the donee die before the donor. *Seabright v. Seabright*, 28 W. Va. 412, 470, 474.

To constitute a donatio causa mortis, there must be three attributes: (1) The gift must be with a view to the donor's death; (2) it must be conditioned to take effect only on the death of the donor by his existing disorder; and (3) there must be a delivery of the subject of donation. *Kiff v. Weaver*, 94 N. C. 274, 276, 55 Am. Rep. 601.

A donatio mortis causa is when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods to keep in case of his decease. *Glynn v. Seaman's Bank for Savings*, 9 N. Y. St. Rep. 499.

To constitute a donatio mortis causa, there must not only be a clear intention to



give, but an executed gift. There must be a subject capable of passing by delivery, and an actual delivery at the time of the gift. *Egerton's Ex'rs v. Egerton*, 17 N. J. Eq. (2 C. B. Green) 419, 421.

A "donatio causa mortis," literally translated, means a gift in prospect of death. The Tennessee Supreme Court, in the case of *Sheegog v. Perkins* (Tenn.) 4 Baxt. 273, 280, following Blackstone, defines it as "a gift made by a person in sickness, who, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods to keep as his own in case of the donor's decease." Judge Redfield (3 Redf. Wills, 322) defines such a gift as a gift of personal estate made in prospect of death at no very remote period, and which is dependent upon the condition of death occurring substantially as expected by the donor, and that the same be not revoked after death. *Royston v. McCulley* (Tenn.) 59 S. W. 725, 733, 52 L. R. A. 899.

Gifts causa mortis are confined to personal property or choses in action; that is, something which can be delivered into the hands of the donee. *White v. Wager* (N. Y.) 32 Barb. 250, 260.

A gift causa mortis is a gift of personal property made in the immediate apprehension of death, subject to the condition that if the donor should not die, or if the donee should die first, the gift should be void. To this definition there probably should be added the further condition that there must be a delivery of the property to the donee, and that no further act would be required on the part of the donor to pass title to the donee. *Calvin v. Free*, 71 Pac. 823, 824, 66 Kan. 466.

A gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver. Civ. Code Cal. 1903, § 1149.

A donation mortis causa (in prospect of death) is an act, to take effect when the donor shall no longer exist, by which he disposes of the whole or a part of his property, and which is revocable. Civ. Code La. 1900, art. 1469.

A donation causa mortis is not a legacy, which requires the assent of the executor to vest the legal title in the donee, but it is a gift made in contemplation of death, which upon delivery passes the legal title at once to the donee, upon condition to be void if the donor do not die. *Egerton v. Carr*, 94 N. C. 648, 651, 55 Am. Rep. 630 (citing *Overton v. Sawyer*, 52 N. C. 6, 75 Am. Dec. 444).

"It is well settled, at least in this country, that a promissory note, a bond, or any instrument in writing which creates a lia-

bility against a third person, which is held by the donor, and is his property, either legal or equitable, is the subject of a valid donatio causa mortis." *Seabright v. Seabright*, 28 W. Va. 412, 470, 474.

#### As a conditional gift.

Gifts causa mortis are always conditioned and dependent on the contingency of the expected death, and are revocable during the lifetime of the donor. *Bleber's Adm'r v. Boackmann*, 70 Mo. App. 503, 507; *In re Seitz's Estate*, 44 N. Y. Supp. 836, 841, 17 App. Div. 1. A donatio causa mortis is that form of gift inter vivos which is expressly made conditional upon the death of the donor. It has been judicially declared to be a gift inter vivos, subject to conditions. 2 Kent, Com. (18th Ed.) 448; *Marshall v. Berry*, 95 Mass. (13 Allen) 43, 46; *Appeal of Perry* (Pa.) 8 Atl. 450, 453. A donation to take effect at the death of the donor is a donation mortis causa. By Civ. Code La. art. 1455, "donation causa mortis" is defined to be an act to take effect when the donor shall no longer exist. *Johnson v. Waters*, 4 Sup. Ct. 619, 622, 111 U. S. 640, 28 L. Ed. 547. A donatio causa mortis is a gift of a personal chattel made by a person in his last illness, subject to an implied condition that, if the donor recovers, the gift shall be void. It is void, also, if the donee dies before the donor. It was introduced from the Roman civil law. *Wells v. Tucker* (Pa.) 3 Bin. 366, 370. A donatio causa mortis is a gift made by one who is in expectation of death, and is conditional to take effect on the death of the donor, who in the meantime has the power of revocation, and may at any time resume possession and annul the gift. *Bedell v. Carll*, 32 N. Y. 581, 584. In a gift causa mortis, the donee takes a present title, liable to be divested on recovery of the donor; but, if the donor dies, then the effect of the gift is the same as in the case of a gift inter vivos. *Appeal of Guinan*, 39 Atl. 482, 484, 70 Conn. 342.

A gift causa mortis imports that the delivery is made in expectation of death. But so long as the donor lives, the gift is ambulatory, revocable. Only death completes the gift. Before death it is subject to the will of the donor. *Bickford v. Mattocks*, 50 Atl. 894, 895, 95 Me. 547.

A donatio causa mortis is a gift absolute in form made by the donor in anticipation of his speedy death, and intended to take effect and operate as a transfer of title only on the happening of the donor's death. The gift must be absolute, with the exception of the conditions inherent in its nature, and a delivery of the article donated is a necessary element; but it may be revoked by the donor, and is completely revoked by his recovery from the sickness or escape from the danger in view of which it was made.

*CrOOK v. First Nat. Bank of Baraboo*, 52 N. W. 1181, 1132, 83 Wis. 31, 35 Am. St. Rep. 17.

Gifts causa mortis are always made upon condition that they shall be revocable during the lifetime of the donor, and that they shall revert in case he shall survive the donee, or shall be delivered from the peril of death in which they were made. The condition need not be expressed, as it is always implied, when the gift is made in the extremity of sickness or in contemplation of death. It is sometimes, perhaps generally, said in English cases that a gift causa mortis does not vest before the donor's death, but in *Nicholas v. Adams* (Pa.) 2 Whart. 17, Gibson, O. J., considered this to be inaccurate; holding that this gift, like every other, is not executory, but executed in the first instance by delivery of the thing, though defeasible by reclamation, the contingency of survivorship, deliverance from peril, or from some other act inconsistent with the gift, and indicating the donor's purpose to resume the possession of the gift. *Emery v. Clough*, 4 Atl. 796, 799, 63 N. H. 556, 56 Am. Rep. 543.

#### Death by existing disorder.

In order to constitute a donatio causa mortis, it must have been made to take effect only in the event of the donor's death by his existing disorder. *Williams v. Chamberlain*, 46 N. E. 250, 252, 165 Ill. 210 (citing *Telford v. Patton*, 144 Ill. 611, 33 N. E. 1119); *Allen v. Allen*, 77 N. W. 567, 568, 75 Minn. 116, 74 Am. St. Rep. 442.

A donatio causa mortis is one made in contemplation of death from present illness or anticipated peril. The circumstances must be such as to show that the donor intended the gift to take effect if he should die shortly afterwards, but, if he should recover, that the property should be restored to him. *Thompson v. Thompson*, 12 Tex. 327, 330 (citing *Nicholas v. Adams* [Pa.] 2 Whart. 17).

#### Delivery.

It is necessary to the validity of a gift causa mortis that there must be an actual delivery of the subject of the gift to the donee—such as will transfer possession to him. *Smith v. Ferguson*, 90 Ind. 229, 233, 46 Am. Rep. 216; *Kilby v. Godwin*, 2 Del. Ch. 61, 69; *Robson v. Robson's Adm'r*, 3 Del. Ch. 51, 63; *Chevallier v. Wilson*, 1 Tex. 161, 169, 170; *Telford v. Patton*, 33 N. E. 1119, 1121, 144 Ill. 611; *Williams v. Chamberlain*, 46 N. E. 250, 252, 165 Ill. 210.

In order to constitute a valid gift causa mortis, there must be an actual delivery of the subject of the donation. It is not enough that the donee had a previous continuous possession of the gift. There must be a delivery to him at the time of the donation.

*Allen v. Allen*, 77 N. W. 567, 568, 75 Minn. 116, 74 Am. St. Rep. 442.

A gift causa mortis is one in which there must be an actual delivery to or for the donee, and at the time it is made, and the possession of the donor must be actually divested. The title passes, subject to the debts of the donor, if it be found necessary to resort to it for that purpose, and subject to revocation by his restoration to health. *Lewis v. Jones* (N. Y.) 50 Barb. 645, 651.

To constitute a gift causa mortis, it should be full and complete at the time, passing from the donor the legal power and dominion over the thing intended to be given, and leaving nothing to be done by him or his executor to perfect it. *Bradley v. Hunt* (Md.) 5 Gill & J. 54, 58, 23 Am. Dec. 597 (citing 2 Bl. Comm. 514).

A donatio mortis causa must be completely executed, precisely as is required in a gift inter vivos, subject to be divested by the happening of any of the conditions subsequent; that is, upon the actual revocation by the donor, or by the donor's surviving the apprehended peril or outliving the donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor. *Basket v. Hassell*, 2 Sup. Ct. 415, 419, 107 U. S. 602, 27 L. Ed. 500.

Delivery is indispensable to the validity of a gift causa mortis. It must be an actual delivery of the thing itself, or of the means of getting possession and enjoyment of the thing, and there must be something amounting to a delivery at the time of the gift, for it is not the possession of the donee, but the delivery to him by the donor, that is material, and after-acquired possession or a previous and continuing possession of the donee, though by authority of the donor, is insufficient." *Cutting v. Gilman*, 41 N. H. 147, 152.

To constitute a donatio causa mortis, there must be a delivery of the property either to the donee, or to some person for his use or benefit, and the donor must part with all dominion over the property, and the title must vest in the donee, subject to the right of the donor at any time during his life to revoke the gift. *Daniel v. Smith*, 17 Pac. 683, 684, 75 Cal. 548; *Flanagan v. Nash*, 39 Atl. 818, 819, 185 Pa. 41.

To constitute a gift causa mortis, there must be a delivery of the property to the donee or some other person for his use. The donor must part with all dominion over it, so that no further act of his or of his personal representative is necessary to vest the title perfectly in the donee; to belong to him presently, as his own property, in case the owner should die of his present illness or

from the impending peril during the lifetime of the donee, and without making any change in relation to the gift. *Liebe v. Battman* (Or.) 54 Pac. 662, 663 (citing *Dickeschied v. Exchange Bank*, 28 W. Va. 340).

A wife on her deathbed called for her nephew, and, being told he was not present, informed her husband that she gave the nephew all her property, and directed him to deliver to the nephew all her property, which he agreed to do. There was no manual delivery of the property, it being already in the husband's possession. The court said that this was a sufficient delivery of a gift causa mortis. *Caylor v. Caylor's Estate*, 52 N. E. 465, 467, 22 Ind. App. 666, 72 Am. St. Rep. 331; *Loucks v. Johnson*, 24 N. Y. Supp. 267, 268, 70 Hun, 565.

Delivery of an instrument in the form of a bill of sale intended as a gift causa mortis of articles present and capable of delivery is not a sufficient delivery. *Knight v. Tripp*, 54 Pac. 267, 268, 121 Cal. 674.

#### Expectation of death.

In order to constitute a valid gift causa mortis, the gift must be with a view to the donor's death. *Allen v. Allen*, 77 N. W. 567, 568, 75 Minn. 116, 74 Am. St. Rep. 442; *Telford v. Patton*, 144 Ill. 611, 33 N. E. 1119; *Williams v. Chamberlain*, 46 N. E. 250, 252, 165 Ill. 210; *Reynolds v. Reynolds*, 45 N. Y. Supp. 338, 341, 20 Misc. Rep. 254; *In re Cornell's Estate*, 73 N. Y. Supp. 32, 36, 66 App. Div. 162; *Zellar v. Jordan*, 38 Pac. 640, 641, 105 Cal. 143 (citing *Daniel v. Smith*, 64 Cal. 349, 30 Pac. 575); *Daniel v. Smith*, 17 Pac. 683, 684, 76 Cal. 567; *Robson v. Robson's Adm'r*, 3 Del. Ch. 51, 63; *Flanders v. Blandy*, 12 N. E. 321, 322, 45 Ohio St. 108; *Jacobs v. Jolley*, 62 N. E. 1028, 1029, 29 Ind. App. 25.

Where it appears that, after an alleged donatio causa mortis, a will was made and regularly proved, the making of such will was conclusive evidence that the will was not made during such a last sickness as the law requires to constitute a disposition of property causa mortis. *Adams v. Nicholas* (Pa.) 1 Miles, 90, 93.

When a gift is made in a donor's last illness a few days or weeks before his death, though nothing be said by the donor to indicate that he was contemplating that the illness might prove fatal, it will nevertheless be presumed a gift causa mortis. *Seabright v. Seabright*, 28 W. Va. 412, 470, 474.

Where one who had entered the military service during the late War, a short time before starting to the army, in which he died, said to a friend in regard to a gun which he had loaned to that friend, "Well, if I never return, you may keep the gun as a present from me," this did not constitute

a donatio causa mortis. *Smith v. Dorsey*, 38 Ind. 451, 457, 10 Am. Rep. 118.

A delivery as a free and voluntary gift of money by a soldier at about the time of his enlistment in the army, with directions to keep the same as a gift in case of his death, does not constitute a gift causa mortis. *Dexheimer v. Gautier* (N. Y.) 34 How. Prac. 472, 477.

#### Intent.

A gift causa mortis can be upheld only where the intention of the donor is definite and certain, and such interest is expressed as to the proper matter of such gift, and such gift is executed. *Gano v. Fisk*, 43 Ohio St. 462, 470, 3 N. E. 532, 534, 54 Am. Rep. 819.

#### Gift inter vivos distinguished.

A donatio inter vivos is distinguished from a donatio causa mortis in this: that the former takes place when the giver is not in any immediate apprehension of death. By such donation, completed by delivery, the property vests immediately and irrevocably in the donee, and the donor has no more right or control over it than any other person. *Gale v. Drake*, 51 N. H. 78, 82.

A donatio inter vivos, as its name imports, is a gift between the living, while a gift causa mortis is one in view of death. But a gift inter vivos may be made by one upon his deathbed who is aware of the near approach of death from his then ailment. Thus, a gift of a note by a person who was able to be at his business and to drive about on the day on which the transfer of the note was made, constituted a gift inter vivos. *Hatcher v. Buford*, 29 S. W. 641, 642, 60 Ark. 169, 27 L. R. A. 507.

There is a difference between an absolute gift and one made mortis causa. In the former case the donee becomes in the lifetime of the donor the absolute owner of the thing given, but donatio mortis causa leaves the whole title in the donor unless the event occurs, to wit, the death of the donor, which is to vest him. *Buecker v. Carr*, 47 Atl. 34, 35, 60 N. J. Eq. 300; *Lewis v. Jones* (N. Y.) 50 Barb. 645, 651.

The test whether a gift is one inter vivos or one causa mortis is not the mere fact that the donor is in extremis, and expects to die and does die of that illness, but whether he intended the gift to take effect in present, irrevocably and unconditionally, whether he lives or dies. And so, where the donor of property intended that the gift thereof shall take effect immediately and irrevocably, the mere fact that the donor is in extremis, and expects to die of his illness, and does die in a short time, does not make it a gift causa mor-

*W. Wilson v. Jourdan*, 29 South. 823, 824, 79 Miss. 183.

#### **Legacy distinguished.**

A gift causa mortis resembles a testamentary disposition of property, in this: that it is made in contemplation of death, and is revocable during the life of the donor. It is not, however, a testament, but in its essential characteristics is what its name indicates—a gift. Actual delivery by the donor in his lifetime is necessary to its validity, or, if the nature of the property is such that it is not susceptible of corporeal delivery, the means of obtaining possession of it must be delivered. The donee's possession must continue during the life of the donor, for recovery of possession by the latter is a revocation of the gift. But in case of a legacy the possession remains with the testator until his decease. The title to a gift causa mortis passes by the delivery, defeasible only in the lifetime of the donor, and his death perfects the title in the donee by terminating the donor's right or power of defeasance. The property passes from the donor to the donee directly, and not through the executor or administrator, and after his death it is liable to be divested only in favor of the donor's creditors. In this respect it stands the same as a gift inter vivos. It is defeasible in favor of creditors, not because it is testamentary, but because, as against creditors, one cannot give away his property. A gift causa mortis is not subject to probate, nor to contribution with legacies, in case the assets are insufficient, nor to any of the incidents of administration. It is not revocable by will, for, as a will does not operate until the decease of the testator, and the donor at his decease is divested of his property in the subject of the gift, no right or title in it passes to his representatives. The donee takes the gift, not from the administrator, but against him, and no act or assent on the part of the administrator is necessary to perfect the title of the donee. *Emery v. Clough*, 4 Atl. 796, 798, 63 N. H. 552, 56 Am. Rep. 543 (citing *Marshall v. Berry*, 95 Mass. [13 Allen] 43, 46; *Cutting v. Gilman*, 41 N. H. 147, 151; *Doty v. Willson*, 47 N. Y. 580, 585; *Dole v. Lincoln*, 31 Me. 422; *Chase v. Redding*, 79 Mass. [13 Gray] 418; *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500; 1 Wms. Ex'rs, 686, note 1.

#### **GIFT ENTERPRISE.**

As lottery, see "Lottery."

A "gift enterprise" is defined as a business, as the selling of books or works of art, the publication of a newspaper, etc., in which presents are given to purchasers as an inducement. Cent. Dict. The term does not necessarily imply a gift involving chance.

*Long v. State*, 22 Atl. 4, 5, 74 Md. 565, 12 L. R. A. 425, 28 Am. St. Rep. 268.

In common parlance a gift enterprise is understood to be substantially a scheme for the division or distribution of certain articles of property to be determined by chance, amongst those who have taken shares in the scheme, and the phrase has attained such a notoriety as to justify a court in taking judicial notice of its meaning. *Lohman v. State*, 81 Ind. 15, 18.

An enterprise by which a trading stamp company distributes among merchant subscribers so-called trading stamps for distribution to customers according to the amounts of their purchases, which stamps when collected in sufficient numbers entitle the holders to premiums supplied by the company, is a "gift enterprise." *Lansburgh v. District of Columbia*, 11 App. D. C. 512, 524.

#### **GIFT INTER VIVOS.**

A donation inter vivos between living persons is an act by which the donor divests himself, at present and irrevocably, of the thing given, in favor of the donee, who accepts it. Civ. Code La. 1900, art. 1468.

"A donation inter vivos is an act by which one gives to another, irrevocably and gratuitously, some property, of which he becomes immediate owner. *Schmiat*, Civ. Law, 201. Donatio inter vivos, otherwise called a proper gift, is when one out of mere liberality bestows a thing upon another, there being no law to compel him to do it. Donatio inter vivos is either *relata* or *simplex*—that is, *absoluta*—and this latter may be said to be *remuneratoria* or *modalis sub modo*. Thus, what is given with reference to some service done is called *relata*, if out of pure liberality, without any reason being assigned, *simplex* or *absoluta*; but should the object be given by way of reward for service done, it is called *remuneratoria*; lastly, if anything be given to a person with the view that he first do something that shall benefit himself alone, it is termed *donatio modalis* or *sub modo*." 2 Colq. Rom. Civ. Law, 109; *Fish v. Flores*, 43 Tex. 340, 343.

#### **Gift causa mortis distinguished.**

See "Gift Causa Mortis."

#### **Delivery.**

A gift inter vivos must be completed by a delivery of the subject of the gift. *Crook v. First Nat. Bank of Baraboo*, 52 N. W. 1131, 1132, 83 Wis. 31, 35 Am. St. Rep. 17.

"To render a gift inter vivos complete, there must be an actual delivery of the chattel, so far as the subject is capable of such a delivery, and without such a delivery the

title does not pass. If the subject is not capable of actual delivery, there must be some act equivalent to it." *Flanders v. Blandy*, 12 N. E. 321, 322, 45 Ohio St. 108.

A gift inter vivos is one in which there must be an actual delivery to or for the donee in the life of the donor, and at the time it is made, and the possession of the donor must be actually divested. The absolute title passes immediately to the donee, and is irrevocable. *Lewis v. Jones* (N. Y.) 50 Barb. 645, 651.

To make a gift inter vivos perfect, it must be delivered to the donee, and until it is delivered it may be revoked by the donor; and, under this rule, delivery of possession is essential to validity of the gift of personal chattels, whether it is made by parol or by an instrument of record. *Royston v. McCulley* (Tenn.) 59 S. W. 725, 730, 52 L. R. A. 899.

To make a gift inter vivos complete, there must be an actual delivery of the subject-matter of the gift, so far as the same is capable of delivery. A gift of bonds by a husband to his wife is not established by evidence that the bonds were deposited in a box in a safety deposit vault, to which the husband and wife each held a key, where they remained until the husband's death; that the wife entered with her husband at various times, and assisted him in cutting coupons from the bonds; and that the husband had declared in the presence of third persons his intention to give the bonds to his wife. *Chambers v. McCreery* (U. S.) 98 Fed. 783, 784.

To constitute a valid gift inter vivos of personal property or choses in action, it is essential that the gift be delivered in present and unconditionally. *Smith v. Ferguson*, 90 Ind. 229, 232, 46 Am. Rep. 216.

To constitute a valid gift inter vivos, it must be made with intent that it is to take effect immediately and irrevocably, and it must be fully executed by a complete and unconditional delivery. Mere intention cannot take the place of it, nor can words, nor can actions. A mere delivery to a third person as the agent of the donor is insufficient, until it is actually delivered. *Bickford v. Mattocks*, 50 Atl. 894, 895, 95 Me. 547.

To constitute a gift inter vivos, there must be an intention to give, and a delivery unto the donee, or to some one for him, of the property given. An intention of the donor to give is not alone sufficient. The intention must be executed by a complete and unconditional delivery. Nor will a delivery be sufficient without an intention to give. The transaction must show a completely executed transfer to the donee of the present right of property and the possession. The

donee must become the owner of the property given. In *re Soulard's Estate*, 43 S. W. 617, 620, 141 Mo. 642.

To constitute a valid gift inter vivos, some unequivocal act on the part of the donor, by which he divests himself of the possession and control of the subject of the gift, and delivers it to the donee, or to a trustee of the donee, is necessary. Where G. conveyed a house and lot to defendant, and took back from her a bond and mortgage, which he redelivered to her, and again took back and retained, there was no such delivery as to constitute a valid gift of the bond and mortgage. *Gannon v. McGuire*, 47 N. Y. Supp. 870, 872, 22 App. Div. 43.

Gifts inter vivos are upheld if the notes or bonds or choses in action are delivered to the donee so as to vest him with an equitable title to the fund they represent, and to divest the donor of all present control and dominion over it absolutely and irrevocably; and a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation according to its terms will not suffice. A delivery which confers on the donee power to control the fund only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character, and not good as a gift. *Sterling v. Wilkinson*, 3 S. E. 533, 536, 83 Va. 791.

#### Immediate effect.

A gift inter vivos, to be valid, must take effect at once, and there must be nothing to be done essential to the validity; and, if it is to take effect in the future, there is no gift, but only a promise to give. In other words, to constitute such a gift, there must be an immediate transfer of the title, and the donor must relinquish all present right to or control over the thing given. *Wright v. Bragg* (U. S.) 106 Fed. 25, 28, 45 C. C. A. 204; *Williamson v. Johnson*, 20 Atl. 279, 280, 62 Vt. 378, 9 L. R. A. 277, 22 Am. St. Rep. 117; *Williams v. Tam*, 63 Pac. 133, 131 Cal. 64; *Zellar v. Jordan*, 38 Pac. 640, 641, 105 Cal. 143; *Matthews v. Hoagland*, 21 Atl. 1054, 1066, 48 N. J. Eq. (3 Dick.) 455; *Williams v. Chamberlain*, 46 N. E. 250, 252, 165 Ill. 210.

A gift inter vivos is a gift in present—a consummated and complete act—and has no reference to past or future acts or events. In *re Birdsall's Estate*, 49 N. Y. Supp. 450, 463, 22 Misc. Rep. 180.

Gifts inter vivos have no reference to the future, and go into immediate and absolute effect. To constitute such a gift, the donor must be divested of, and the donee invested with, the right of property in the subject of the gift. It must be absolute; irrevocable; without any reference to its

taking place at some future period. The donor must deliver the property, and part with all present and future dominion over it. *Liebe v. Battman* (Or.) 54 Pac. 662, 663 (citing *Dickeschied v. Exchange Bank*, 28 W. Va. 340).

#### As a solemn contract.

Donations inter vivos are solemn contracts, subjected to certain forms, without which they are inexistent. To form a particular importance is given, as it completes and gives life to the act. "Forma dat esse rei." The solemnity is established by the notarial act. The offer of the donor and the acceptance of the donee are valid after signing the act. A grandson owed a collation to the succession of his grandfather—the value of a slave. The only evidence in support of the title by donation was a receipt, under private signature, signed by his mother, who acknowledged the receipt of the slave from her father, who was the grandfather of plaintiff. The donation was null for matters of form. *Cawthon v. Kimbell*, 15 South. 101, 108, 46 La. Ann. 750.

#### GIFT OF PUBLIC MONEY.

A legislative appropriation made to an individual in payment of a claim for damages on account of personal injuries sustained by him while in its service, and for which the state is not responsible, either on general principles of law, or by reason of any statute, is a gift of public money, within Const. § 31, providing that the Legislature shall have no power to make any gift of public money. Such appropriation is a mere gratuitous assumption of an obligation from which the state was and is exempt, and is within the mischief which the framers of the Constitution intended to remedy by such statute. *Bourn v. Hart*, 28 Pac. 951, 98 Cal. 321, 15 L. R. A. 431, 27 Am. St. Rep. 203.

The Constitution declares that the Legislature shall not have power to make any gift of public money or thing of value to any individual or corporation whatever. Civ. Code, § 1143, defines a gift as a voluntary transfer of personal property without consideration. Held, that the gift which the Legislature is prohibited from making is not limited to a gift as defined by Civ. Code, § 1146, but the term includes all appropriations of public money for which there is no authority or enforceable claim, or which rest on some moral or equitable obligation, which, in the mind of a generous, or even a just, individual, dealing with his own moneys, might prompt him to recognize as worthy of some reward. The Legislature is to be regarded as holding the public moneys in trust for public purposes, and this limitation of the Constitution is directed against its disposal of these funds, except in accordance

with such purposes. All those moral considerations or demands arising merely upon some equitable consideration or idea of justice, which in an individual acting in his own behalf would be upheld, are insufficient as a basis for making an appropriation of public moneys. An appropriation of money by the Legislature for the relief of one who has no legal claim therefor must be regarded as a gift, within the meaning of that term as used in the Constitution; and it is none the less a gift when a sufficient motive appears for its appropriation, if the motive does not rest upon a valid consideration. *Conlin v. Board of Sup'rs of San Francisco*, 33 Pac. 753, 99 Cal. 17, 21 L. R. A. 474, 37 Am. St. Rep. 17.

#### GILDING.

"Gilding" is a Danish word signifying a castrated animal, and from it Mr. Webster derives our word "gelding." The use of the word "gilding" instead of "gelding" in an indictment for the theft of such animal does not invalidate the indictment. *Thomas v. State*, 2 Tex. App. 298, 294.

#### GILL.

While a gill is less than a quart, an averment in an indictment under the law which makes it an offense to sell liquor to a minor in less quantities than a quart at one time that the defendant sold a gill of liquor to a minor is not good as an averment that he sold less than a quart. *Arbintrode v. State*, 67 Ind. 267, 270, 33 Am. Rep. 86.

#### GILL NET.

Gill net is defined by Webster as a flat net so suspended in the water that its meshes allow the heads of fish to pass, but catch in the gills when they seek to extricate themselves. The Century Dictionary defines "gill net" as a net which catches fish by the gills. *State v. Lewis*, 33 N. E. 1024, 1025, 134 Ind. 250, 20 L. R. A. 52.

#### GILLING TWINE.

The term "gilling twine," as used in the tariff act, means twine that is made and used for gilling,—such as salmon twine,—and does not mean linen thread, although one of the minor uses of the latter is for gilling. *American Net & Twine Co. v. Worthington* (U. S.) 83 Fed. 826, 829.

#### GIN.

A gin and its band, and the rollers thereof, are not fixtures, and therefore may be removed by the owner of land after the sale thereof. *Gresham v. Taylor*, 51 Ala. 505, 507.

**As a spirituous liquor.**

Rum, brandy, and "gin" are different species of spirituous liquors, and the words in and of themselves import them to be spirituous liquors. Thus an indictment, charging the sale of rum, brandy, and gin, is not defective in failing to charge that such liquors are spirituous. *State v. Munger*, 15 Vt. 290, 293.

The question whether or not a particular article is gin is not a subject requiring an expert, but is a matter of general knowledge. *Commonwealth v. Timothy*, 74 Mass. (8 Gray) 480, 481.

As long as the laws for licensing the sale of intoxicating liquors have existed, brandy, whisky, gin, rum, and other alcoholic liquids have been held to be intoxicating liquors per se, simply because it is within the common knowledge and ordinary understanding that they are intoxicating liquors. *Snider v. State*, 7 S. E. 631, 632, 81 Ga. 753, 12 Am. St. Rep. 350. See, also, *Commonwealth v. Peckham*, 68 Mass. (2 Gray) 514, 515.

**GINHOUSE.**

A ginhouse is an edifice which, like a barn, is of a permanent and substantial kind, and is well known in communities where cotton is grown as a building to which seed cotton is carried from the field, and where the seeds are separated by the machine called a "gin" from the lint or wool, so that, in an indictment for burglary from a ginhouse, it was not necessary to allege that it was specially constructed for the purpose. *Stonie v. State*, 63 Ala. 115, 119.

A ginhouse is a building where cotton is ginned, and is not in any sense a storehouse, so that an indictment charging defendant with breaking and entering a storehouse is not supported by proof that he entered a ginhouse. *Givins v. State*, 23 South. 850, 851, 40 Fla. 200.

**GINGER ALE.**

Ginger ale is a temperance drink prepared from sugar and water, flavored with ginger, and colored. *City of Lincoln Center v. Linker*, 53 Pac. 787, 788, 7 Kan. App. 282.

**GINSENG CORDIAL.**

Ginseng cordial is a mixture consisting of 30 parts of water, 8 parts of alcohol, 2 parts of simple syrup and ginseng and other roots and herbs possessing medicinal properties. It is not what is usually known as intoxicating liquor, such as whisky, brandy, gin, and the like, nor, on the other hand, is it what is generally and properly known as medicine, or as a toilet or culinary article, recognized as such in standard authority, such as tincture of gentian, paregoric, bay

rum, cologne, essence of lemon, and the like, which, though containing alcohol and capable of producing intoxication, are not intoxicating liquors, bitters, or beverages, within prohibitory statutes; and it is not, therefore, to be declared, as a matter of law, either that ginseng cordial is or is not an intoxicating liquor, bitter, or beverage. *Wadsworth v. Dunnam*, 13 South. 597, 598, 98 Ala. 610.

**GIRDLE.**

As the word "girdle" is used in speaking of the girdling of trees, it means the cutting off of a ring of bark around the trunk of the tree. In ordinary speech, various degrees of abrasion are called girdling. *State v. Towle*, 62 N. E. 373, 374.

**GIRL.**

See "Bad Girl or Woman."

"Girl" is a generic term, and embraces children of all ages, both over and under ten years. Such is the signification of the word given by the best lexicographers. Walker defines the word "girl" as a young woman or child; Webster, a female child or young woman. *State v. Bill* (La.) 8 Rob. 527, 528.

**GIST.**

"In pleading, 'gist' means the essential ground or object of the action, in point of law, without which there would be no cause of action. The gist of an action is the cause for which an action will lie; the ground or foundation of the suit, without which it would not be maintainable; the essential ground or object of a suit, without which there is no cause of action." *Frazier v. Georgia R. & Banking Co.*, 28 S. E. 684, 685, 101 Ga. 70; *Kitson v. Farwell*, 132 Ill. 327, 338, 23 N. E. 1024, 1025; *First Nat. Bank of Flora v. Burkett*, 101 Ill. 391-394, 40 Am. Rep. 209; *In re Murphy*, 109 Ill. 31, 33; *Tarbell v. Tarbell*, 15 Atl. 104, 106, 60 Vt. 486; *Beckman v. Menge*, 82 Ill. App. 228, 230; *Jernberg v. Mix*, 65 N. E. 242, 199 Ill. 254.

The gist is the main point of a question; the point on which the action rests; the pith of the matter; as the gist of a question. Thus, in an action for a penalty for failure to satisfy a chattel mortgage on the record, the gist of the action is the failure to satisfy the record after notice in writing. *Hoffman v. Knight*, 28 South. 593, 595, 127 Ala. 149.

**GIVE.**

As allow.

In the supplementary articles to the Choctaw treaty of September 28, 1830 (7

Stat. 340), wherein no provision is made for patents, the terms "shall be entitled to," "there is allowed," "may locate," "shall be granted," "there is given," are used synonymously with respect to reservations. *Meehan v. Jones* (U. S.) 70 Fed. 453, 455.

#### **As communicate.**

In an action against a railroad company for personal injuries to a brakeman caused by the engineer's failure to obey the brakeman's signals, an instruction requiring the jury to find that the brakeman "gave the engineer the signals," as a predicate of the latter's failure to obey them, was not necessarily improper because permitting recovery regardless of whether the signals were seen or not; the court remarking that, by giving the signal to the engineer, the jury, as every one else, understood he communicated to the engineer the orders to move, and the words, as used, necessarily implied that the engineer saw the signals. *Cambron v. Omaha & St. L. R. Co.*, 65 S. W. 745, 747, 165 Mo. 543.

#### **As convey and pay.**

In a compromise of all the differences between parties interested in the estate of a deceased person, the heirs agreed to give the widow \$3,750 and a certain lot of ground. Held, that the word "give," so far as it related to the lot, must be taken and construed in the sense of "convey," and, so far as it related to the payment of money, in the sense of "pay." *Carter v. Alexander*, 71 Mo. 585.

#### **Covenant of warranty imported.**

"Give" is the only word which implies a warranty in the conveyance of fee-simple estates. *Rickets v. Dickens*, 5 N. C. 843, 347, 4 Am. Dec. 555.

"According to the writers of the ancient law, there is but one word which of itself implies a covenant whenever or wherever used in a conveyance of an estate, and that is the verb 'to give.'" *Mack v. Patchin* (N. Y.) 29 How. Prac. 20, 23.

The word "give," when used in a deed of bargain and sale, does not import a covenant of warranty. *Allen v. Sayward*, 5 Me. (5 Greenl.) 227, 230, 17 Am. Dec. 221; *Powell v. Lyles*, 5 N. C. 848, 350.

The use of the word "give" in a deed conveying an estate in freehold or in fee implies a warranty for the life of the grantor. This arose from the fact that the ancient creation of estates consisted in the donation of land to the tenant to be held by the donor, and reciprocal relations arose between them of homage and feudal services from the grantee, in return for which the donor was bound to assure the enjoyment of the estate which he undertook to confer. "These duties were held to arise, not from express obligation, but from the nature of the tenure. They

were imposed upon the tenant by his acceptance of the estate, and might be exacted of the lord, who employed the term 'dedi,' or other term of donation by which estates were created. Hence Lord Coke says, where 'dedi' is accompanied with a perdurable tenure of the feoffor and his heirs, there 'dedi' importeth a perdurable warranty for the feoffor and his heirs to the feoffee and his heirs. 2 Inst. 275." The use of the word in a lease for years does not have such effect, which arises from the fact that such leases were not originally regarded as estates in land, but as contracts for the perception of profits, and the only right of the lessee to redress or indemnity depended upon his contract. *Young v. Hargrave's Adm'r*, 7 Ohio (7 Ham.) 63, 69, pt. 2.

The word "give," in a deed, imports a warranty in law during the lifetime of the grantor, and this legal warranty is not taken away by the fact that an express warranty is inserted in the deed. *Hoxton's Lessee v. Gardiner* (Md.) 1 Har. & McH. 437, 451.

The word "give," in a feoffment at common law, implied, in the absence of express covenants, a warranty during the life of the grantor. Co. Litt. 384a; 2 Inst. 275, 276. But there is no good reason for extending this rule to an instrument which is but the execution of a power given by statute, in which the grantor neither assumes to have, nor to convey, any estate, title, or interest of his own. And therefore a sheriff's deed under execution, which recited, "I have given, granted, bargained, and sold, and do by these presents give, grant, bargain, sell, and convey," etc., did not contain any warranty during the life of either the sheriff or the judgment debtor. *Dow v. Lewis*, 70 Mass. (4 Gray) 468, 473.

#### **As deliver.**

To give a reward by way of bribe is to pass or deliver the reward or bribe immediately to another. *State v. Harker* (Del.) 4 Har. 559, 561.

"Given," as used in a will providing for the repayment of money given to testator by his wife, may be construed in the sense of handed or delivered. *Dresser v. Zabriskie* (N. J.) 39 Atl. 1066, 1067.

"Given," as used in a statement by a person that in case of his death he wanted a certain box given to his attorney (naming him), means the delivery of the box after his death to the person named. But the delivery of the box is a mere corporeal act, which relates only to its custody; and the word "given" does not show any testamentary intent or purpose, express or implied. In *re Jacoby's Estate*, 42 Atl. 1026, 1030, 190 Pa. 382.

A contract whereby the promisor agreed to give shares of stock in a certain corpora-



tion means that he will transfer them a right to the shares, and a right to demand a certificate, and not the manual delivery of the shares, or even of the certificate. *Field v. Pierce*, 102 Mass. 253, 261.

The word "give," in a contract to give one-half of all fruits raised or produced in a certain orchard for certain years, means to yield possession of, or to deliver over as property in exchange. The term requires the delivery of the fruit at the place where grown at a proper season of the year for the gathering of such fruit. *Smock v. Smock*, 37 Mo. App. 56, 67.

Statements by a deceased person that she has "given" money to a certain person are not equivalent to a declaration that she made him a gift of it, since the term is often used as the equivalent of a mere delivery. *White v. Warren*, 49 Pac. 129, 131, 120 Cal. 322.

If delivery must be proven in order to establish a valid gift of personalty, the very use of the term "I have given" may sometimes be intended to include the delivery; and where, therefore, such declarations had been used by the donor, and they are admitted by the court as competent, it ought to be left to the jury to say whether the gift has been proved, including the delivery, and ought not to be laid down as a rule of law that such declarations in themselves are insufficient to prove the gift. *Sprouse v. Littlejohn*, 22 S. C. 358 (approvingly cited in *Lord v. New York Life Ins. Co.*, 66 S. W. 290, 293, 95 Tex. 216, 56 L. R. A. 596, 93 Am. St. Rep. 827).

Rev. St. 1844, c. 154, § 3, providing that notice may be served on the attorney of a creditor by "giving him in hand" a copy thereof, means the same as delivering a copy, and imports that the copy is to be handed to the person in the presence of the officer; and therefore sending a copy by mail or by the hands of a third person is not a sufficient service, though the officer may be satisfied that it reached the person for whom it was intended. *Williams v. Kimball*, 135 Mass. 411, 412.

Under Code, § 232, providing that, at any time before the delivery of property to plaintiff in replevin, the defendant may require the return thereof, upon giving to the sheriff a written undertaking executed by two or more sufficient sureties, etc., the undertaking is not required to be executed by the defendant—the word "give" meaning deliver—so that an undertaking executed by two sureties and not by the defendant is sufficient. *Polite v. Bero*, 41 S. E. 305, 306, 63 S. C. 209.

#### **As devise.**

The use of the word "given" in *Pater-son's Laws*, pp. 53, 54, § 2, providing that no

entailment of any lands or other real estate shall continue to entail the same in any case whatever longer than the life of the person to whom the same hath been "given" or shall be first given or devised by such entailment, makes the statute embrace estates tail created by deed, as well as by will, and is not synonymous with "devise." The word "given," in its appropriate legal sense, is applicable to deeds as well as to wills. *James v. Dubous*, 16 N. J. Law (1 Har.) 285, 292.

#### **Execution and acceptance implied.**

The record of a court contained the following entry: "N. O., sheriff, who had been notified to come into court by S. E., to give other security, came into court and gave his bond as sheriff, to collect all public taxes," etc. Held, that the word "gave" implies that the bond is executed and acknowledged, and that it is approved and accepted by the court. *Governor v. Organ's Sureties*, 24 Tenn. (5 Humph.) 161, 163.

#### **As expressive of gift.**

"Gave," as used in a question asked by a decedent of another as to where the notes were which the decedent gave her, was entirely appropriate to express the fact of the gift. *Kulp v. March*, 37 Atl. 913, 181 Pa. 627, 59 Am. St. Rep. 687.

The use of the word "give" in a deed indicates that the land was to be conveyed to the grantee as a gift, simply, but does not necessarily imply that there was not any valuable consideration at all. *Baker v. Pyatt*, 9 N. E. 112, 114, 108 Ind. 61.

The word "give," used by a stepfather in saying that he had given certain real and personal property to his stepson, who had lived with and assisted the former for a long time, was construed, in view of the facts, not to have been employed as indicating the disposition of a gratuity, but for the consideration of services rendered by a dutiful son. *Mills v. McCaustland*, 74 N. W. 930, 932, 105 Iowa, 187.

The term "give," in a writing that "I give to J. \$100, to be paid as soon as my financial condition will allow, and, if I do not live to pay it, I wish it to be paid out of my estate," does not show, as a matter of law, that the instrument is a promise to make a gift, but the instrument is so ambiguous as to depend for its construction on extrinsic facts. If the words "I do give" are not qualified by other words, then plainly enough the instrument is a promise to pay a gift, and not a contract to pay money. The word "give" does not always signify a mere gratuitous act. At all events, it is not one of those words which have a fixed and unalterable meaning. In business affairs we frequently find embodied in propositions from one con-

tracting party to another such expressions as, "I will give you such a price for" such an article, or, "I will give so much rent for" such a parcel of land. In these cases, and very many like them, no one would take the meaning of "give" to be that the person making the proposal meant to do what he proposed out of mere generosity. But while the word does not invariably indicate an intention to make a gift, the usual meaning unquestionably is to grant the thing specified as an act of generosity. *Johnston v. Griest*, 85 Ind. 503, 504.

In its ordinary and familiar signification, the word "give" means to transfer gratuitously, without any equivalent. Thus a promise to give a boy a sum of money if he would abstain from liquor, tobacco, etc., until he was 21, was a promise to give, and not a contract, and therefore not enforceable. *Hamer v. Sidway*, 11 N. Y. Supp. 182-184, 57 Hun, 229.

#### **As furnish or supply.**

"Give," as used in Gen. St. c. 29, art. 85, § 9, making it an offense for any one to give spirituous liquor to a person under 21, means to furnish or supply, but is not used in its primary and strict sense, signifying to confer or transfer without price or reward. *Commonwealth v. Davis*, 75 Ky. (12 Bush) 240, 241.

The word "give," in the constitutional provision, declaring that the General Assembly has no power to give or lend the credit of the state in aid, etc., is not limited in meaning to express a mere gratuity, but means to pass from one to the other, and the idea of its being done for or without consideration is not involved. Subscribing for corporation stock is a gift of the credit of the state, within the meaning of the section. *Galloway v. Jenkins*, 63 N. C. 147, 155.

#### **Grant distinguished.**

The word "grant" is carefully to be distinguished from the word "give," for it is well settled that "concessi," in a feoffment or estate of inheritance, implies no warranty. This distinction between the force and effect of the words "give" and "grant" arose from artificial reasons derived from the feudal law. The distinction has now become merely technical, but it is sufficient that it clearly exists, and we are certainly not at liberty to confound the word or change their established operation. *Frost v. Raymond* (N. Y.) 2 Caines, 188, 194, 195, 2 Am. Dec. 228.

#### **Immediate gift imported.**

The operative word "give," as used in a written instrument, is appropriate to either a deed or will, but, standing alone, would seem to indicate a direct and immedi-

ate gift, rather than a testamentary bequest. *Ferguson v. Ferguson*, 27 Tex. 339, 344.

#### **Leave synonymous.**

The words "leave" and "give," especially when used in a will without qualifying or restraining words, are interchangeable terms, and mean one and the same thing. *Carr v. Effinger*, 78 Va. 197, 203.

#### **Quantity not designated.**

Where the word "give" is used in a deed, it is not employed to express or to designate in any degree the quantity of estate intended to be conveyed, but is for the mere purpose of passing from the seller to the purchaser the estate therein described by other words introduced specially for that end. *Krider v. Lafferty* (Pa.) 1 Whart. 308, 314, 315, 316.

#### **Sell distinguished.**

"Give," as used in Rev. St. 1874, c. 43, providing that whoever shall sell or give intoxicating liquor to any minor without the written order of his parent, guardian, or family physician, shall for each offense be fined, etc., should be construed as stating an offense distinct from that of selling liquor to a minor, and hence a count in an indictment for the one will not be sustained by proof of the other. The words are used in the statute in their natural meaning, and cannot be considered as synonymous with the word "let," so that a conviction may be had on a count in an indictment of selling liquor to a minor where the proof showed that the liquor was sold to an adult, who gave the liquor to the minor. *Siegel v. People*, 106 Ill. 89. See, also, *Parkinson v. State*, 14 Md. 184, 190, 74 Am. Dec. 522.

#### **Transfer of title imported.**

The word "give" is often used with other meaning than as evincing an intent to confer title in a thing delivered—as, for instance, where an article is given to a person for the purpose of delivering it to some other person, or for the purpose of performing some work thereon, so that evidence that a person said he would give stock to another is not sufficient to show an intention to transfer title. *Smith v. Burnet*, 35 N. J. Eq. (8 Stew.) 314, 324.

The use of the word "give" by a father in making random statements that he gave his son certain money does not show a gift to the son if the latter has given his note for such money, but the transaction will be considered to be a loan. *Roland v. Schrack*, 29 Pa. (5 Casey) 125, 127.

The word "give," in a contract by which defendant agreed to take the wheat of plaintiff, and to give back a barrel of flour for a certain number of bushels, requires some act

of defendant which should pass the property of the flour to the plaintiffs. As a word of contract, it demands something more than the redelivery of the plaintiff's wheat in the form of flour. It implies that the property in the thing to be given is in the donor until changed by delivery. The word does not import a mere gratuity, since the defendant was to give superfine flour for—that is, in consideration of or as equivalent for—the wheat taken by him from the plaintiffs. Such a contract imports a sale, not merely a bailment. *Norton v. Woodruff*, 2 N. Y. (2 Comst.) 153, 156.

One of two sisters who jointly owned a mortgage, being in an advanced stage of consumption, handed all her valuable papers, including the mortgage, to the other sister. Nine years afterward, when the estates of both sisters were being administered, a daughter of the alleged donee testified that the donor said to the donee on handing over the papers: "I give them to you because they are yours. Everything I have got is yours." It appeared that the donor lived nearly a year thereafter, and that no notice was given to the mortgagor, who subsequently paid a part of the principal and a year's interest to both the sisters. It was held that the evidence was not sufficiently convincing to show a gift of the mortgage, the court saying that the word "give" is often used with other meaning than as evincing an intention to confer the title in the thing delivered. You give a person an article to carry for you, or to perform work upon. *Thompson v. West*, 40 Atl. 197, 199, 56 N. J. Eq. 660.

In construing a clause in a will providing that "I hereby lend to my granddaughter certain slaves during her natural life, and at her decease I give the slaves to" a certain designated beneficiary, it was said that the testator used the word "lend" to express the interest that his granddaughter should take in the property, and the word "give" to carry the property from her to the other beneficiaries. *Pournell v. Harris*, 29 Ga. 736, 742.

The use of the word "give" in a will in which testator states that "I give," etc., is a word of the largest signification, and is as applicable to real as personal estate. *Hooper v. Hooper*, 63 Mass. (9 Cush.) 122, 129.

In an instrument reciting that, "in consideration that L. shall care for me until my death, I give him all my goods and chattels and real estate," the word "give" is sufficient to convey the real estate. *Evenson v. Webster*, 53 N. W. 747, 749, 3 S. D. 382, 44 Am. St. Rep. 802.

#### GIVE AND BEQUEATH.

The words "give and bequeath," in a will, are equivalent to the word "devise."

In *re Barrett's Will*, 82 N. W. 998, 111 Iowa, 570.

#### Absolute gift imported.

The words "give and bequeath," in a will, import an absolute gift, to take effect upon the decease of the testator. *Smith v. Jackman*, 73 N. W. 228, 229, 115 Mich. 192; *Eldridge v. Eldridge*, 63 Mass. (9 Cush.) 516, 519; In *re Jones' Will*, 21 Atl. 950, 951, 46 N. J. Eq. (1 Dick.) 554.

#### Gift of personalty imported.

The words "give and bequeath" are more properly used in a will to designate a mere gift of personal property, while the word "devise" should be added to the other words if real estate is also included in the gift. *Scholle v. Scholle*, 21 N. E. 84, 85, 113 N. Y. 261.

The words "give and bequeath," in a will, are strictly more applicable to personal than real estate. *Delafield v. Barlow*, 14 N. E. 498, 500, 107 N. Y. 535.

#### Estate in fee passed.

A residuary bequest in a will stating that testator gives and bequeaths all the rest and residue of his property, after paying just debts, to his wife, passes an estate in fee, although no words of inheritance are used. *Lincoln v. Lincoln*, 107 Mass. 590, 591.

#### GIVE, BEQUEATH, AND CONVEY.

The phrase "give, bequeath, and convey," as used in an instrument reciting that on consideration of past services, etc., the person executing the instrument does hereby "give, bequeath, and convey" certain real estate, is sufficient to constitute the instrument a conveyance, and not a will. *Campbell v. Morgan*, 22 N. Y. Supp. 1001, 1008, 68 Hun, 490.

#### GIVE COLOR.

The rule of common-law pleading that a plea of confession and avoidance must give color to the averments of the complaint or petition, or it will be fatally defective, simply means the absence of any denials of the facts alleged in the declaration, and the express or silent admission that the declaration, as far as it goes, is true. *Mauldin v. Ball*, 1 Pac. 400, 411, 5 Mont. 96; *Merten v. San Angelo Nat. Bank*, 49 Pac. 913, 914, 5 Okl. 585.

#### GIVE AN EDUCATION.

Where a testator's will directed that the executors give his son an education, the phrase "give an education" did not mean merely that the executors should furnish money necessary for such education, but

they were to see that the thing was done. In re Van Houten, 8 N. J. Eq. (2 H. W. Green) 220, 227, 29 Am. Dec. 707.

### GIVE, GRANT, AND CONVEY.

The words "give, grant, and convey" are as comprehensive as any that can be used to convey legal title, and are as efficient in law to transfer the title. Young v. Ringo, 17 Ky. (1 T. B. Mon.) 80, 81.

"The words 'give, grant, sell, and convey,' in a deed, do not of themselves imply a warranty. Nor do they expressly and specifically convey the whole title, but are rather words of general description, susceptible of explanation or modification by other appropriate language. They are just as applicable to a conveyance of a right of redemption as to the grant of a fee." Thus their use in a deed, followed by a statement that the grantor intends to convey the same premises and title as conveyed to him by another, only operates to pass such title, though it is only a right of redemption. Bates v. Foster, 59 Me. 157, 160, 8 Am. Rep. 408.

### GIVE IN HIS VOTE.

"Give in his vote," as used in an indictment charging that the defendant did willfully and unlawfully give in his vote, is equivalent to "vote," as used in Nix. Dig. 223, § 50, providing that any person who shall vote, or fraudulently offer to vote, at any election, who shall not have certain qualifications, shall be deemed guilty of a misdemeanor. "Voting" and "giving a vote" are precisely synonymous terms. Giving the vote is voting, not offering the vote. State v. Moore, 27 N. J. Law (3 Dutch.) 105, 106, 107.

### GIVE INFORMATION.

A statute providing for the payment of the reward to the persons who shall make discovery and give information against any other person guilty of a crime or misdemeanor, so that he may be tendered to justice and convicted, does not mean that every one who merely gives information is entitled to a reward, but it includes the discovering and causing to be adduced some additional and corroborative testimony to the statement of a person charged with crime, implicating another, who was prosecuted and convicted by means of such additional and corroborative testimony. In re Kelly, 89 Conn. 159, 162.

Acts 1899, c. 64, § 7, providing that, whenever any person shall sustain any damage from sheep being worried by dogs, he shall within a certain time after he has

knowledge thereof give information to the selectmen, cannot be construed to require the injured party to give notice in person, but he may do so by letter, or through the agency of another. Where the selectmen received information of such damage from some person other than the party injured, and act on such information, it is sufficient. Jones v. Sherwood, 87 Conn. 466, 467.

"Giving information," as used in Act Cong. July 12, 1876, c. 186, 19 Stat. 90 [U. S. Comp. St. 1901, p. 2658], which prohibits the mailing of letters "giving information" as to where or how or of whom certain articles mentioned in the section may be obtained or made, is so construed that the letters, pamphlets, etc., so mailed, must be actually read by some person. The mailing to a fictitious person would not be giving information, within the meaning of this statute. United States v. Whittier (U. S.) 28 Fed. Cas. 591, 594.

### GIVE NOTICE.

The statement in a notary certificate of protest of a note that "I then protested the same for nonpayment, and gave written notice of the same to the indorser," is not subject to the objection that it does not show the mode or manner in which the notice was given. To say, "I gave written notice to the indorser," was, in effect, saying, "I placed a written notice in the indorser's hands." O'Neill v. Dickson, 11 Ind. 253, 254.

The word "given," in Bankr. Act 1867, § 12, making it proper for the register to adjourn a meeting of creditors to an hour, to be then and there fixed by him, and direct that a new notice should be given by the marshal, means notice published, as well as served. In re Devlin (U. S.) 7 Fed. Cas. 563, 564.

### GIVEN.

"Given," as used by discriminating law writers in speaking of a judgment being given, is only used to designate judgments which are not obtained by confession. Schuster v. Rader, 22 Pac. 505, 506, 13 Colo. 829.

"Given," as used in Code Civ. Proc. § 456, providing that, in pleading a judgment, it is not necessary to state the facts conferring jurisdiction, but such judgment may be stated to have been "duly given or made," are not equivalent to the words "duly rendered," and a pleading using the latter is defective. City of Los Angeles v. Mellus, 59 Cal. 444, 451.

"Given," as used in Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], prescribing that preferences given within four months of the filing of the bankrupt's petition are voidable by

the trustee, cannot be construed to mean recorded, so that a mortgage given more than a year before the filing of the petition, but not recorded until within four months of such filing, is not voidable by the trustee. *Asbury Park Bldg. & Loan Ass'n v. Shepherd* (N. J.) 50 Atl. 65, 67.

Testator provided that his land should be sold by his executors, and the proceeds invested in negroes, and, after the death of his wife, her third interest should be lent by the executors to his daughters during their lives, and then given to their heirs. The will further proceeded, "I lend unto my three daughters \* \* \* during their natural lives, and then given to the lawfully begotten heirs of their body," the remaining two-thirds of his estate. Held, that the use of the word "given," rather than "give," showed an intention of the testator that the title to two-thirds of the estate should remain in his executors during the life of his daughters, and should be by them given to the heirs of the daughters. The expression was equivalent to "then to be given." *Loving v. Hunter*, 16 Tenn. (8 Yerg.) 4, 31.

#### GIVEN BAIL.

When a defendant is said to be "on bail" or to have "given bail," it is intended to apply as well to recognizance as to bail bonds. *Code Cr. Proc. Tex.* 1895, art. 307.

#### GIVING AWAY.

"Giving away," as used in Laws 1873, c. 646, providing that any wife injured in her means of support in consequence of the intoxication of any person shall have a right of action against the person selling or giving away the liquors which caused the intoxication, does not include the taking of liquor by a bartender while engaged in his employment, though his employer knew that he was drinking, and said nothing against it. *Campbell v. Schlesinger*, 1 N. Y. Supp. 220, 221, 48 Hun, 428.

*Comp. St. c. 50, § 11*, making it criminal to give away intoxicating liquors upon any pretext without obtaining a license, etc., means give away upon some pretext for the purpose of evading the law. The statute does not prohibit the mere act of giving away intoxicating liquors, as such act is not criminal. *State v. Ball*, 43 N. W. 398, 399, 27 Neb. 601.

*Code 1876, § 4205*, declaring that any person, whether with or without a license, who shall "sell or give" away spirituous liquors, in any quantity whatever, to minors or persons of known intemperate habits, except upon the requisition of a physician for medicinal purposes, is guilty of a misdemeanor, etc., should be construed to in-

clude one who procures the act denounced by it to be done, although he may not actually commit the offense. It is enough that he be present, procuring or counseling, aiding or abetting, the person who actually delivers the liquor to one of the prohibited class. *Walton v. State*, 62 Ala. 197, 200.

The words "give away," as used in the chapter relating to traffic in intoxicating liquors, shall not apply to the giving away of intoxicating liquors, by a person in his private dwelling, unless given to a minor other than a member of his own private family, or to an habitual drunkard, or unless such private dwelling becomes a place of public resort. *V. S. 4462*.

As used in the chapter relating to intoxicating liquors and cigarettes, the words "giving away" do not apply to the giving away of intoxicating liquors by a person in his private dwelling, unless such private dwelling is a place of public resort. *Bates' Ann. St. Ohio 1904, § 4364-20c*.

#### GIVING CREDIT.

In a contract of guaranty, whereby, in consideration of R. & Co. giving credit to D., the guarantor agreed to be responsible for any sum not exceeding £120 due to the said R. & Co. by said D., the words "giving credit" were equally applicable to future as well as past credit, and the agreement was a binding guaranty. *Edwards v. Jevons*, 8 O. B. 436, 444.

#### GIVING IN PAYMENT.

The "giving in payment" is an act by which a debtor gives a thing to the creditor, who is willing to receive it in payment of a sum which is due. *Civ. Code La. 1900, art. 2655*.

#### GIVING NOTICE.

The word "giving," in a poor debtor's bond given under *Gen. St. c. 124, § 10*, providing that the debtor will deliver himself up for examination before some magistrate authorized to act, giving notice of the time and place thereof, being a present participle, rather implies that the notice is to be given, or at least may be given, at the time the party delivers himself up for examination. The debtor is not required to give a prior notice of his intention to submit himself to an examination. *City Nat. Bank v. Williams*, 122 Mass. 534, 535.

#### GIVING OUT.

In *Rev. St. c. 23, § 6*, relating to mines and mining machinery, which requires that every drum shall be provided with a sufficient brake to prevent accident in case of

the giving out or breaking of the machinery, "giving out" means any giving way of the machinery, whether from breaking or imperfection of some of its parts, or a failure of the motive power, or from any other cause. *Beard v. Skeldon*, 113 Ill. 584, 588.

The phrase "giving out of the machinery," in a statute requiring the coal mine operators to provide a sufficient brake on every drum to prevent accidents in case of the giving out or breaking of the machinery, includes any giving away of the machinery, whether from the breaking or imperfection of some of its parts, a failure of the motive, or, rather, of the static, power to hold in equilibrium, or from any other cause, and therefore includes a case where the cage of a mine goes down the shaft in consequence of some failure or diminution in the pressure of the steam on the face of the piston. *Beard v. Skeldon*, 18 Ill. App. (13 Bradw.) 54, 58.

#### GIVING TIME.

The words "giving time" were defined by the court in *Howell v. Jones*, 1 Crompt. M. & R. 107, in the following terms: "We think it means extending the period at which, by the contract between them, the principal debtor was originally liable to pay the creditor, and extending it by a new and valid contract between the creditor and the principal debtor, to which the surety does not assent." *Shipman v. Kelley*, 41 N. Y. Supp. 328, 339, 9 App. Div. 316.

In Code Civ. Proc. § 1187, requiring a claimant for a mechanic's lien to state in his claim of lien "the terms, time given, and conditions of his contract," "time given" means, not the date or time when the contract was made, but the time of payment for the work and labor performed, and of materials furnished, as agreed and expressed in the contract. *California Powder Works v. Blue Tent Gold Mines (Cal.)* 22 Pac. 391, 392 (citing *Hills v. Ohlig*, 63 Cal. 104).

#### GIVING WAY.

The term "giving way," within the meaning of maritime regulations requiring steam vessels to give way to sailing vessels, does not mean the putting the helm to port under all circumstances, but porting or starboarding the helm as the exigencies may require. *Lockwood v. Lashell*, 19 Pa. (7 Harris) 344, 350.

#### GLANDERS.

Glanders is a disease of the mucous membrane of the nostrils of a horse, with a vitiated secretion, and is contagious. *Wirth v. State*, 22 N. W. 860, 862, 63 Wis. 51.

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#### GLARING.

The word "glaring" in its ordinary meaning is a stronger word than "apparent," but it is sometimes used synonymously with the words "open" and "manifest." So that an instruction that a servant having no notice of a danger does not assume the same unless so glaring and apparent as to be open to the observation of ordinarily prudent men, was not necessarily understood by the jury to mean glaringly apparent, so as to be erroneous. *Chicago & E. R. Co. v. Lee*, 64 N. E. 675, 679, 29 Ind. App. 480.

#### GLASS.

Time out of mind glass has been made by melting mixtures of sand and alkali in crucibles. For many years the crucibles have consisted of large tanks, and the contents been subjected to continuous heat on the surface. As the ingredients melt, they gradually form a mixture of glass, more or less perfect, sand, etc. *Benjamin v. Chambers & McKee Glass Co. (U. S.)* 59 Fed. 151, 155, 8 C. C. A. 61.

"Glass," as used in Carriers' Act, 11 Geo. IV and 1 Wm. IV, c. 68, § 1, enacting that no common carrier shall be liable for loss of any trinkets, gold-plated articles, glass, silks, etc., when the value exceeds £10, unless at the time of the delivery to the carrier the value was declared, would include such articles as smelling bottles and glass flagons, though some ornaments were superadded. *Bernstein v. Baxendale*, 6 C. B. (N. S.) 251 260.

#### GLASS BEADS.

"Glass beads, loose, unthreaded, or unstrung," as used in Tariff Act Oct. 1, 1890, par. 445, do not include glass beads threaded on strings. In *re Steiner (U. S.)* 66 Fed. 726, 727.

#### GLASS BROKEN.

A window glass, broken in transit, so that part of it is useless, except for remanufacture, is not admissible under Act Oct. 1, 1890, par. 590, of the free list, as glass, broken, but the whole is dutiable as window glass. *United States v. Bache (U. S.)* 59 Fed. 762, 764, 8 C. C. A. 258.

#### GLASS—WITH CARE—THIS SIDE UP.

"Glass—With care—This side up," as used on a box, is sufficient notice to a carrier that the article is valuable, and liable to injury from rough handling and other causes, and that there is danger in carrying it in any other position than the one indicated by the inscription. *Hastings v. Pepper*, 28 Mass. (11 Pick.) 41, 43.

**GLASSWORKS.**

The term "glassworks," as used in all laws relative to the employment of labor, shall mean any premises in which the manufacture of glass is carried on. Rev. Laws Mass. 1902, p. 918, c. 106, § 8.

**GLAZED BRICK.**

Magnesic brick, glazed, and not known in commerce as fire brick, is subject to duty as glazed brick, under Tariff Act Aug. 28, 1894, c. 349, § 1, Schedule B, par. 76, 28 Stat. 512. *Fleming v. United States* (U. S.) 124 Fed. 1014.

**GLOVE CONTEST.**

A glove contest, as distinguished from a prize fight, is a mere exhibition of skill in sparring with gloves, not calculated to do great bodily injury, instead of a contest continued until one of the contestants succumbs from exhaustion or injuries received. *State v. Olympic Club*, 15 South. 180, 184, 46 La. Ann. 935, 24 L. R. A. 452.

**GO.**

A prison limits bond, providing that the bond shall be forfeited if the prisoner shall go beyond the prison limits, should be construed to mean "shall voluntarily go." *Randolph v. Simon*, 29 Kan. 406, 409.

**As be considered.**

A stipulation stating that a policy of insurance and letters of administration should go in evidence is tantamount to saying that they should be considered in evidence, and not that they might be read in evidence. *The Protection Life Ins. Co. v. Palmer*, 81 Ill. 88, 91.

**As belong.**

"Go," as used in a legislative provision that certain fines and forfeitures shall go to the county in which the indictment was found, is the equivalent of "belong." *Jackson County v. Derrick*, 23 South. 193, 197, 117 Ala. 348.

**As vest.**

The expression "shall go," as used in St. 1850, providing that on dissolution of the community one-half of the common property shall go to the survivor, etc., means "shall vest." *Plass v. Plass*, 53 Pac. 448, 449, 121 Cal. 131 (citing *Broad v. Broad*, 40 Cal. 490, 496).

**GOING BEFORE THE WIND.**

There is in nautical technicality a difference between a vessel "going before the

wind" and "going off large." Going before the wind is when the wind is free, comes from the stern, and the ship's yards are braced square across; going off large is when the wind blows from some point abaft the beam, or from the quarter of the ship. *Hall v. The Buffalo* (U. S.) 11 Fed. Cas. 214, 216.

**GO BEYOND.**

"To go beyond the contract in search of its meaning" means to ascertain the subject-matter to which it refers by means of extrinsic evidence, which, in connection with the instrument, establishes the right. The extrinsic evidence is essential to the completion of the meaning of the instrument, and the latter can be admitted in proof only on condition that the former is introduced. *Gregory v. North Pac. Lumbering Co.*, 17 Pac. 143, 147, 15 Or. 447.

**GO HENCE.**

"Go hence," as used in a judgment that the defendant go hence without day, and recover his costs, etc., is synonymous with and has the same force as "go home" in respect to constituting the judgment a final judgment for the purposes of review in the Supreme Court. *Hiatt v. Kinkaid*, 58 N. W. 700, 702, 40 Neb. 178.

**GO HOME.**

"Go home," as used in a judgment directing that the defendant go home without day, and recover his costs, has the same force as the term "go hence," in respect to constituting the judgment a final judgment for the purposes of review in the Supreme Court. *Hiatt v. Kinkaid*, 58 N. W. 700, 702, 40 Neb. 178.

**GO SHORT.**

The expression "go short" in a will providing that, if the executrix would have to collect all rents and pay all debts, to divide the balance, if any, and, "if you go short, take out of each one share," evidently meant in the mind of the testatrix to be unable, from the net income available for the purpose, to pay the full amount of the legacies, since the remedy she provides in that case is a corresponding deduction from the share of each. *Angus v. Noble*, 46 Atl. 278, 280, 73 Conn. 56.

**GO TO BED WITH.**

"To go to bed with is to be in bed with. In all times, in every age, and by all writers, sacred and profane, in the language of scripture and in the language of the law, these words, except between man and wife, impute illicit intercourse, and with them it

imputes the rite of hallowed love." *Walton v. Singleton* (U. S.) 7 Serg. & R. 449, 451, 10 Am. Dec. 472.

### GOING.

A contract employing a shepherd, which provides that the latter would have the "going" of 105 sheep with his master's flock, meant that the sheep should be pasture fed. *The King v. Inhabitants of Nacton*, 3 Barn. & Adol. 543.

### GOING BUSINESS OR CONCERN.

"Going business or establishment" is a term applied to a corporation which "is still prosecuting its business with the prospect and expectation of continuing to do so, even though its assets are insufficient to pay its debts." *Corey v. Wadsworth*, 11 South. 350, 353, 99 Ala. 68, 23 L. R. A. 618, 42 Am. St. Rep. 29.

A going concern is some enterprise which is being carried on as a whole, and with some particular object in view. *Oliver v. Lansing*, 80 N. W. 829, 831, 59 Neb. 219.

The term "going concern," when applied to a corporation, means that it continues to transact its ordinary business. The mere fact that a corporation is insolvent does not dissolve the corporation and make the directors mere trustees of its assets if it is still a going concern. *White, Potter & Paige Mfg. Co. v. Pettes Importing Co.* (U. S.) 30 Fed. 864, 865.

### GOING FREE.

According to the *Seaman's Manual*, a vessel is going free when she has a fair wind, and her yards braced in. *The Queen Elizabeth* (U. S.) 100 Fed. 874, 876.

### GOING OFF LARGE.

"Going off large," as used in Act 1849, § 5, providing that during the night vessels on the starboard tack shall show a red light, vessels on the larboard tack a green light, and vessels going off large, or before the wind, or at anchor, a white light, "is having the wind free on either tack, properly termed a 'vessel off large,' because it is in her power to take a course to either side—starboard or larboard—proceed straight forward on her course, or return back to her anchorage, or to the point from which she started. In other language, she is free to the wind." *Ward v. The Fashion* (U. S.) 29 Fed. Cas. 181, 188.

There is in nautical technicality a difference between "going off large" and "going before the wind." Going off large is when the wind blows from some point abaft the beam, or from the quarter of the ship; go-

ing before the wind is when the wind is free, comes from the stern, and the ship's yards are braced square across. *Hall v. The Buffalo* (U. S.) 11 Fed. Cas. 214, 216.

### GOING ONLY.

Acts 1869-70, p. 159, provide that for every mile necessarily traveled in going only in executing any warrant of arrest, subpoena, or venire, bringing up a prisoner on habeas corpus, taking prisoners before a magistrate or to prison, the officer shall be entitled a certain mileage. It is held that the words "in going only" do not apply to the taking of a prisoner before the magistrate, except as applicable to the distance traveled from the place of arrest to the magistrate. *Cunningham v. San Joaquin County*, 49 Cal. 323, 324. The words "in going only," in such statute, are not to be construed to mean that the constable was only entitled to his mileage in going to make an arrest, and not in bringing his prisoner before the magistrate. The words "in going only" would, in all probability, prevent the officer from charging mileage on the return trip when he does not succeed in making the arrest, but where he does succeed, and consequently has to take the prisoner before a magistrate, it would seem that the case is covered by the words "taking prisoners before a magistrate." *Allen v. Napa County*, 23 Pac. 43, 45, 82 Cal. 187.

### GOING PRICES.

Where one has sold lumber at the going prices, this means the market value of the same at the place and time of delivery. *Kelsea v. Haines*, 41 N. H. 246, 254.

### GOING RATE.

Rate means price, value. Going rate as to freight, like market price for produce, means a fixed and established price for the time. A rate for freight cannot be established by a mere offer of a shipper or demand of a carrier. It can only be done by an actual contract having been made in the port, and the last one so made for the same port would fix the rate. *Barrett v. The Wacousta* (U. S.) 2 Fed. Cas. 928, 929.

### GOING TO PASTURE.

The turnpike act, exempting from tolls horses and cattle "going to or returning from pasture" and horses attending cattle returning from pasture, does not include a horse ridden by the owner of the cattle at pasture in order to fetch them therefrom. *Harrison v. Brough*, 6 Term R. 706, 707.

### GOING VALUE.

By the phrase "going value" of a water-works corporation empowered to furnish



water to a city and its inhabitants is meant the value which arises from having an established going business. While not exactly equivalent to the term "good will" as applied to ordinary business, it is of a somewhat similar nature, and attaches to the business, rather than to the property employed in such business. The fact that the business is established is of course a material fact in ascertaining the value of the plant, and especially is this true where the property is estimated for the purpose of sale or condemnation; but as the basis of estimating profits its signification is less apparent. In deciding whether water rates fixed by a city ordinance are so low as to allow the water company an insufficient return on its investment, and thus result in confiscating its property, the going value of the works will not be regarded as a distinct element of value. *Cedar Rapids Water Co. v. City of Cedar Rapids*, 91 N. W. 1081, 1091, 118 Iowa, 234.

### GONE TO SEA.

"Gone to sea," as used in St. 1718, allowing married women to trade and be subject to the responsibilities of a feme sole where her husband had gone to sea, includes a going to sea both as a mariner or a passenger. It is her being left to contract debts for which his person cannot be reached by process that gives her the credit and subjects her to the responsibility of feme sole. It is indifferent whether she got her living by shopkeeping or by any other employment, or whether he be a mariner or passenger. *Jacobs v. Featherstone (Pa.)* 6 Watts & Serg. 346, 349.

### GOAT.

As cattle, see "Cattle."

### GOAT-HAIR GOODS.

Goat-hair goods are fabrics manufactured of cotton and the hair of the angora or other goat; the warp being cotton and the woof being goat's hair. Their chief use is for women's dresses, and they are known in the trade under such specific names as "brilliantines," "lustrines," "alpacas," and "mohairs." They are composed of about 80 per cent. goat's hair and 20 per cent. cotton. *Arthur's Ex'rs v. Butterfield*, 8 Sup. Ct. 714, 715, 125 U. S. 70, 31 L. Ed. 643.

### GODLY PREACHERS.

"Godly preachers," as used by a Protestant Nonconformist in 1704 in conveying estates to trustees for the benefits of poor and Godly preachers, meant preachers of the different classes of Protestant dissenters from the established church who professed and

preached what were generally acknowledged at that time to be the doctrines of the Holy Gospel of Christ, and who were then tolerated by the law of the land, and which classes were at the time divided amongst themselves into the Presbyterian, the Independents or Congregationalists, and Baptists, all of whom were believers in the doctrine of the Holy Trinity. *Attorney General v. Shore*, 11 Sim. 592, 635.

### GOD'S LAW.

Under an act declaring all persons lawful for the purpose of marriage that "be not prohibited by God's law to marry," the words may mean more than the Levitical law. They may refer to the state of body or mind; and where God's law and the Levitical degrees are mentioned in the same branch of enactment they cannot mean the same thing, and God's law, though it includes the Levitical degrees, may prohibit something beyond them. *Regina v. Chadwick*, 17 L. J. M. Cas. 33, 36, 11 Q. B. 173, 176.

### GOLD.

"Gold," as used in the following writing: "Two years from date for value received I promise to pay J. S. K., or bearer one ounce of gold," should not be construed to mean money, but to mean an ounce of the specific article. *Roberts v. Smith*, 58 Vt. 492, 494, 4 Atl. 709, 56 Am. Rep. 567.

In a promise to pay "\$60.00, payable in gold," the words "dollars in gold" can only mean the gold coin of the country made current as money by public authority. Gold, in this sense, is not an article of ordinary traffic, but one form of that medium of exchange by the instrumentality of which a traffic in commodities is effected. Under such a promise the payee can recover no more than \$60 and interest thereon, and is not entitled to have the premium on gold added to that amount. *Gist v. Alexander (S. C.)* 15 Rich. Law, 50, 51.

The misspelling of the word "gold" by the omission of the last letter thereof in an indictment charging that defendant feloniously took and carried away ten \$20 "gol" pieces of American coinage, is equivalent to the word "gold," and does not invalidate the indictment, as neither clerical nor grammatical errors have such effect, unless they change the words or obscure the sense. *Grant v. State*, 55 Ala. 201, 207.

### GOLD COIN.

See "United States Gold Coin."

By "gold or silver coin," as used in the statute punishing counterfeiting and diminishing value of current coin, is meant any

piece of gold or silver of which one of these metals is the principal component part, and which passes as money in the United States, either by law or usage, whether the same be of the coinage of the United States or of any foreign country. Pen. Code Tex. 1895, art. 564.

### **GOLD DOLLARS.**

An allegation in an indictment of the theft of "gold dollars" is defective for want of a sufficient description, as the term cannot be construed to mean "gold dollars of the lawful money or current coin of the United States" or other countries. *Lavarre v. State*, 1 Tex. App. 685, 687.

### **GOLD DUST.**

Gold dust is not cash within the meaning of a contract calling for the payment of cash, since the price of gold dust is constantly fluctuating in its market value. It is an article of traffic like merchandise. *Gunter v. Sanchez*, 1 Cal. 45, 49.

### **GONORRHEA.**

Gonorrhea is a loathsome disease within the meaning of the statute entitling the wife to a divorce on the ground that the husband has contracted a loathsome disease. *Boughner v. Boughner* (Ky.) 41 S. W. 28, 27.

### **GOOD.**

See "As Good As."

#### **Acceptance imported.**

"By the law merchant of this country the certificate of a bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be applied whenever the check is presented for payment. It is an undertaking that the check is good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check as regards both parties is to enable the holder to use it as money." *Merchants' Nat. Bank of Boston v. State Nat. Bank of Boston*, 77 U. S. (10 Wall.) 604, 645, 19 L. Ed. 1008; *Willeys v. Phoenix Bank*, 11 N. Y. Leg. Obs. 211, 215; *Meads v. Merchants' Bank of Albany*, 25 N. Y. 143, 147, 82 Am. Dec. 331; *Girard Bank v. Bank of Penn Tp.*, 89 Pa. 92, 99, 80 Am. Dec. 507.

The customary certification "Good" on a note by a bank at whose place of business

the note is made payable should be construed to give information merely that the maker has funds in the bank to meet the note, and not as a binding obligation of the bank. Such information may also be furnished verbally or by letter, as well as a memorandum on the note, the effect in each case being the same. *Irving Bank v. Wetherald*, 38 N. Y. 335.

The words "good for the sum expressed," when placed on a check by the drawee, constitute an undertaking by the drawee that the paper will be paid on presentation, and is indorsed on the check with a view to its circulation, and to cause it to pass from hand to hand upon the strength of such indorsement. The words also import that the drawer has funds or means convertible into funds in the hands of the drawee at the time, which shall be retained and devoted to the payment of the paper on presentation. A check so indorsed is known as a "certified check." *Farmers' & Mechanics' Bank of Kent County v. Butchers' & Drovers' Bank*, 28 N. Y. 425, 427.

#### **Average distinguished.**

See "Average."

#### **As clear.**

The word "good" in a vendor's contract to convey a good title comprehends all that the word "clear" does, and therefore there is no strength to any argument based on the intention of the parties, as shown from the fact that the word "clear" in the original draft of the contract was stricken out, and the word "good" inserted. Such change does not show that the parties did not intend that the title should be conveyed free from all incumbrances. *Oakey v. Cook*, 7 Atl. 495, 503, 41 N. J. Eq. (14 Stew.) 350.

#### **As collectible.**

"Good," as used in a warranty of a note as being good, means that the note is collectible, and not that it will be paid on demand. *Curtis v. Smallman* (N. Y.) 14 Wend. 231, 232.

The indorsement, "I warrant this note good," means that it is collectible; that the maker is responsible; and is not an acknowledgment that the note will be promptly paid at maturity, making it incumbent on the owner of such note and guaranty, in order to charge the grantor, to prove by legal evidence that the maker was not responsible. *Cowles v. Pick*, 10 Atl. 569, 570, 55 Conn. 251.

A guaranty that a note is good "is in law a contract that the maker is solvent, and that the amount can be collected by due course of law." *Cooke v. Nathan* (N. Y.) 16 Barb. 342, 344.

An award of referees for a certain sum of sterling money of Great Britain, payable in "good and safe sterling bills of exchange on England or Holland," means such bills of exchange as would be honored and paid in either of those states by the drawee on using proper diligence and legal means. *Warder v. Whittall*, 1 N. J. Law (Coxe) 84.

A contract to pay a certain sum in good notes, which shall be due, and which shall provide for attorney's fees for collecting the same, means notes which are collectible by legal proceedings, and is not limited to mercantile paper which will be promptly met and paid at maturity, and hence a note secured by mortgage is a good note, though the makers are insolvent. *Polk v. Frash*, 61 Ind. 206, 210, 28 Am. Rep. 669.

By a writing, "I hereby guarantee this note good until January 1, 1850," the guarantor does not promise to pay the note on that date, nor that it should be paid by the makers. It is an obligation on his part, having relation merely to the solvency and ability of the makers to pay the note; in other words, he agreed that during the period mentioned in the guaranty the makers of the note should be in that condition that payment of the note could be enforced against them if legal diligence was used for that purpose. The note was good if during that period they had the means of payment, or if payment could be enforced by legal measures. The liability of the guarantor commenced when that degree of insolvency on the part of the makers existed which rendered them unable to pay the note, or the holder to collect it. *Hammond v. Chamberlin*, 26 Vt. 406, 412.

#### **As financially responsible.**

In *Weil v. Schwartz*, 21 Mo. App. 372, it was held that, where an inquiry was made of one whether another was good for a bill of \$400, the word "good" meant solvent. *Felix v. Shirey*, 60 Mo. App. 621, 624.

"Good," as used in an inquiry by one man of another whether a third party is good for a bill of goods, has reference only to the financial responsibility of the debtor, and the ability of a creditor to make his debt by legal process in the ordinary form. It does not refer to the moral character and trustworthiness of the party. *Weil v. Schwartz*, 21 Mo. App. 372, 380.

"Good," as used in a representation that a note is good, means that the maker of the note is responsible. *Weeks v. Burton*, 7 Vt. 67, 70.

#### **As genuine.**

In an indictment for obtaining money under false pretenses, which states that de-

fendant did unlawfully, knowingly, designedly, and falsely pretend that a certain paper was a good negotiable promissory note and bank bill, "good" is to be construed as meaning that the note and bank bill was genuine, rather than an expression of it being available to insure payment. "Taking the words in their ordinary meaning, we think the indictment describes not the genuine note of a worthless bank, but a note not the genuine note of any bank; that is, either a counterfeit note of some real bank, or a paper bearing the resemblance of a bank note, but purporting to be of some bank having no real existence." *Commonwealth v. Stone*, 45 Miss. (4 Metc.) 43, 48.

#### **As good in law.**

"Good," as used in an admission by the plaintiffs, on a trial to recover possession of land, that a certificate of entry was good, means good in law, in contradistinction to that which is deemed fraudulent in law. *Howard v. Perry*, 7 Tex. 259, 268.

In a prosecution for rape the defendant asked the court to instruct the jury as to the legal presumption arising from the conduct of the prosecutrix, such as failure to resist or make an outcry. The court modified the instruction requested as to such presumption by adding the words, "Unless there was a good excuse," etc. Held, that such modification was erroneous, since "good excuse," as there used, could only mean a legal excuse, and a legal excuse presents a question of law. The court should have added instead of the words "good excuse" what in law in the particular instance constituted a legal excuse, leaving the jury to find whether the requisite facts predicated were proved; as, for instance, that the prosecutrix was paralyzed by fear, or by the superior strength of the defendant. But it should not have been left to the jury to find what would constitute a good excuse for doing or omitting to do an act, without any direction as to what in law would constitute a good excuse. *Austine v. People*, 110 Ill. 248, 254.

"Good," as used in Gen. St. c. 105, § 5, declaring that no contract for the sale of goods shall be "allowed to be good" unless the buyer accepts and receive part, or gives earnest, or there is some memorandum, means good for the purpose of a recovery under it. *Townsend v. Hargraves*, 118 Mass. 325, 334.

#### **As suitable, proper.**

"Good watch," in an answer to a question in an application for fire insurance as follows: "Is a watch kept upon the premises during the night? Is any other duty required of the watchmen than watching for the safety of the premises?" that a "good watch kept, men usually at work, watchmen work

at the saws," is equivalent to a "watch suitable, proper, and adapted to the exigency of the case." *Parker v. Bridgeport Ins. Co.*, 76 Mass. (10 Gray) 802, 804.

#### **Warranty not imported.**

An affirmation by a vendor that the articles he has for sale or sells are good does not amount to warranty of the quality of the goods sold. It is not an affirmation of any particular quality; hence the vendor is not liable if the goods turn out not to be good. The language merely imports an opinion. *Barrett v. Hall* (Vt.) 1 Aikens, 269, 271.

A written instrument, which, after the date, reads, "We agree to put on board the brig Charlotte 200 dozen good fine wine and send the same to" a specified address, "and we acknowledge to have received our full pay for the above wines," does not constitute a warranty of the quality of the wines. The instrument does not purport to be a contract of sale, but it presupposes a sale already made, and is of itself a promise and undertaking to ship the wines to the address named. There is no doubt that in a contract of sale words of description are held to constitute a warranty that the articles sold are of the species and quality so described. But the warranty must be upon the sale, and one of the terms of the contract of sale. Any subsequent or collateral contract of warranty must arise from an express promise or undertaking to warrant, and that upon a new consideration distinct from that of the sale itself. *Hogins v. Plympton*, 28 Mass. (11 Pick.) 97, 99.

Where the seller of a horse which was exposed to the purchaser's inspection stated that the eyes of the horse were good as any horse's eyes in the world, the expression did not amount to a warranty of the horse's eyes. *House v. Fort* (Ind.) 4 Blackf. 293, 294.

#### **GOOD AND CLEAR TITLE.**

A vendor's contract to furnish an abstract of title showing a "good and clear title" free from defects is not performed if the abstract shows defects which may or may not exist in the title as tested by the original records, and an incumbrance which may or may not be barred by limitation. *Kane v. Rippey*, 33 Pac. 936, 24 Or. 383.

#### **GOOD AND COLLECTIBLE NOTE.**

See "Good and Sufficient Note."

A guaranty that a note is "good and collectible" means that it is capable of being collected. Such a guaranty does not require the obtaining of a judgment and the

return of an unsatisfied execution to render the guarantor liable thereon. *Sanford v. Allen*, 55 Mass. (1 Oush.) 473, 475.

The term "good and collectible," as used in a guaranty of a note, requires the person taking the security to resort to legal measures within a reasonable time, and to pursue them with common diligence until the final event is thereby completed. *Wheeler v. Lewis*, 11 Vt. 265.

A guaranty of a note as follows: "I warrant this note good and collectible for two years from date," means that the note shall be and remain "good and collectible" for the full period of two years. *Bull v. Bliss*, 30 Vt. 127, 131; *Marsh v. Day*, 35 Mass. (18 Pick.) 321, 322.

The expression, "I hereby warrant the within note good and collectible until paid," is a waiver of legal process and the usual requirements as to diligence in proceeding against the maker, and the guarantor is liable, though demand is not made or suit instituted against the maker within a reasonable time. *Lemmon v. Strong*, 13 Atl. 140, 142, 55 Conn. 443.

A guaranty of promissory notes as good and collectible, which is executed before the maturity of the notes, means good and collectible at the date of their maturity. *Dana v. Conant*, 30 Vt. 246, 253.

#### **GOOD AND COMFORTABLE SUPPORT AND MAINTENANCE.**

A will bequeathing to the testator's widow "a good and comfortable support and maintenance" both as to food and clothing and nursing in health and sickness, includes a proper supply of fuel and the necessary expenses of keeping the house in a tenable and comfortable condition. *Conant v. Stratton*, 107 Mass. 474, 484.

#### **GOOD AND CONVENIENT COURT HOUSE.**

A "good and convenient courthouse" may necessarily mean a courthouse with shade trees surrounding it, and therefore a statute requiring the board of supervisors of each county to keep in repair a good and convenient courthouse may be construed to be an authorization for the making of an appropriation for shade trees on the courthouse grounds. *Allgood v. Hill*, 54 Miss. 666, 667.

#### **GOOD AND LAWFUL FENCE.**

The term "good and lawful fence" in a statute imposing a liability for stock killed in the operation of a railroad, containing a proviso that the act shall not apply to any company whose road is inclosed with a good

and lawful fence to prevent such animals from being on said road, means a fence sufficient to prevent the animals from going on the track. *Atchison, T. & S. F. R. Co. v. Jones*, 20 Kan. 527, 529. The words "good and lawful fence," as so used are to be construed in connection with the fence law in force. In other words, railroad companies are not required to build different fences from other parties. The fence spoken of in the stock law is no different or more expensive than that mentioned in the general law defining a legal and sufficient fence. In townships where hogs are permitted to run at large, the bottom rail, board, or plank of which the fence is composed shall not be more than six inches from the ground. In other townships it shall not be more than two feet. In the law there is no prohibition against building fences of rail or timber, and when constructed of this material they are lawful fences. *Atchison, T. & S. F. R. Co. v. Yates*, 21 Kan. 613-620.

#### GOOD AND LAWFUL MEN.

A record stating that the grand jury returning a certain indictment is composed of good and lawful men means that the men composing the grand jury have all the qualifications required by law. *Bonds v. State*, 8 Tenn. (1 Mart. & Y.) 143, 146; *State v. Price*, 11 N. J. Law (6 Halst.) 203, 209; *Jerry v. State (Ind.)* 1 Blackf. 395, 396.

#### GOOD AND LAWFUL REASONS.

An order by a trial judge appointing another judge to try a cause, which recites that the presiding judge refuses to try such cause for "good and lawful reasons," will be construed to mean some one of the causes specified in Act March 1, 1885, which provides that in certain specified cases it shall be lawful for the presiding judge, in his discretion, to decline to preside during the trial of a cause. *Leonard v. Blair*, 59 Ind. 510, 514.

#### GOOD AND MARKETABLE TITLE.

Where land is conveyed under and subject to the condition that no mill, factory, brewery, or distillery shall be erected thereon, the title of the grantee thereto cannot be regarded as "good and marketable." *Batley v. Foerderer*, 29 Atl. 868, 870, 162 Pa. 460.

#### GOOD AND MERCHANTABLE CATTLE.

A contract for the delivery of good and merchantable cattle did not mean cattle which, at the time of the delivery, were merely in such a condition and of such an appearance as to be salable, but meant cattle which were sound and free from ex-

isting disease. *Parks v. O'Connor*, 8 S. W. 104, 108, 70 Tex. 377.

#### GOOD AND PERFECT DEED.

A contract for the sale of land, wherein the vendor stipulated that he would make a good and sufficient deed, meant that he would give a good and perfect title to the land. *Greenwood v. Ligon*, 18 Miss. (10 Smedes & M.) 615, 617, 48 Am. Dec. 775.

A covenant requiring a vendor to make a good and perfect deed does not mean a deed good in form only, but requires the vendor to give good title. *Feemster v. May*, 21 Miss. (13 Smedes & M.) 275, 277, 53 Am. Dec. 83.

#### GOOD AND PERFECT TITLE.

A contract to execute a conveyance vesting in the purchaser a good and perfect title to the property conveyed means one which is not only good in point of fact, but also one apparently perfect when exhibited; that is, free from any reasonable objection. It is not sufficient that it can be shown to be good as the result of an action instituted for the purpose of reforming defects existing in any deed which is necessary to make the chain of title complete. *Peckham v. Stewart*, 31 Pac. 928, 929, 97 Cal. 147.

The charter of an insurance company provided that no insurance effected on any property should be valid unless he has a "good and a perfect title" thereto at the time of effecting such insurance, or unless the true title of the insured to the same, and the incumbrances, if any, be fully disclosed, etc. Held, that the term "good and perfect title" should be construed to mean a perfect title which is good both at law and in equity, and a good title in equity alone to the property was not sufficient within the terms of the charter, and hence where a mortgagee of the insured premises declared that he had no interest in the premises to the insured, so that the mortgagee would be estopped from making any subsequent claim to the property as against the plaintiff or any one claiming under him, it did not create a good and perfect title in the plaintiff which he could avail himself of in the suit on the policy. *Warner v. Middlesex Mut. Assur. Co.*, 21 Conn. 444, 449.

#### GOOD AND SUFFICIENT CAUSE.

Other good and sufficient cause, see "Other."

Under Horner's Ann. St. 1897, § 6436, providing that where a receiver neglects to pay taxes on property he may be cited to show cause why such taxes, with penalty, should not be paid, it was a good and suffi-

cient cause that the receiver had sold the property, which was realty, by the court's order and approval, and that the purchaser had taken it subject to taxes. The statute was intended to secure a short and simple method of enforcing the taxes due upon property in custodia legis, and to enable the court in whose custody the property should be held not only to judge with considerable discretion as to what should constitute good and sufficient cause for the failure of its officer, but to punish a failure without such cause by denying a credit for the sum which might be ordered paid. *Stetson v. Rochester Shoe Co.*, 52 N. E. 149, 150, 151 Ind. 575.

The term "good and sufficient cause" in a will appointing one of several heirs as trustee, but giving the power to other heirs to remove him for good and sufficient cause, is not limited to such cause as would be deemed by a court of equity to be good and sufficient, but the heirs have the power to determine the sufficiency of the cause, being subject only to the restraining power of a court of equity against the abuse of it. *May v. May*, 17 Sup. Ct. 824, 827, 167 U. S. 310, 42 L. Ed. 179.

#### GOOD AND SUFFICIENT COURTHOUSE.

Where the Legislature imposed on the police jury of a parish the obligation to provide a good and sufficient courthouse, it did not mean that a house should be rented, nor a log house nor a frame house built, nor any other makeshift, but it meant a permanent and substantial courthouse giving promise of durability, and in keeping with the dignity of the people and the solemnity of the rites to whose uses it would be dedicated. *State ex rel. Knollman v. King*, 33 South. 776, 781, 109 La. 799.

#### GOOD AND SUFFICIENT DEED.

The term "good and sufficient deed," as used in a contract to convey real estate, relates only to the validity of the deed to pass the title which the vendor has, and does not imply that the title is valid, or free from incumbrances. *Tinney v. Ashley*, 32 Mass. (15 Pick.) 546, 552, 26 Am. Dec. 620; *Barrow v. Bispham*, 11 N. J. Law (6 Halst.) 110; *Brown v. Covillaud*, 6 Cal. 566, 573. A covenant to execute a good and sufficient deed does not mean that a perfect title is to be conveyed, but that the deed is to contain good and sufficient covenants. *Clute v. Robinson* (N. Y.) 2 Johns. 595, 611; *Gazley v. Price* (N. Y.) 16 Johns. 267, 269.

In a contract for the sale of land calling for a good and sufficient warranty deed, the words "good and sufficient" relate only to the validity of the deed to pass the title which the defendants had to the plaintiff, and do not imply that their title was valid,

or that it was free from incumbrances. *Louisville & N. R. Co. v. Shepard*, 28 South. 202, 203, 126 Ala. 416.

A bond conditioned on the defendant's selling and conveying to plaintiff a certain quantity of land by a "good and sufficient deed" should be construed as having reference to the form of the deed and its execution, and not to the title. If the deed was of a proper form, and regularly executed, and the grantor was seised, so that the land was conveyed by it, the condition was performed. *Aiken v. Sanford*, 5 Mass. 494, 499.

#### Conveyance in fee.

An agreement made by the owner of land with the turnpike company to grant land for the company's use, on condition that the road be located on a particular route, and covenanting to rent so much land as the road should occupy, and to execute a good and sufficient deed for the same, meant a conveyance in fee, and not merely for the time the charter had to run. *New Barbadoes Toll Bridge Co. v. Veerland*, 4 N. J. Eq. (3 H. W. Green) 157, 162.

In a contract to procure from a third person "a good and sufficient warranty deed of conveyance in the law of fee simple of the premises," the term means a good and sufficient deed to convey an estate in fee simple in the land, a conveyance operative upon the title and effectual to transfer it immediately to the purchaser. *Carpenter v. Balley* (N. Y.) 17 Wend. 244, 246.

A contract to make a good and sufficient deed means a deed conveying the fee simple with covenant of warranty. *Tremain v. Liming* (Ohio) Wright, 644.

Where the defendant, by a written agreement, in consideration of a sum of money, admitted to have been paid by the plaintiff, agreed to execute to him a good and sufficient deed of a particular pew in a church, and it appeared that the church was built pursuant to articles of subscription, by the terms of which the pews were all to be leased in perpetuity, subject to an annual rent, and that the religious society gave no title to pews other than such leases reserving rent, and that the plaintiff, at the time the agreement was made, had knowledge of these facts, held, notwithstanding, that the plaintiff was not obliged to accept such lease as a performance of the defendant's agreement. *Foote v. West* (N. Y.) 1 Denio, 544.

#### Covenants of warranty.

A bond to make a good and sufficient deed to lands requires a general warranty. *Fleming v. Harrison's Devisees*, 5 Ky. (2 Bibb) 171, 174, 4 Am. Dec. 691.

The term "good and sufficient deeds of conveyance," in a statute empowering ad-

ministrators and executors to make good and sufficient deeds of conveyance, means that the deeds shall not only be good and sufficient to convey, but shall also contain the usual covenants against defects in title. *Sumner v. Williams*, 8 Mass. 162, 181, 5 Am. Dec. 88.

An undertaking to sell and convey by good and sufficient warranty deed requires the making of a deed with statutory covenants. *Whicker v. Hushaw*, 64 N. E. 460, 461, 159 Ind. 1 (citing *Clark v. Redman* [Ind.] 1 Blackf. 379; *Linn v. Barkey*, 7 Ind. 69; *Bethell v. Bethell*, 92 Ind. 318).

The agreement to convey by a good and sufficient deed of conveyance calls for a deed with the usual covenant. *Fleckten v. Spicer*, 65 N. W. 926, 927, 63 Minn. 454.

#### Good title.

A contract covenanting to deliver a good and sufficient deed with covenants of warranty relates to something more than the form of the instrument; it relates to the title, and imports an understanding to convey a good title. *Tindall v. Conover*, 21 N. J. Law (1 Zab.) 651, 654; *Conover v. Tindall*, 20 N. J. Law (Spencer) 513, 516; *Everson v. Kirtland* (N. Y.) 4 Paige, 628, 638, 27 Am. Dec. 91.

A contract by which a vendor was bound to convey land, the title to be a good and sufficient deed, meant that a good title should be conveyed by deed, and, if the vendor had no title, the purchaser was not bound to receive a deed from him, with whatever formality executed, or by whatever covenants secured. *Brown v. Gammon*, 14 Me. (2 Shep.) 276, 280.

A contract to give a good and sufficient deed of land is not satisfied by a deed conveying covenants of warranty and against incumbrances, where the grantor has not the legal title to the premises. *Fletcher v. But-ton*, 4 N. Y. (4 Comst.) 396, 400.

In construing a contract to convey land by good and sufficient deed, Chancellor Kent said that: "A covenant to execute and deliver a good and sufficient deed of a piece of land does not mean merely a conveyance good in point of form. That would be a covenant without substance. But it means an operative conveyance; one that carries with it a good and sufficient title to the lands to be conveyed." *Clute v. Robison* (N. Y.) 2 Johns. 595, 618.

A good and sufficient deed, within the meaning of a contract to convey real estate by such a deed, imports that the vendor is to furnish a good title to the land in question; and this rule is not affected by the fact that a defect in title might have been discovered at the time of entering into the contract to purchase by an examination of the public records, as the vendee is not

bound, as between himself and the vendor, to search the records for defects of title. *Burwell v. Jackson*, 9 N. Y. (5 Seld.) 535, 545; *Story v. Conger*, 36 N. Y. 673, 675, 93 Am. Dec. 546.

A contract for the sale of real estate, by which the vendor agreed to execute and deliver to the purchaser a good and sufficient warranty deed in fee-simple, free from all incumbrances, meant a deed not only sufficient in form, but one which would pass the title free from incumbrances; so that, if the vendor had no title, or the land was incumbered, the tender of a deed containing the specified covenant was not a compliance. *Cogan v. Cook*, 22 Minn. 137, 139, 140.

Ordinarily, when a person sells and agrees to convey land to another by good and sufficient deed in fee simple, and when there are no circumstances to take the case out of the general rule, the words are held to mean a perfect title, both legal and equitable. But where the vendee has notice and knowledge of the condition of the title, knows that the title is perfect in the vendor with the exception of the issuance of the patent, goes into possession of the property, makes improvements thereon, makes payments, asks for and is given an extension of time in which to make his final payment, and when this extension has expired asks for and offers a bonus of \$500 for further extension when he knows patents have not issued, and his time has expired, such facts show clearly that the parties themselves not only intended that the contract to convey by good and sufficient deed in fee simple meant such title as the vendor could convey, and that the vendee was to rely on the covenant contained in the deed to indemnify himself against loss by reason of no issuance of patent, but also that the parties themselves so construed it by their subsequent acts and conduct. *Bash v. Cascade Min. Co.*, 70 Pac. 487, 29 Wash. 50.

#### GOOD AND SUFFICIENT FENCE.

A good and sufficient fence, within the stock law, is a fence sufficient to turn ordinary cattle. *Headen v. Rust*, 39 Ill. 186, 188.

A good and sufficient fence which a railroad is required to erect along its right of way must be not merely one which will turn ordinary stock, for a slight barrier might do that, but one which will turn stock even though to some extent unruly. *Chicago & A. R. Co. v. Utley*, 38 Ill. 410, 414; *Chicago, B. & Q. R. Co. v. Bryant*, 29 Ill. App. 17, 20.

#### GOOD AND SUFFICIENT NOTE.

See "Good and Collectible Note."

Where a contract called for payment to be made by a good and sufficient note, such

phrase meant such a note as the payee could get his money on, which could be readily discounted at some bank where the parties resided. *Armstrong v. Andrews*, 109 Mich. 537, 539, 67 N. W. 567.

#### GOOD AND SUFFICIENT SECURITY.

An award of the possession of certain premises upon the giving of good and sufficient security for the payment of specified sums at certain periods, is void for uncertainty when it does not define the nature of the security, and whether it was to consist of real or personal security, or to what extent. *Jackson v. De Long* (N. Y.) 9 Johns. 43, 44.

#### GOOD AND SUFFICIENT SUPPORT.

A will providing that good and sufficient support should be furnished to the wife of testator's son, should be construed to mean such as is proper for a mother and head of a family with the fortune and rank of her husband and his children. *Jacobus' Ex'r v. Jacobus*, 20 N. J. Eq. (2 C. E. Green) 49, 51.

#### GOOD AND WELFARE OF COMMON-WEALTH.

"The 'good and welfare of this commonwealth,' for which reasonable orders, laws, statutes, and ordinances may be made, by force of which private rights of property may be affected, is a much broader and less specific ground of exercise of power than public use and public service. The former expresses the ultimate purpose or result sought to be obtained by all forms of legislative power over property. The latter implies a direct relation between the primary object of appropriation and the public enjoyment. The circumstances may be such that the use or service intended to be secured will practically affect only a small portion of the inhabitants or lands of the commonwealth. The essential point is that it affects them as a community, and not merely as individuals." The rebuilding by private property owners in a city of buildings destroyed by general fires is not a public use or public service for which the city may issue bonds. *Lowell v. Boston*, 111 Mass. 454, 470, 15 Am. Rep. 39.

#### GOOD AND WORKMANLIKE MANNER.

"Good and workmanlike manner," as used in contracts for the performance of particular services, means that the work shall be done as a skilled workman should do it. As used in a contract for the laying of tiling in a good and workmanlike manner, the phrase should not be construed to mean that

the contractor merely agreed to perform the work in a manner considered good and workmanlike by the local tilers of that community, though in determining the question as to whether or not the work was skillfully done the jury might be properly governed by the testimony of local tilers, still the question to be determined is not whether the work was done in a manner considered skillful by the workman of that particular community only, but whether it is done in a manner generally considered skillful by those capable of correctly judging such work, whether in that community or elsewhere. *Fitzgerald v. La Porte*, 40 S. W. 261, 64 Ark. 34.

#### GOOD AS GOLD AND SILVER.

A warranty of a debt as being as "good as gold and silver" is to warrant that it is founded on a legal consideration, that the debtor is of competent ability, and that the debt will be paid on demand. *Koch v. Melhorn*, 25 Pa. 89, 92, 64 Am. Dec. 685.

#### GOOD AS A POSSESSORY TITLE.

Where a title company reported a title to be "good as a possessory title," the phrase should be taken as meaning a title good by prescription or adverse possession under such circumstances and for such length of time as to have ripened into a perfect title indefeasible at law or in equity. *Block v. Ryan* (U. S.) 4 App. Cas. 283, 287.

#### GOOD AUTHENTIC DEED.

An award that plaintiff should execute a good authentic deed or conveyance of all the lands which the plaintiff held by deed from M., means that plaintiff shall convey all the lands which he holds by that deed. An award that a man should execute a good authentic deed of land, or that he should convey the land, means the same thing. *Whitcomb v. Preston*, 13 Vt. 53, 56.

#### GOOD BANK NOTES.

See "Good Current Bank Notes."

The term "good bank notes" imports such only as are redeemable in gold or silver. *Roberts v. Short*, 1 Tex. 373, 381.

#### GOOD BEHAVIOR.

See "Behavior."

Good behavior is conduct authorized by law. In re *Spenser* (U. S.) 22 Fed. Cas. 921, 922.

Const. 699, providing that clerks of the courts of the state shall be removable for breach of good behavior, does not mean merely a breach of official good behavior, but



signifies general moral behavior. *State v. Bell* (La.) 2 Mart. (N. S.) 683, 699.

In proceedings under a provision of the Constitution providing that clerks should be removable from office for breach of good behavior it was held that the inquiry must be confined to misconduct in office, and that conduct, however immoral, which did not relate to the official action of the clerk, constituted no ground for his removal. *Commonwealth v. Williams*, 79 Ky. 42, 47, 42 Am. Rep. 204 (citing *Commonwealth v. Barry*, 3 Ky. [Hardin] 238; *Commonwealth v. Chambers*, 24 Ky. [1 J. J. Marsh.] 160).

The term "breach of good behavior," as used in a constitutional provision that clerks of courts shall be removable for a breach of good behavior, means unreasonable neglect; as, if the clerk should wantonly refuse to obey an order of court. *State v. Roll*, 2 West. Law Jour. 121, 137. The term, as so used, is held to include the procuring of means to produce an abortion. *State v. Bell* (La.) 2 Mart. (N. S.) 350, 357.

Act March 11, 1902, § 3 (Acts 1902, p. 42, c. 14), providing that on the second or any subsequent conviction for a violation of the local option law the court shall require the defendant to execute a bond for his good behavior for 12 months, is held not to be void on the ground that the phrase "good behavior" is uncertain, the court observing in this connection that the words "good behavior" are so well known, and their connection with the intent and purpose of the statute so patent, that they cannot fail to be understood by persons of ordinary intelligence. *Huyser v. Commonwealth* (Ky.) 76 S. W. 174, 175.

### GOOD BOND.

Under a building contract requiring that the contractor shall furnish a good bond, and a stipulated amount, it is held that the meaning of the term "good bond" is that the surety on the bond shall be financially sound. *Barnes v. Ludington*, 51 Ill. App. 90, 97.

### GOOD CATTLE.

See "Good and Merchantable Cattle."

### GOOD CAUSE.

See "Good and Sufficient Cause."

Good cause shown, see also, "Shown."

#### For adjourning sale.

"Good cause," within the meaning of Pub. St. c. 132, § 30, authorizing an officer to adjourn a judicial sale for good cause, is shown by a return that the adjournment was by plaintiff's attorney, and it is not necessary that the return shall recite that the

officer deemed the adjournment expedient. *Frazer v. Nelson*, 61 N. E. 40, 42, 179 Mass. 456, 88 Am. St. Rep. 391.

#### For bringing action on judgment.

"Good cause," as used in Code, § 14, providing that no action shall be brought upon a judgment rendered in any court in this state except a court of a justice of the peace, between the same parties, without the leave of the judge of the court for good cause shown, is synonymous with "sufficient cause." What is good cause is a question exclusively within the discretion of the judge to whom the application is made. *Kendall v. Briley*, 86 N. C. 56, 58.

#### For canceling contract.

"Good cause," as used in a contract stipulating that it might be canceled by either party for good cause, has no such distinct sense as to furnish a common and intelligible criterion for the parties, or any determinate sense whatever. It is impossible to say that the wills of the parties concurred, and that each meant exactly what the other did or what either meant. As so used, the phrase can only have reference to the respective understandings of the parties, and any revocation in good faith is a revocation for good cause. *Cummer v. Butts*, 40 Mich. 322, 325, 29 Am. Rep. 630.

#### For not dismissing prosecution.

What is good cause within the meaning of the statute providing that, when a person has been held to answer for a public offense, the court shall order the prosecution dismissed unless good cause to the contrary be shown, if an indictment be not found against him at the next term of the court at which he is held to answer, may be difficult to define with precision, since it must, in a great measure, be determined with reference to the particular circumstance in each case. There should undoubtedly be some fact or circumstance disclosed to the court upon which its authority in this respect, somewhat discretionary, could be brought into exercise. Its discretion is not to be arbitrary, but should proceed upon such knowledge and information as would enable it to determine for itself whether or not public justice requires the detention of the prisoner notwithstanding the delay upon the part of the prosecution. *Ex parte Isbell*, 11 Nev. 295, 298. The mere recommendation of a grand jury, which fails to indict, that a prisoner be further detained, is not a good cause for his detention within the meaning of the statute. *Ex parte Bull*, 42 Cal. 196, 199.

#### For dissolving corporation.

Rev. St. 1891, c. 32, § 25, which provides that courts of equity shall have full power,

on good cause shown, to dissolve or close up the business of any corporation, means "a legal cause, a cause for which the sovereign authority might be allowed to resume the franchise granted." *Wheeler v. Pullman Iron & Steel Co.*, 32 N. E. 420, 422, 143 Ill. 197, 17 L. R. A. 818.

#### **For failing to file transcript.**

Comp. Laws 1884, § 2189, provides that the appellant shall file a transcript in the Supreme Court within ten days before the first day to which appeal is returnable, and that, in case of his failure to do so, the court may affirm the judgment, unless good cause shall be shown to the contrary. Held, that the fact that a client was a poor man, and was not able to obtain the money with which to procure a transcript until after the time for filing it, constituted a good cause within the meaning of the statute. *Armijo v. Abeytia*, 25 Pac. 777, 779, 5 N. M. 533.

The term "good cause" has no fixed meaning, but must depend upon the circumstances of each case, to be determined by the sound discretion of the court. A delay of seven months in order that counsel might find time from an engrossing business to prepare briefs is not good cause for permitting a transcript to be filed after the 90 days. *Christensen v. Anderson*, 58 S. W. 962, 964, 24 Tex. Civ. App. 345.

#### **For failing to take appeal.**

Under a statute giving a right of appeal from the judgment of a justice within 10 days from the entry of judgment, or thereafter, and within 90 days, upon showing good cause for his not having taken appeal within the 10 days, the fact that the defendant was a nonresident of the state, and did not know that the appeal was required to be taken within 10 days, is not good cause for granting an appeal. *Hubbard v. Yocum*, 5 S. E. 867, 870, 30 W. Va. 740.

The words "good cause" in the statute authorizing appeal from a decision of a justice of the peace after the time when such appeal may be taken as a matter of right on showing good cause, etc., means a showing that appellant was prevented from taking his appeal within the specified time by fraud, accident, surprise, or adventitious circumstances beyond his control, as would entitle him to a new trial. *Home Sewing Machine Co. v. Floding*, 27 W. Va. 540.

The term "good cause" in a statute limiting the right of the county court to grant an appeal from the judgment of a justice of the peace after the expiration of 10 days from the rendition thereof, to cases in which the party seeking the appeal shows good cause for not having taken the appeal within such time, means such cause as would authorize the granting of a new trial; as, for

instance, fraud, accident, surprise, or some adventitious circumstance beyond the control of the party. Where the party has full knowledge of the facts upon which his rights depend, and fails to take his appeal in 10 days through mistake as to the legal consequences, an appeal will not be granted. *Ruffner v. Love*, 24 W. Va. 181, 185.

#### **For limiting costs.**

"Good cause," within a statute authorizing the court to limit costs when good cause is shown, is practically identical in meaning with the phrase "just and reasonable," as used in the former statute, providing that the court might limit costs as they should deem just and reasonable. Whatever, under the old statute, would make it appear just and reasonable to the court that the cost should be limited, would be good cause shown for doing the same thing under the new law. *Whitcher v. Town of Benton*, 50 N. E. 25, 27.

#### **For quitting employment.**

Good cause, within a statute authorizing an employé to quit his service, means sufficient cause, and an irresistible, superhuman cause, which disabled, unnerved, and placed an employé on his deathbed, is a good and sufficient cause for his failure to perform arduous toil and ordinary farm labor. *McClellan v. Harris*, 64 N. W. 522, 7 S. D. 447.

#### **For setting aside appraisement of land.**

The term "good cause" in a statute providing that when land is taken for railroad purposes, and any one is dissatisfied with the report of the commissioners appointed to determine the value of the land taken, he may have a new trial upon good cause shown, is not satisfied by the mere dissatisfaction of landowners, regardless of the merits of the matter. *Virginia & T. R. Co. v. Elliott*, 5 Nev. 358, 365. Good cause means something clear and indubitable, pointing error in law or fact or both, intentional or unintentional, on the part of the commissioners. *Virginia & T. R. Co. v. Henry*, 8 Nev. 165, 176.

Good cause means such matters as lead to a reasonable apprehension that injustice has been done in settling the amount of damages, or some improper conduct on the part of the commissioners, the company, or their agents, in respect to the assessment. Objections that there was a mistake in locating a part of the land in the wrong township, or that the engineer did not specify all the lands taken, cannot be considered on an application to set aside the report. *Vanwickie v. R. R. Co.*, 14 N. J. Law (2 J. S. Green) 162, 167. The term is to be construed as authorizing the court to grant a new appraisement when the court is thoroughly satisfied that the commissioners have erred in the

principles upon which they have made their appraisals. *St. Louis & St. J. R. Co. v. Richardson*, 45 Mo. 466, 468. It does not mean mistake, irregularly, or even fraud in the proceedings previous to or in the appointment of the commissioners. Good cause is where the commissioners have not taken and subscribed an oath or affirmation before some person duly authorized to administer an oath faithfully and impartially to examine the matter in question, and to make a true report, or where a notice such as is required in the act of the time and place of the meeting of the commissioners is not given to the party, and for want of which he has been prejudiced in his claim; or if the commissioners did not meet at the time and place appointed, but at some other time or place without due notice to or the consent of the party, so that he had not an opportunity of being heard and presenting his claims; or where the commissioners did not view and examine the lands and materials, but made their report without such view and examination; or where the commissioners acted with partiality or corruption; or where mistake of law or fact intervene on the part of the commissioners as to their powers or duty, or in relation to the quantity and value of the land, and such mistake is made manifest; or where, upon the whole matter, there should be reasonable grounds to apprehend that justice may not have been done, and the landholder is willing to take the hazard of paying costs if the jury do not assess his damages at more than the commissioners have given. *Bennett v. Camden & A. R. Co.*, 14 N. J. Law (2 Green) 145, 150.

Good cause, within a statute relating to the assigning of homestead in an action against a debtor, and providing that upon good cause shown the court out of which the process issued may order a reappraisement and reassignment, would include a case where an assignment of 400 acres of land as a homestead had been, after trial, set aside as excessive, and new appraisers appointed, who assigned the same land and 54 acres additional without affixing any valuation to such homestead tract. *Kerchner v. Singletary*, 15 S. C. 535, 539.

#### **For setting aside judgment.**

Good cause, within a statute authorizing the court, upon good cause shown, to set aside or modify its judgment, is satisfied by showing that there is a good defense. *Lord v. Hawkins*, 38 N. W. 689, 690, 39 Minn. 73.

Good cause, within Sp. Laws 1889, c. 351, relating to the municipal court of the city of St. Paul, which provides that defaults may be opened and judgments or orders may be set aside or modified for good cause shown within six days after the party effected thereby shall have notice or knowledge of the same, means such cause as would

justify the exercise of the power by a district court. *Granse v. Fringo*, 49 N. W. 60, 61, 46 Minn. 352.

Under the statute providing that a defendant against whom publication is ordered made upon good cause shown be allowed to defend after judgment, to show good cause he must show a sufficient excuse for his default, and, except where the motion is on the ground of the want of jurisdiction, he must also show that he has a meritorious defense to an action or suit. A mere stating that defendant had a good and valid defense, without setting forth the facts constituting the defense, is not sufficient. *Mayer v. Mayer*, 89 Pac. 1002, 1003, 27 Or. 133.

Within Rev. St. art. 1373, entitling a nonresident served by publication to a new trial for good cause shown, good cause has always included a showing that the applicant had no actual notice of the pendency of the suit; and hence does not apply where he has actual notice of the suit. *Roller v. Ried* (Tex.) 24 S. W. 655, 656.

Under a statute authorizing the court to set aside a default judgment and permit the defendant to defend on good cause being shown, the good cause required to be shown must not only be a meritorious defense, but the exercise of all due diligence by the party. And where a defendant, having been personally served with process, supposing that he could put in his plea by the sixth day of the term, did not call on an attorney until the fifth day, when he was informed that judgment had been entered on the third day of the term, due diligence is not shown. Ignorance of the law does not excuse a party from the exercise of diligence. *Green v. Goodloe*, 7 Mo. 25, 27.

Under a statute which authorized defendant, in a suit by attachment sued out against him because he resides out of the state, to set aside the decree by default on his application and good cause shown, the good cause must, it would seem, go to the merits, but, if it is in abatement, it must be distinctly and unequivocally stated. *Cain v. Jennings*, 3 Tenn. Ch. 131, 133.

#### **For removing criminal cause.**

The high character and political prominence of defendants is not good cause within Code Cr. Proc. § 344, providing that a criminal action prosecuted by indictment may at any time before trial, on the application of the defendant, be removed from a court of sessions or a city court to the court of oyer and terminer of the same county for good cause shown; nor will such removal be made on the ground that the probability of defendants having a fair trial has been effected by public clamor. But the fact of the indictment being against the officers of a railroad company for violating a car-heating

act is good cause, because it involves such important questions, as is also the fact that the district attorney contends that the questions involved, though novel and important, have already been adjudicated in the general sessions by the charge of the judge of that court to the grand jury. *People v. Clark*, 15 N. Y. Supp. 79, 80. In attempting to define the term "good cause" the first thought which naturally suggests itself is, why was an expression so general and sweeping used? If the Legislature had in view any particular reasons, which, in their judgment, were sufficient to transfer any criminal action from the one court to the other, and had determined that no others should have that effect, those reasons would have been embodied in the statute. The result from such omission and the general language employed is that every application for removal must rest in the sound discretion of the court or judge who is to determine it, and the reasons must be as various as the surroundings of each case in which it is attempted. Without undertaking to define with exact precision the phrase employed, it will be safe to say that a motion of this character should be granted not only when the obtainment of an impartial and fair trial requires it, but also whenever the situation and official standing of the accused party, the widespread and clearly divided line of popular opinion, and the circumstances of the alleged crime, as well as the important legal questions which it presents, so magnify the importance of the cause as to justify its removal from the inferior to the superior tribunal for trial. In deciding upon such an application it is impossible that the court or judge to whom it is addressed should regard the personnel of the magistrate who is to preside in the lower court. That the political and official standing of the accused (he was at the time of the alleged act a member of the Senate of this state), the act charged (accepting a bribe), and the warm and bitter feelings which the allegation of its perpetration caused, have magnified this cause far above and beyond an offense committed under other and different circumstances, must also be conceded; and, if any case of sufficient importance can be supposed in which the relief asked should be granted, then the present is that case. *People v. Sessions* (N. Y.) 62 How. Prac. 415, 420.

#### GOOD CAUSE OF ACTION.

If a person have a legal right to sue he must necessarily have a good (using that word, as it obviously is always used in this connection, in the sense of "legally sufficient") cause of action. If he have no legal right to sue, he has not merely a bad cause of action, but no cause of action; so good cause of action can mean no more than cause of action, and the word "good" in that con-

nection is hence clearly superfluous. *Parker v. Enslow*, 102 Ill. 272, 273, 40 Am. Rep. 588.

#### GOOD CHARACTER.

See "Good Moral Character."

#### GOOD COARSE SALT.

A contract obligating a seller to deliver to a buyer a quantity of "good coarse salt" was filled and the contract complied with by a delivery of "coarse salt" of a medium quality of the kind in use at the time and place of the contract. *Goss v. Turner*, 21 Vt. 437, 441.

#### GOOD COMPANY.

See "Very Good Company."

#### GOOD CONDITION.

See "Good Order and Condition"; "Good Working Condition."

A statute requiring a jail to be kept in good condition "does not merely refer to its security, but to its sanitary condition, and to its capacity to render persons reasonably comfortable. It is impossible to say it is in good condition when it is filthy and unhealthy." *Stuart v. La Salle County Sup'rs*, 83 Ill. 341, 346, 25 Am. Rep. 397.

#### GOOD CONDUCT.

The words "good conduct" in a divorce statute forbidding the granting of the divorce in ex parte proceedings in the absence of proof of the good conduct of the petitioner, have always been construed to have reference to the conduct of the husband or the wife in his or her marital or home relations, as distinguished from the conduct of either of them to society in general. Thus proof of entire propriety in the latter relations is a very slight, if any, proof of the good conduct mentioned in the statute. *Reed v. Reed*, 39 Mo. App. 473, 477.

#### GOOD CONSIDERATION.

A good consideration is such as that of blood, or of natural love and affection, as when a man grants an estate to a near relation; being founded on motives of generosity, prudence, and natural duty. *Potter v. Gracie*, 58 Ala. 303, 307, 29 Am. Rep. 748 (quoting 2 Black, 293, 297); *Groves v. Groves*, 62 N. E. 1044, 1045, 65 Ohio St. 442 (quoting 2 Bl. Comm. 296); *Clark v. Troy*, 20 Cal. 219, 224; *Corwin v. Corwin* (N. Y.) 9 Barb. 219, 225.

Love and natural affection of parent to child was a good consideration, and would

support a deed operating as a covenant to stand seised. The distinction between good considerations and valuable considerations seems first to have been discussed in cases arising from the technical rules of the common law, now no longer applicable to conveyances. Deeds of bargain and sale required a consideration of some pecuniary value, either expressed or proved, to support them, and not merely a good consideration. *Jackson v. Alexander* (N. Y.) 3 Johns. 484, 3 Am. Dec. 517 (cited in *Turner v. Howard*, 42 N. Y. Supp. 335, 338, 10 App. Div. 555).

A moral obligation to perform a duty is a good consideration for a subsequent promise to do so, even if there was originally no legal obligation to perform. *Para. Cont. § 434*. In view of this rule of law, the duty resting on a purchaser of coal to protect the barges of the vendor, in which it was shipped, from injury while in his possession, was a sufficient consideration to support a promise to protect the barges from ice. *Pierce v. Walton*, 50 N. E. 809, 813, 20 Ind. App. 66.

A thing which must be of advantage or gain to him who makes the promise, or an injury to him to whom the promise is made, is a good consideration. Where a person sent out to locate mines by associates, who were to pay his expenses, faithfully performs his part of the contract, his promise to repay moneys advanced thereunder if they were dissatisfied is without consideration. *Templin v. Hobson*, 51 Pac. 1019, 1020, 10 Colo. App. 525.

Any benefit conferred or agreed to be conferred upon the promisor by any other person to which the promisor is not lawfully entitled, or any prejudice suffered or agreed to be suffered by such person other than such as he is at the time of consent lawfully bound to suffer as an inducement to the promisor, is a good consideration for a promise. *Rev. Codes N. D. 1899, § 3871; Civ. Code S. D. 1903, § 1124; Civ. Code Cal. 1903, § 1605; Rev. St. Okl. 1903, § 766; Civ. Code Mont. 1895, § 2160*.

#### GOOD COURT HOUSE.

See "Good and Sufficient Court House."

#### GOOD COWHIDE.

See "Good Custom Cowhide."

#### GOOD CURRENT BANK NOTES.

Good current bank notes are bank notes which circulate currently as money. *English v. Turney*, 49 Tenn. (2 Helsk.) 617, 618.

#### As valuable consideration.

The words "good consideration" have always been construed by the courts of Eng-

land and this country to mean "valuable consideration." *Arrington v. Arrington*, 19 S. E. 351, 356, 114 N. C. 151.

The phrase "good consideration," as used in the statute of frauds, was derived from the English statutes, in which it frequently occurs in reference to valuable consideration; perhaps good also in the ordinary acceptance of the word, or any consideration which is legal and sufficient and bona fide. *Killough v. Steele* (Ala.) 1 Stew. & P. 262, 269.

A good consideration, within a statute requiring the recording of all conveyances, and that the act shall extend to any conveyance made upon good consideration and bona fide, will be construed to mean valuable consideration. *Hodgson v. Butts*, 7 U. S. (3 Oranch) 140, 157, 2 L. Ed. 391.

St. 13 Eliz. avoids all gifts, conveyances, etc., of lands or chattels had or made with intent or purpose to delay or defraud creditors, with the proviso that it shall not extend to any estate or interest upon good consideration lawfully conveyed or assured to any person not having at the time any notice or knowledge of the fraud. Held, that good consideration means valuable consideration as between existing creditors and others claiming under the debtor. *Cunningham v. Dwyer*, 23 Md. 219, 231.

The language of Shaw, C. J., in *Nelson v. Boynton*, 43 Mass. (3 Metc.) 396, 37 Am. Dec. 148, where he says that a promise to answer for the debt, default, etc., of another, in order to be binding on the promisor without the memoranda required by the statute of frauds, must be made on good consideration, is to be construed as using the word "good" not in any technical sense as denoting consideration of blood, but it was used with reference to a sufficient or valuable consideration. *Doyle v. White*, 26 Me. (13 Shep.) 341, 351, 45 Am. Dec. 110.

A "good consideration," as used in Civ. Code, § 1605, where the general definition of any benefit conferred or agreed to be conferred is applied to the case of a promise, is not used in the ancient technical sense "as that of blood or natural affection," but as equivalent to the term "a valuable consideration." *Aden v. City of Vallejo*, 72 Pac. 905, 906, 139 Cal. 165.

#### GOOD CURRENT MONEY.

"Good current money," as used in a contract, will be understood to mean the coin of the Constitution, or foreign coins made current by act of Congress, unless it appears from the context that the terms have a different local signification by reason of the usage in trade. *Moore v. Morris*, 20 Ill. (10

Peck) 255, 259; *Graham v. Adams*, 5 Ark. (5 Pike) 261, 262.

### GOOD CUSTOM COWHIDE.

"Good custom cowhide," as used in a note promising to pay a certain sum of good custom cowhide boots at a certain number of dollars per pair, has no definite meaning in relation to the kind, quality, and worth of the boots intended. *Walt v. Fairbank* (Vt.) *Brayt* 77.

### GOOD DEED.

See "Good and Perfect Deed"; "Good and Sufficient Deed"; "Good Authentic Deed"; "Good Warranty Deed."

The term "good deed," in a bond calling for a good deed, means a deed in fee simple, with covenants. *Carver v. Williams*, 10 Ind. 267, 268.

A contract to give a good and warranty deed does not refer to the title, but to the instrument, and the alleged inability to convey a title on account of a mortgage at the time the bond was executed does not constitute a breach of the condition. *Joslyn v. Taylor*, 33 Vt. 470, 475.

### GOOD FAIR.

The words "good fair" and "average," when used as descriptive of cotton, are not precisely the same in their primary signification, as the quality indicated by the former is a shade above what the latter describes. Thus, changing a contract requiring the delivery of average cotton by inserting the words "good fair" instead of the word "average" is a material change in the contract. *Waddell v. Glassell*, 18 Ala. 561, 565, 54 Am. Dec. 170.

### GOOD FAITH.

See, also, "Bona Fide."

Good faith means honest, lawful intent; the condition of acting without knowledge of fraud, and without intent to assist in a fraudulent or otherwise unlawful scheme. *Crouch v. First Nat. Bank*, 40 N. E. 974, 979, 156 Ill. 342.

Good faith, in the popular sense, is used to denote the actual existing state of the mind, without regard to what it should be from given standards of law or reason. *Seymour v. Cleveland*, 68 N. W. 171, 173, 9 S. D. 94 (citing *Wright v. Mattison*, 59 U. S. [18 How.] 50, 56, 15 L. Ed. 280).

The phrase "in good faith," as it is used in the law, simply means honestly; without

fraud, collusion, or deceit; really, actually, without pretense. *Docter v. Furch*, 65 N. W. 161, 164, 91 Wis. 464.

A want of that caution and diligence which an honest man of ordinary prudence is accustomed to exercise in making purchases is, in judgment of law, a want of good faith. *Pringle v. Phillips*, 7 N. Y. Super. Ct. (5 Sandf.) 157, 165.

Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious. *Rev. St. Okl.* 1903, § 2787; *Rev. Codes N. D.* 1899, § 5114; *Civ. Code S. D.* 1903, § 2448; *Cone v. Iverson*, 4 Wyo. 203, 248, 33 Pac. 31, 35 Pac. 933; *Breaux-Renoudet Cypress-Lumber Co. v. Shadel*, 52 La. Ann. 2094, 28 South. 292, 294; *Friedrich v. Fergen*, 91 N. W. 328, 330, 15 S. D. 541; *Gress v. Evans*, 46 N. W. 1132, 1134, 1 Dak. 387.

Good faith in general means without notice, as well as for a valuable consideration. *Milton v. Boyd*, 22 Atl. 1078, 1082, 49 N. J. Eq. (4 Dick.) 142; *Meding v. Roe*, 30 Atl. 587, 589; *Keller v. Stanley* (Ky.) 4 S. W. 807, 809; *Dormitzer v. German Savings & Loan Soc.*, 62 Pac. 802, 882, 23 Wash. 132; *Cardenas v. Miller*, 39 Pac. 783, 785, 108 Cal. 250, 49 Am. St. Rep. 84; *McKee v. Bassick Min. Co.*, 8 Pac. 561, 563, 8 Colo. 392; *Burchinell v. Gorsline*, 52 Pac. 413, 415, 11 Colo. App. 222; *Riederer v. Pfaff* (U. S.) 61 Fed. 872, 873; *People's Sav. Bank v. Bates*, 7 Sup. Ct. 679, 682, 120 U. S. 556, 30 L. Ed. 754; *Strahorn-Hutton-Evans Commission Co. v. Florel*, 54 Pac. 710, 713, 7 Okl. 499; *Tolbert v. Horton*, 18 N. W. 647, 648, 31 Minn. 518; *Kohl v. Lynn*, 34 Mich. 360, 361.

Good faith and diligence are not always the same. Lack of diligence does not necessarily involve absence of good faith; so that failure to discover fraud in the sale of the bank stock within a short time is not proof of lack of good faith. *Stufflebeam v. De Lashmutt* (U. S.) 101 Fed. 367, 370.

Good faith is the opposite of fraud and of bad faith, and its nonexistence must be established by proof. *McConnell v. Street*, 17 Ill. (7 Peck) 253, 254.

The term "good faith" is used in the law to qualify many different kinds of actions. Thus a purchaser without notice of a defect or a fraud is called a purchaser in good faith. One who acts honestly, and not fraudulently, is said to act in good faith. There are purchasers in good faith, settlers in good faith, and possessors in good faith. *Walraven v. Farmers' & Merchants' Nat. Bank*, 74 S. W. 530, 534, 96 Tex. 331.

**Assignment of commercial paper.**

One who takes an assignment of commercial paper before maturity, paying value, without notice of infirmity in title or consideration, is deemed a "good-faith purchaser." *Atlas Nat. Bank v. Holme* (U. S.) 71 Fed. 489, 491, 19 C. C. A. 94.

An allegation in an action on a promissory note that the indorsee took the note in good faith is not equivalent to an averment that the indorsee took the note without notice of the maker's defenses. *Bunting v. Mick*, 81 N. E. 1055, 1056, 5 Ind. App. 289.

**Color of title.**

The good faith required to constitute the payment of taxes and the making of valuable improvements upon property a sufficient color of title is an honest belief in the validity of one's title. One holding by a conveyance obtained in violation of law, and in a manner which the statute says shall be treated as against equity in good conscience, cannot be said to hold in good faith. The claimant must not only obtain an honest belief in the validity of his title, but he must have some reasonable ground upon which to base such confidence. *Lindt v. Uihlein*, 89 N. W. 214, 216, 116 Iowa, 48.

"Good faith," as used in Rev. Code Miss. 1871, c. 17, art. 4, § 1557, which provides for the payment to defendants, in actions of ejectment, of the value of their improvements on the land, and that no defendant shall be entitled to such compensation unless he shall claim the premises under some deed or contract of purchase made or acquired in good faith, means nothing more than an honest belief on the part of the purchaser that he was the true owner. It does not mean that the purchaser must have made every possible research to discover whether or no his title was valid. It is used in contradistinction to bad faith. *Canal Bank v. Hudson*, 4 Sup. Ct. 303, 311, 111 U. S. 66, 28 L. Ed. 354.

Good faith, such as is required in the creation or acquisition of color of title, is a freedom from a design to defraud the person having the better title, and the knowledge of an adverse claim to or lien upon property does not, of itself, indicate bad faith in a purchaser, and is not even evidence of it, unless accompanied by some improper means to defeat such claim or lien. *Searl v. School Dist. No. 2*, 10 Sup. Ct. 374, 377, 133 U. S. 553, 33 L. Ed. 740.

Within the rule that a prescription of ten years, based on good faith, will give title to land, good faith consists in the well-settled opinion that the possessor has acquired the property which is in his possession. But a purchaser, knowingly not having complied with his bid at a tax sale, was not

in good faith. *Marmion's Heirs v. McPeak*, 26 South. 376, 378, 51 La. Ann. 1631.

Good faith in the acquirement of title, within the meaning of the statute in reference to title by adverse possession, does not require ignorance of adverse claims or defects in the title. Notice, actual or constructive, is of no consequence. There may be good faith notwithstanding actual notice of existing claims or liens or knowledge of legal defects which prevent the title of which there is color from being absolute. Thus one who obtains a deed to property without fraud, supposing that it conveys good title, may acquire title by possession and payment of taxes, although he took the deed with knowledge of an adverse claim. *Keppel v. Dreier*, 58 N. E. 386, 388, 187 Ill. 298.

By the term "good faith," as used in the rule that good faith in the claimant is an indispensable element in the law of adverse possession, it must not be understood that it involves an inquiry into the party's belief in the character or strength of his title, or whether in fact he has any title. What is meant by the term is simply good faith in claiming possession or title; or, in other words, a real intention to claim the land as his own, distinct and hostile to the title of the owner. *Newell on Ejectment*, p. 788. But the court held that, to say that good faith is an essential element, and then to limit it to mere intent to claim title, is to eliminate it altogether, as the intent to claim title may exist entirely independent of any element of good faith, as the term has universally been understood. *Lampman v. Van Alstyne*, 69 N. W. 171, 174, 94 Wis. 417.

The words "good faith," as used in the statute of limitations of 1839, providing that title of land shall vest in one in possession who has paid taxes for seven years under claim and color of title acquired in good faith, should be construed in their practical common-sense meaning. The statute was intended to protect a purchaser of land who bought and paid his money under the belief that he was acquiring title. The fact that a purchaser may err in judgment, or do an act that another, under like circumstances, might not do, is not enough to impeach the good faith of the transaction, when the purchase is made with an honest purpose, though the real title is not acquired. *Winters v. Haines*, 84 Ill. 585, 588.

The requirement that the defeated party in ejectment must have made improvements on the premises while claiming under some deed or contract of purchase made in good faith in order to be entitled to the value of the improvements, means merely that the party must have an honest belief that he is the true owner. The expression "some deed or contract" of itself negatives the idea that it is the true title which he must have, and

plainly indicates that what the law calls "color of title" will be sufficient. Indeed, if he were the purchaser of the true title, there would be no occasion for him to invoke the protection of the statute, since he could never be dispossessed, and hence could never be compelled to make claim for improvements. *Hicks v. Blakeman*, 21 South. 7, 8, 74 Miss. 459.

#### **Contribution to limited partnership.**

An affidavit, made at the time of the formation of a limited partnership, that a definite amount stated in the certificate of partnership to have been contributed to the capital stock thereof by the special partners had been actually contributed and applied and paid into the same, was a sufficient affidavit of good faith, as required by a statute providing that the affidavit must state that the property specified in the certificate had been contributed and applied in good faith. *Crouch v. First Nat. Bank*, 40 N. E. 974, 979, 156 Ill. 342.

#### **Deed of married woman.**

The words "good faith," in Laws 1880, c. 103, legalizing deeds of married women made in good faith after judgment of divorce, are used in their ordinary and popular sense, referring to the actual knowledge and intentions of the parties. *Wistar v. Foster*, 49 N. W. 247, 248, 46 Minn. 484, 24 Am. St. Rep. 241.

#### **Improvements.**

"Good faith," as used in Act Cong. June 1, 1874, c. 200, 18 Stat. 50, 1 Supp. Rev. St. p. 25 [U. S. Comp. St. 1901, p. 581], providing that, when an occupant of land having color of title in good faith has made valuable improvements thereon, such occupant will be entitled in the federal courts to all the rights and remedies secured by the state or territory where the land lies, means "without notice." One having knowledge of plaintiff's claim to certain land cannot erect valuable permanent improvements in good faith. *Hawke v. Deffebach*, 22 N. W. 480, 490, 4 Dak. 20.

"Good faith," as used in a statute giving the defendant in ejectment the right to recover for improvements made in good faith, cannot be construed to apply to improvements made by one who derived his title through a life tenant whose interest was plainly shown by the title papers. *Stewart v. Matheny*, 5 South. 387, 66 Miss. 21, 14 Am. St. Rep. 538.

#### **Mortgage.**

A mortgage in good faith means the same thing as a mortgage for a valuable consideration without notice. *People's Savings Bank v. Bates*, 7 Sup. Ct. 679, 682, 120

U. S. 556, 30 L. Ed. 754 (citing *Kohl v. Lynn*, 34 Mich. 360).

No one can become a purchaser or an incumbrancer of property in good faith if he have notice of a pre-existing mortgage, although such mortgage may not be verified or recorded in accordance with the statute. *Strahorn-Hutton-Evans Commission Co. v. Florer*, 54 Pac. 710, 713, 7 Okl. 490.

The expression "good faith," as used in the statute providing that a chattel mortgage shall cease to be valid against the creditors of the person making the same or mortgagees in good faith after the expiration of one year from following the same, unless an affidavit of renewal is filed, is synonymous with "conscience." It embraces those obligations which are imposed upon one in dealing with property by the circumstances surrounding it at the time. It is fundamental that such preference cannot be acquired by any one having notice of the existing right, and the words "good faith" in the statute are therefore synonymous with "without notice." *Riederer v. Plaff* (U. S.) 61 Fed. 872, 873; *Burchinell v. Gorsline*, 52 Pac. 413, 415, 11 Colo. App. 22.

The words "good faith" in the chattel mortgage act, providing that an unrecorded chattel mortgage unaccompanied by immediate delivery shall be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith, have been held to mean "without notice." *Meding v. Roe* (N. J.) 30 Atl. 587, 589.

"Good faith," as used in Chattel Mortgage Act, § 4, declaring unrecorded mortgages to be invalid as against creditors and purchasers and mortgagees in good faith, means such as parted with something of value, or otherwise altered their positions on the strength of the apparent ownership, and without notice. *Milton v. Boyd*, 22 Atl. 1078, 1082, 49 N. J. Eq. (4 Dick.) 142.

Gen. St. 1878, c. 39, § 1, providing that every mortgage on personal property, unaccompanied by immediate delivery, and followed by actual and continued change of possession, shall be absolutely void as against subsequent purchasers in good faith, unless the mortgage was executed in good faith and filed, cannot be construed to include a purchaser with actual notice of a prior conveyance. *Tolbert v. Horton*, 18 N. W. 647, 648, 31 Minn. 518.

A vendor and vendee, without any intent to defraud, entered into a genuine agreement that the sale of a certain lot should be "on time," and that the vendor should advance to the vendee a certain sum of money, to be used in the building of a house, taking for such sum and the purchase



price of the lot a mortgage. Held, that such agreement, when executed, constituted the vendor a mortgagor in good faith. *Hill v. Aldrich*, 50 N. W. 1020, 48 Minn. 73.

"Good faith," when used with reference to the transfer of a mortgage, means without notice, as well as for a valuable consideration. *Wright v. Larson*, 51 Minn. 321, 53 N. W. 712, 38 Am. St. Rep. 504.

#### **Offer to marry.**

"Good faith," as used in Pen. Code, art. 969, authorizing the dismissal of prosecution if defendant offered to marry the complaining witness in good faith, means ability to consummate the marriage. *Merrell v. State*, 57 S. W. 289, 290, 42 Tex. Cr. R. 19.

#### **Payment for corporate stock.**

Under the so-called "trust fund doctrine," which is founded on the proposition that, as the state undertakes to relieve a stockholder in a corporation of general liability of the debts of the concern to the amount he has invested in the enterprise, he ought in good faith to pay in money or its equivalent the face value of the stock received, there has arisen what is called the "good-faith rule" in determining whether the property given in exchange for the stock was properly valued. Some courts hold that the valuation should be made in good faith, and some of them hold that, in the absence of an affirmative showing of fraud allunde, mere oral valuation of the property given in exchange for stock will not render the stockholder liable for the difference, while others hold that overvaluation itself, especially if gross, constitutes or raises a strong presumption of fraud. *State Trust Co. v. Turner*, 82 N. W. 1029, 1030, 111 Iowa, 664, 53 L. R. A. 136.

#### **Publication of libelous article.**

St. 1894, § 5417, relating to actions for libel, providing that where a libel has been published in a newspaper, and the publisher of the paper, upon notice, publishes a retraction of the same, and that, if it appear on the trial that the same was published in good faith, the plaintiff shall only recover actual damages, means an absence of negligence as well as improper motives in making the publication. It must have been honestly made, in the belief of its truth, and upon reasonable grounds for this belief, after the exercise of such means to verify its truth as would be taken by a man of ordinary prudence under like circumstances. *Allen v. Pioneer Press Co.*, 41 N. W. 936, 939, 40 Minn. 117, 3 L. R. A. 532, 12 Am. St. Rep. 707.

#### **Purchase of personalty.**

A party who took personal property in payment of a debt, without notice, was a "purchaser in good faith," within Laws 1893,

p. 253, making unrecorded conditional sales of property absolute as to creditors and purchasers in good faith. *Johnston v. Wood*, 53 Pac. 707, 708, 19 Wash. 441.

Laws 1833, c. 279, § 1, providing that the failure to record a chattel mortgage shall render it void against subsequent purchasers in good faith, does not include debtors of the mortgagor, who purchase the property in satisfaction of an existing indebtedness. *Button v. Rathbone, Sard & Co.*, 27 N. E. 266, 267, 126 N. Y. 187.

#### **Purchase of realty.**

Want of notice and payment of the purchase money are not necessary ingredients to constitute one a purchaser in good faith within the meaning of Act Oct. 10, 1868; declaring that the liens of judgments created or preserved by certain acts and consequences of acts should be null and void against a purchaser in good faith for valuable consideration. "In certain cases the faith of a transaction involves the motive with which it is entered into. Thus, if a purchaser, knowing of a judgment not of itself a lien, has the view and purpose to defeat the creditor's execution, his purchase is iniquitous, and fraudulent, and is void against the creditor, notwithstanding he may give a full price; but, if his intention is pure, the sale is valid. Mere knowledge of a lien is not incompatible with good faith because the purchaser may buy subject to it." *Thornton v. Bledsoe*, 46 Ala. 73, 76.

Rev. St. 1851, c. 46, § 44, providing that all conveyances of real estate shall pass title without record as against all persons except subsequent purchasers in good faith for a valuable consideration whose conveyances should be first duly recorded, cannot be construed to include a judgment or attaching creditor. *Gaston v. Merriam*, 22 N. W. 614, 618, 33 Minn. 271.

Rev. St. § 2241, providing that those only who purchase in good faith shall be protected by a prior record of their deed, means to purchase without knowledge of an outstanding incumbrance, or any information sufficient to put the purchaser upon inquiry; and the law would not protect one who purchases land with knowledge of an outstanding unrecorded mortgage. *Mueller v. Brigham*, 10 N. W. 366, 368, 53 Wis. 173.

Acts 1873, c. 41, for the relief of purchasers of real estate at probate or chancery sales, when it states that the purchase money must have been in good faith paid by the purchaser, and in good faith applied to the payment of debts, or distributed among the distributees, means that it shall have been genuinely paid without any knowledge or suspicion of fraud either on the part of the purchaser or of the administrator. The term is used in contradistinction to "bad faith," and

not in the technical sense in which it is applied to conveyances of title, in which latter sense a party wholly free from moral malefices is still frequently held not to be a bona fide purchaser. *Cole v. Johnson*, 53 Miss. 94, 99.

#### **Purchase of stock.**

To constitute good faith there must not only be an absence not alone of participation in the fraud or collusion with the vendee, but also of knowledge, or even of notice, of the fraud, or of facts and circumstances calculated to put an ordinary business man on inquiry, so that he would ascertain the truth. Thus, where it appeared that a purchaser of stock had suspicions relating to the sale of it, he cannot be said to be a purchaser in good faith. *Pinkerton Bros. Co. v. Bromley*, 77 N. W. 307, 308, 119 Mich. 8.

#### **Set-off.**

Statutes which provide that, in order to be allowed as a set-off, a demand must have belonged to the defendant in good faith before notice of the assignment of the plaintiff's claim, mean that demand shall be actually, and not merely colorably, owned by the defendants. *Smith v. Warner*, 16 Mich. 390, 398.

Where a defendant filed an offset sufficient in amount to entitle him to an appeal in a suit before a magistrate, and there was no evidence against it, it was held that the magistrate had no power to refuse the appeal on the ground that the offset was not filed in good faith. The court said in this connection: "Good faith, or the want of it, is not a tangible, visible fact that can be seen and touched, but rather a state or condition of mind which can only be judged of by actual or fancied tokens or signs; and the greatest errors have been committed and the bloodiest and blackest pages of history have been written by men who arrogate to themselves good faith and deny it to others. The richest ingredient of our inheritance is that there is woven into the texture of our organic law that crime cannot be predicated upon a fancied state of mind, nor fundamental rights lost or denied except for overt acts. Sin, whether original or imputed, doubtless exists, and sometimes in the most subtle form; but it has been found wiser and safer to leave that to free discussion and the harmless exercise of opinion, that the subtle disputants on creeds may have free course without power to inflict penalties for error of opinion or a bad state of mind. It is not probable that this justice had a very accurate conception of what good faith meant—whether it had reference to the Nicene creed or to some abstruse process of the law which he did not fully comprehend. This statute, to work beneficial results, must have a practical administration. The petitioner

was denied a valuable right, because, as the record is made to say, he did not present his claim in good faith, and there was no evidence to the contrary." *Wilder v. Gilman*, 55 Vt. 504, 505.

#### **Taking property of another.**

"Good faith," as the term is used in the rule of law that a trespasser on the land of another who takes property therefrom shall be liable only for the actual damage if the property taken was taken in good faith, means that the taking is without culpable negligence or a willful disregard of the rights of others, and in the honest and reasonable belief that it was rightful. The term has been employed in the authorities upon this subject to characterize the acts of one who, while legally a wrongdoer, acted in the honest belief that his conduct was rightful. *Whitney v. Huntington*, 83 N. W. 561, 563, 87 Minn. 197.

#### **Testimony.**

In an instruction that the jury are not required to blindly receive the testimony of defendant as true, but are to fully and fairly consider whether it is true, and made in good faith, etc., it was contended that the expression "good faith" was uncalled for, in that, if the jury believe the testimony to be true, it made no difference whether it was given in bad faith; but the court held that, if the defendant's story was true, it was for that reason given in good faith; if it was false, then it was in bad faith, because it was false. "True" and "in good faith," used in such a connection, are necessarily convertible terms, and could not have misled the jury. *Carleton v. State*, 61 N. W. 699, 714, 43 Neb. 373.

#### **Use of land.**

Where the horticultural or agricultural use of a small tract of land is merely contributory to the comfort or convenience and for the purpose of adorning the home on such land, it cannot be said to be used for agricultural or horticultural purposes in good faith, so as to relieve it from liability from any city tax except a road tax, under Acts 23d Gen. Assem. c. 1, § 3. *Windsor v. Polk County*, 80 N. W. 323, 324, 109 Iowa, 156.

#### **GOOD FENCE.**

See "Good and Lawful Fence"; "Good and Sufficient Fence."

#### **GOOD FOR ONE PASSAGE.**

A railroad ticket stating that the same was good for "one first-class passage," means a continuous passage. A journey wherein the party going between two places stopped over at different places on the way would not be

one passage within the meaning of the term as above used. *Hamilton v. New York Cent. R. Co.*, 51 N. Y. 100, 104.

### GOOD FOR ONE SEAT.

The statement "good for one seat," printed on a railroad ticket, means a seat in the train on which the passenger enters to be carried; not by different trains or by broken stages. "There is nothing in the words 'one seat' which enlarges the meaning so that the holder can take seat after seat, train after train, day after day, and from station to station, especially in contravention of the known regulations of the company as to the travel on such tickets. It necessarily follows that the contract for one seat must mean in the train which the holder of the ticket enters to be carried, and not by different trains and by broken stages day after day." *Dietrich v. Pennsylvania R. Co.*, 71 Pa. (21 P. F. Smith) 432, 437, 10 Am. Rep. 711.

### GOOD FOR THIS DATE, DAY, AND TRIP ONLY.

The words "good this date only," when indorsed on a railroad ticket, operate as a valid limitation on the ticket by which it is good for transportation only on the day on which it is dated. *Elmore v. Sands*, 54 N. Y. 512, 515, 13 Am. Rep. 617.

The words "good for this trip only" on a railroad ticket will not limit the undertaking of the company to any particular day, nor any specific train of cars. They do not relate to time, but to a journey; and, if the ticket has not been previously used, it entitles the holder to a passage on a subsequent day, as well as on the day it bears date. *Pier v. Finch* (N. Y.) 24 Barb. 514, 516.

A railroad company may, in making arrangements with another company to sell tickets over both roads at a rate less than the regular fare for transportation over each road if purchased separately, limit the time during which such ticket is good; and where a ticket is so sold, clearly stamped "Good for this day and train only," and it is not used until several days thereafter, the connecting road may refuse to accept and receive such ticket for carriage of the passenger. *Shedd v. Troy & B. Ry. Co.*, 40 Vt. 88, 94.

The words "good for this date only," on a railroad ticket, operate as a limitation of the right of the holder to passage to the day only of the date of the ticket. *Bolce v. Hudson River R. Co.* (N. Y.) 61 Barb. 611.

A condition in a railroad ticket that it is "good for one continuous passage on and from the date," stamped on the back, implies

that the ticket is limited to the day upon which it was dated, and to such further time as is necessary to complete the continuous passage designated. *Texas & N. O. R. Co. v. Powell*, 35 S. W. 841, 842, 13 Tex. Civ. App. 212.

"Good for this day and train only," printed on a railway ticket, was not a representation that the first train passing the station after the purchase of the ticket would stop to take on passengers, and that the purchaser was entitled to passage on that particular train. *Duling v. Philadelphia, W. & B. R. Co.*, 6 Atl. 592, 596, 66 Md. 120.

### GOOD HABITS.

A warranty of insured in a life policy that his habits were good, and had always been good, cannot be construed to mean that his habits were absolutely correct according to the strict rules of ethics, but they were and had always been ordinarily good. *Galbraith's Adm'r v. Arlington Mut. Life Ins. Co.*, etc., 75 Ky. (12 Bush) 29, 39.

### GOOD HEALTH.

The term "good health" in an application for a life insurance policy representing that the insured is in good health does not mean absolute perfection, but is comparative. The insured need not be entirely free from infirmity, or from all the ills to which flesh is heir. If he enjoys such health and strength as to justify the reasonable belief that he is free from derangement of organic functions, or free from symptoms calculated to cause a reasonable apprehension of such derangement, and to ordinary observation and outward appearance his health is reasonably such that he may with ordinary safety be insured, and upon ordinary terms, the requirement of good health is satisfied. Slight troubles, temporary and light illness, infrequent and light attacks of illness, not of such a character as to produce bodily infirmity or serious impairment or derangement of vital organs, do not disprove the warranty of good health. In other words, the term "good health," when used in a policy of life insurance, means that the applicant has no grave, important, or serious disease, and is free from any ailment that seriously affects the general soundness and healthfulness of the system. *Barnes v. Fidelity Mut. Life Ass'n*, 43 Atl. 341, 342, 191 Pa. 618, 45 L. R. A. 264 (citing 3 Joyce, Ins. § 2004); *Goucher v. Northwestern Traveling Men's Ass'n* (U. S.) 20 Fed. 596, 598; *Provident Sav. Life Assur. Soc. of New York v. Beyer* (Ky.) 67 S. W. 827, 828; *Hann v. National Union*, 56 N. W. 834, 836, 97 Mich. 513, 37 Am. St. Rep. 365; *McDermott v. Modern Woodmen of America*, 71 S. W. 833, 837, 97 Mo. App. 636.

The term "good health" in a life insurance policy is comparative; and an assured is in good health unless affected with a substantial attack of illness threatening his life, or with a malady which has some bearing on the general health. It does not mean in perfect health; nor would it depend upon ailments slight, and not serious in their natural consequences. *Manhattan Life Ins. Co. v. Carder* (U. S.) 82 Fed. 986, 989, 27 C. C. A. 844; *Galbraith's Adm'r v. Arlington Mut. Life Ins. Co., etc.*, 75 Ky. (12 Bush) 29, 39; *Mason's Benefit Society v. Winthrop*, 85 Ill. 537, 541; *Maine Benefit Ass'n v. Parks*, 16 Atl. 339, 840, 81 Me. 79, 10 Am. St. Rep. 240; *Jeffrey v. United Order of Golden Cross*, 53 Atl. 1102, 1104, 97 Me. 176.

"Good health," as used in a warranty in an application for a policy of life insurance by a third person that insured is in good health, does not mean an actual freedom from illness or disease, but simply that the person has indicated in his actions and appearance no symptoms and traces of disease, and to the ordinary observation of a friend or relation is in truth well. *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274, 280, 44 Am. Rep. 372.

Good health, within the meaning of the following question and answer in an application for life insurance: "Question. What is the present state of the party's health? Answer. Good"—means free from any apparent sensible disease or symptoms of them; that the party was not conscious of any derangement of the functions by which health could be tested; or, in other words, that he was in a good state of health. *Conver v. Mutual Ins. Co.* (U. S.) 6 Fed. Cas. 368, 369.

The term "good health" in an application for renewal of a life insurance policy, representing that the insured was then in good health, should be construed by the standard of health existing at the time of the original policy and the description of the insured's condition and ailments contained in the declaration on which it was made. Where the insured, at the time of the renewal, is not affected with any diseases, other than those named in the original application, which tend to shorten life or increase the risk, and those diseases have not become so aggravated as to make his condition subsequently different from what it was at the date of the first policy, he is in good health within the meaning of the policy. The adjective "good" is comparative; it does not require absolute perfection. When, therefore, one is described as being in good health, that does not necessarily nor ordinarily mean that he is absolutely free from all and every ill that flesh is heir to, but rather means—especially in applications for life insurance—that the applicant is exempt from any dangerous disease, or one which frequently terminates fatally. *Peacock v. N. Y. Life Ins.*

*Co.*, 20 N. Y. 293, 296. In an application for the renewal of a policy of life insurance, a certificate that the applicant is "now in good health" means the same thing as was meant by the same words when used in the original application for the policy; that is, just such health as the original declaration of the insured described. It cannot be said that good health has so definite a meaning that it admits of application to only one physical condition. Its ordinary use in the community does not import a perfect physical condition once in one hundred times. *Peacock v. New York Life Ins. Co.*, 14 N. Y. Super. Ct. (1 Bosw.) 338, 347.

In construing an application for life insurance in which the assured had stated that he was in good health, the court said: "It cannot be supposed that one who, for the purpose of procuring insurance, alleges himself to be in good health, shall be understood as warranting himself to be in perfect and absolute health, for this is seldom, if ever, the fortune of any human being; and we are all born, as said by Lord Mansfield in *Willis v. Poole*, Park, Ins. 555, with the seeds of immortality in us. These inquiries as to symptoms of disease, as is said by Mr. Parsons, therefore must mean whether they have ever appeared in such a way or under such circumstances as to indicate a disease which would have a tendency to shorten life." *Alabama Gold Life Ins. Co. v. Johnston*, 80 Ala. 467, 475, 2 South. 125, 59 Am. Rep. 816.

"Good health," as contained in an application for reinstatement to life insurance stating that the applicant was in good health, means that state of health which his original application disclosed to the company. *Massachusetts Ben. Life Ass'n v. Robinson*, 30 S. E. 918, 932, 104 Ga. 256, 42 L. R. A. 261.

#### GOOD HUNTER.

"Good hunter," as applied to a horse, implies soundness in wind and eyes, which would exclude a whistler, whistling being a noise made in respiration by a horse while trotting or cantering, which, though at first it does not indicate any defect in pace or endurance, is apt to increase, and indicate such defect. 29 Alb. Law J. 25.

#### GOOD MAINTENANCE.

See "Good and Comfortable Support and Maintenance."

#### GOOD MANNER.

See "Good and Workmanlike Manner."

#### GOOD MARBLE.

See "Good White Marble."

**GOOD MEN.**

See "Good and Lawful Men."

**GOOD MERCHANTABLE SHIPPING HAY.**

The meaning of the words "good merchantable shipping hay," within the meaning of a contract to sell such hay, is to be determined by evidence as to what was intended by such words. *Fitch v. Carpenter* (N. Y.) 48 Barb. 40, 42.

**GOOD MORAL CHARACTER.**

"Good moral character," as used in Rev. St. § 2165 [U. S. Comp. St. 1901, p. 1329], providing that an alien, to be entitled to admission to citizenship, must first prove that he has behaved himself as a man of good moral character, means that he must have conducted himself as a man of good moral character ordinarily would, should, or does, but what constitutes good moral character is not easy to determine, as the standard may vary from one generation to another, and the conduct of the average man of the country is probably as high as the standard can be set, but, on general principles, it would seem that whatever is forbidden by the law of the land ought to be considered for the time being immoral; and therefore a person who violates the law thereby manifests in a greater or less degree that he is not well disposed to the good order and happiness of the country, and hence a man who commits perjury is not a man of good moral character. In *re Spenser* (U. S.) 22 Fed. Cas. 921, 7 Cent. Law J. 84, 85.

The phrase "good moral character" as used in Rev. St. c. 144, § 2580, subd. 3, declaring that a person, in order to be admitted to the bar, must, in addition to other requisites, be of good moral character, is general in its application, and includes all the elements essential to make up such a character, among those being common honesty and veracity. In *re O——*, 42 N. W. 221, 225, 73 Wis. 602.

A teacher who habitually used profane language in the presence of his scholars, and who openly and conspicuously broke the Sabbath, was not a person of good moral character. *Wleman v. Mabec*, 8 N. W. 71, 72, 45 Mich. 484, 40 Am. Rep. 477.

**GOOD MORTGAGE.**

An affidavit that a mortgage was good and valid has reference to the character and sufficiency of the security, and not to the title simply. *Du Flon v. Powers* (N. Y.) 14 Abb. Prac. (N. S.) 391, 395.

**GOOD NOTE.**

See "Good and Collectible Note"; "Good and Sufficient Note."

**GOOD OPPORTUNITY.**

In a will reciting testator's wish that his farm should be rented for five years, and then sold, or, should a good opportunity offer, then the same should be sold sooner, and expressing the desire that his minor son, 17 years old, should buy the same, the expression "good opportunity" does not mean a good offer, so as to authorize the executors of the will to sell the farm at any time they receive a good offer for it. *Appeal of Clouse*, 43 Atl. 413, 414, 192 Pa. 108.

**GOOD ORDER AND CONDITION.**

See "Apparent Good Order."

The term "good order," when applied to the shipment of glass, is to be taken in the meaning in which it is used in the glass trade, and cannot be defined by the court in the absence of evidence of such meaning. *King v. Nelson*, 36 Iowa, 509, 512.

A bill of lading stating that goods were received in good order, but that the contents thereof are unknown, only means that the external condition of the goods was in good order. *Clark v. Barnwell*, 53 U. S. (12 How.) 272, 283, 13 L. Ed. 985; *Vaughan v. 630 Casks of Sherry Wine* (U. S.) 28 Fed. Cas. 1114.

A bill of lading which recites that certain articles were shipped in good order and well conditioned refers to the exterior and apparent condition of the articles, and not to the internal condition, except so far as it may be inferred from external appearances. *Gowdy v. Lyon*, 48 Ky. (9 B. Mon.) 112, 114; *The Olbers* (U. S.) 18 Fed. Cas. 635, 636; *Bradstreet v. Heran* (U. S.) 3 Fed. Cas. 1183; *Keith v. Amende*, 64 Ky. (1 Bush) 455, 459.

A bill of lading reciting that the goods were shipped in good order and condition refers only to the external condition, and not to the state of the article. It has no reference to its soundness. *West v. The Berlin*, 8 Iowa, 532, 542; *The Oriflamme* (U. S.) 18 Fed. Cas. 810; *The California* (U. S.) 4 Fed. Cas. 1058, 1059.

The use of the words "good order" in a bill of lading reciting the receipt of the goods in good order is not conclusive, as between the carrier and shipper, that the goods were in fact in good order, but creates a presumption to such effect. *Ellis v. Willard*, 9 N. Y. (5 Seld.) 529; *Barrett v. Rogers*, 7 Mass. 297-300, 5 Am. Dec. 45; *Carson v. Harris* (Iowa) 4 G. Greene, 518, 517; *Choate v. Crowninshield* (U. S.) 5 Fed. Cas. 646, 647.

The use of the words "good order," in a bill of lading reciting that freight received for carriage which is contained in boxes is in good order, operates to impose the burden of proof on the carrier of showing that

the goods were not in good order when received. *Price v. Powell*, 3 N. Y. 322, 325; *The Oriflamme* (U. S.) 18 Fed. Cas. 810.

The use of the words "good order," in a contract to deliver wool in good order, imports a warranty that the wool delivered will be in good order. *Polhemus v. Helman*, 50 Cal. 438.

Where a steamboat gave a bill of lading in which cotton is receipted for as in good order and condition, the receipt is not conclusive against the vessel, but throws the burden of proof upon it, and the recital cannot be overthrown or qualified except by evidence of a very clear and convincing character. The policy of the law—a policy justified by long experience—is to hold the carrier to a very strict accountability. The recital of a bill of lading is not to be weakened by a conjectural showing, and where the cotton, when delivered by the boat at its destination, was wet and damaged, it cannot be presumed, without clear proof, that the cotton was wet before its receipt by the steamer. *Bond v. Frost*, 6 La. Ann. 801, 802.

In a bill of lading containing a receipt of goods packed in boxes as in good order, and a contract to forward such goods, the parts of such bill containing the receipt may be explained and contradicted by parol evidence, as any other receipt. In such a receipt, if the property to be transported, and which was declared to be in good order, was in all parts open to inspection, and no fraud or imposition was practiced, it might not be unreasonable to say that no evidence should be admitted to prove that it was not in good order; but, in the case of goods put up in boxes, the exterior only of which was visible, and neither the interior, nor its quality or condition, could be known to the master, who signed the bill of lading, evidence is admissible to prove that the goods were not in good order at the time the bill of lading was given. *The Missouri v. Webb*, 9 Mo. 193, 195, 196.

"Good order," in a receipt signed by a person receiving goods from a carrier that the goods are in good order when so received, does not preclude the person giving the receipt from showing that they were not in fact in good order; but he may show that he wanted to sign for the goods as being in poor condition, but was not permitted to do so by the carrier. The instrument is a mere receipt, which may be varied by parol evidence. *Tierney v. New York Cent. & H. R. R. Co.* (N. Y.) 10 Hun, 569, 570.

A bill of lading providing that the ship should deliver the goods in like good order and condition must be construed strictly, and so as to harmonize with the ship's duty to make a good delivery, and, as so construed, means that the goods may be landed at a

proper time and place, though without notice to the consignee, and that, on the ship's taking reasonable care of them afterwards, they will be at the consignee's risk and expense, and therefore, if the goods are discharged at an improper time, or are voluntarily exposed to known and imminent peril of loss, the ship will be liable for breach of duty, though the goods were at the owner's risk after delivery in good order and condition. *The Surrey* (U. S.) 26 Fed. 791, 795.

The words "good order and condition," as used in an instruction stating that it is the duty of a city to keep its streets in good order and condition, are not synonymous with the words "reasonably safe condition for travel," since a street might not be considered in good order and condition, but still it might be reasonably safe for travel in ordinary modes with the exercise of reasonable and ordinary care. *City of Denver v. Moewes*, 60 Pac. 986, 987, 15 Colo. App. 28.

#### GOOD REASON TO BELIEVE.

See "Good and Lawful Reasons."

"Good reason to believe," as used in an affidavit for a warrant for arrest for trespass, alleging that the affiant has "good reason to believe" a just cause of action exists, is not "probable cause," within Const. art. 6, § 26, providing that such a warrant can only issue on a showing under oath of probable cause, but the facts must be sworn to. *Meddaugh v. Williams*, 12 N. W. 34, 35 48 Mich. 172.

#### GOOD REPAIR.

See "Good Tenantable Repair."

A provision in a charter of a tollbridge corporation that the bridge should at all times be kept in good, safe, and passable repair, meant in such condition as befitted a public highway, and safe and convenient for all kinds of travel at all seasons and at all times, by day and night. *Commonwealth v. Central Bridge Corp.*, 66 Mass. (12 Cush.) 242, 244.

An agreement of a lessee to deliver the premises in good repair at the expiration of the lease does not bind him to restore the buildings if burned, where it is stipulated that he shall take insurance to a certain amount, and assign it to the lessor, and use it to restore the buildings if destroyed by fire. *Sun Ins. Office v. Varble*, 46 S. W. 486, 103 Ky. 758.

#### GOOD REPUTE.

"Good repute," as used in an instruction in an action for seduction, declaring that, if the plaintiff's daughter was seduced and debauched, she being then an unmarried fe-

male of good repute, the jury would find defendant guilty, etc., means if she was honestly pursuing the path of virtue. "Good repute" is synonymous with, and only means, "of good reputation." *State v. Wheeler*, 18 S. W. 924, 925, 108 Mo. 658.

"Good repute" is synonymous with, and only means, "of good reputation." *State v. Wheeler*, 18 S. W. 924, 108 Mo. 658. And it has such meaning in the statute declaring it an offense for one under promise of marriage to seduce an unmarried female of good repute, under 18 years of age. *State v. Sharp*, 33 S. W. 795, 796, 132 Mo. 165.

In construing Rev. St. § 1259, providing for the punishment of persons who shall, under promise of marriage, seduce any unmarried female of good repute, it was held in *State v. Patterson*, 88 Mo. 88, 95, 57 Am. Rep. 374, that the words "of good repute" did not confine the evidence, on a prosecution under the act, to mere reputation of the prosecutrix, but that evidence of previous unchastity was admissible, the same as under statutes in which the words "of previous chaste character" are used instead of "of good repute." This conclusion is reached from an analysis of the essential meaning of the word "seduction." This case overrules *State v. Brassfield*, 81 Mo. 151, 51 Am. Rep. 235.

"Good repute for chastity," as used in a statute providing for the prosecution of any person seducing a woman of good repute for chastity, does not mean actual personal virtue. Actual personal virtue may be preserved while the good repute for chastity may be impaired by indiscreet conduct. The offer of evidence to show that the woman was not chaste is immaterial, and does not bear on the question of her good repute for chastity. *Foley v. State*, 35 Atl. 105, 106, 59 N. J. Law, 1.

#### GOOD RICE.

See "Good Seed Rice."

#### GOOD RIGHT TO SELL.

A covenant in a deed of a good right to sell and convey does not imply a warranty of absolute title, but only of actual seisin and possession. *Raymond v. Raymond*, 44 Mass. (10 Cush.) 134.

#### GOOD SALT.

See "Good Coarse Salt."

#### GOOD SAWMILL.

See "Good Steam Sawmill."

#### GOOD SECURITY.

See "Good and Sufficient Security."

#### GOOD SEED RICE.

A representation in a sale of rice that it was good seed rice amounted to a warranty, and, on the failure of the rice to sprout under proper conditions, the warranty was broken. *Reiger v. Worth Co.*, 41 S. E. 377, 130 N. C. 268, 89 Am. St. Rep. 885.

#### GOOD STANDING.

An application by a member of a temperance order for a beneficiary certificate in the nature of a life insurance policy contained the following clause: "I further agree that should I at any time violate my pledge of total abstinence, or be suspended or expelled for a violation of any of the laws of the order, or for nonpayment of dues," etc., "then all rights which either myself, the person or persons named in the certificate, my heirs," etc., "may have in the beneficiary fund of the order, shall be forfeited." The certificate provided that, "in case he is in good standing at the time of his decease, then the person or persons hereinafter named shall be entitled," etc. Held, that the term "good standing" not only implies that the party should be a member of the society at the time of his decease, but that he have a good reputation therein. The words should not be construed so as to make a trial and conviction of the violation of the insured's pledge of total abstinence a condition precedent to forfeiture. The words are to be construed with reference to the language of the certificate, and when this is done they manifestly mean not only good reputation, but good conduct; that is, a freedom from a violation of the pledge of total abstinence. The violation of this pledge, therefore, and not the expulsion or suspension by reason thereof, is a cause for forfeiture of rights and benefits under the certificate. *Supreme Council Royal Templars of Temperance v. Curd*, 111 Ill. 284, 289 (cited in *High Court I. O. O. F. v. Zak*, 26 N. E. 593, 595, 136 Ill. 185, 188, 29 Am. St. Rep. 318); *Smith v. Knight of Father Mathew*, 36 Mo. App. 184.

A member of an order at the time of his death in arrears of dues and assessments, the time for collecting which has fully expired, is, by reason of those facts, not in good standing, within the meaning of a benefit certificate requiring the member to be in good standing in the order at the time of his death, to entitle the beneficiary to recover. *Puhr v. Grand Lodge German Order of Haugari*, 77 Mo. App. 47, 63 (citing *Bacon*, Ben. Soc. § 414).

"Good standing," within the meaning of the order of the Knights of Honor, implies a full and fair compliance with their laws in the payment of assessments and dues; and therefore a member who is largely in arrears for assessments and dues is not in

good standing, within the meaning of a benefit certificate, and his beneficiaries are not entitled to the payment of the same. It is not necessary to prevent insured from being in good standing that he should have been actually suspended before his death. *McMurry v. Supreme Lodge Knights of Honor* (U. S.) 20 Fed. 107.

A provision in the constitution of a fraternal insurance society that, if the member continue in good standing, the certificate shall be incontestable after a certain date from the issuance thereof, refers to such good standing as exists up to the time of death; and hence suicide, though elsewhere declared to avoid the certificate, does not involve loss of good standing. *Royal Circle v. Achterrath*, 68 N. E. 492, 498, 204 Ill. 549, 63 L. R. A. 452.

### GOOD STEAM SAWMILL.

A promise by a vendee to erect on land a good steam sawmill is a promise to erect a mill capable of doing such work and to such amount as is ordinarily done by good mills. Such a promise is not void for uncertainty. *Kraley v. Bentley*, 46 N. W. 506, 1 Dak. 25.

### GOOD SUPPORT.

See "Good and Comfortable Support and Maintenance"; "Good and Sufficient Support."

### GOOD TENANTABLE REPAIR.

The phrase "good tenantable repair," in a lease requiring the tenant of a house to yield up the premises in good tenantable repair, is not violated by the act of the tenant, on quitting the property, in leaving nine cart loads of ashes, brickbats, and rubbish on the demised premises. *Thorndike v. Burrage*, 111 Mass. 531.

### GOOD TITLE.

See "Good and Clear Title"; "Good and Marketable Title"; "Good and Perfect Title."

The term "good title" does not necessarily mean one perfect of record. *Block v. Ryan*, 4 App. Cas. (D. C.) 283, 287.

#### As clear title.

The word "good," in a vendor's contract to convey a good title, comprehends all that the word "clear" does, and therefore there is no strength to any argument based on the intention of the parties, as shown from the fact that the word "clear," in the original draft of the contract, was stricken out, and the word "good" inserted. Such change does not show that the parties did not intend that

the title should be conveyed free from all incumbrances. *Oakey v. Cook*, 7 Atl. 495, 503, 41 N. J. Eq. (14 Stew.) 350.

"Good title" means a title free from litigation, palpable defects, and grave doubts. It should consist of both legal and equitable titles, fairly deducible of record. *Reynolds v. Borel*, 25 Pac. 67, 69, 86 Cal. 538 (citing *Turner v. McDonald*, 76 Cal. 179, 18 Pac. 262).

#### As marketable title.

A good title means not merely a title valid in fact, but a marketable title which can again be sold to a reasonable purchaser, or mortgaged to a person of reasonable prudence as a security for a loan of money. *Irving v. Campbell*, 24 N. E. 821, 822, 121 N. Y. 358, 8 L. R. A. 620; *Moore v. Williams*, 22 N. E. 233, 234, 115 N. Y. 586, 5 L. R. A. 654, 12 Am. St. Rep. 844; *Emens v. St. John* (N. Y.) 29 N. Y. Supp. 655, 657, 79 Hun, 102.

#### As fee-simple title.

The term "good title," in Acts 1854, § 18, speaking of the obtaining of a good title to certain real estate by a county, means a title in fee simple absolute. Title of itself to real estate implies an estate in fee. Nothing short is a complete title. A good title can be nothing less than a legal estate in fee—an estate indefeasible. *Jones v. Gardner* (N. Y.) 10 Johns. 286. Such would be the construction of an agreement between individuals. A contract to give a good title to real estate will be held to require a deed in fee that should in effect give a perfect title. *Gillespie v. Broas* (N. Y.) 23 Barb. 370, 381.

The words "good, unincumbered title," as used in Acts 1854, § 18, relating to the erection of a courthouse for the county of Schuyler, and directing commissioners to obtain a "good, unincumbered title" to certain lands for the purpose of erecting thereon a courthouse, jail, and clerk's office, mean a title in fee simple absolute, free and clear from any legal exception or charge thereon. They import an estate without any prior claim to continue forever, and having no qualification or condition in regard to its continuance. *Gillespie v. Broas* (N. Y.) 23 Barb. 370, 375.

#### Quitclaim deed.

The term "good title," as used in an agreement to sell and convey land with a good title, is satisfied by a deed of quitclaim, as such a deed vests the right of property and of exclusive possession as effectually as a warranty deed. *Kyle v. Kavanagh*, 103 Mass. 356, 359, 4 Am. Rep. 560.

A contract for the sale of land, by which the vendor agreed to furnish a good title,



should not be construed to call for a conveyance with covenants of warranty, where the title was in the vendors. A quitclaim deed sufficiently complied with the terms of the contract. The title being in the vendors, the form of the conveyance was immaterial. *Pugh v. Chesseldine*, 11 Ohio, 109, 126, 87 Am. Dec. 414.

### GOOD WARRANTY DEED.

As used in a covenant to execute a good warranty deed of conveyance, the word "good" refers only to the instrument of conveyance. The expression does not mean that the covenantor will give a good warranty title. It merely means that it is to be a good warranty deed of conveyance. *Parker v. Parnele* (N. Y.) 20 Johns. 130, 134, 11 Am. Dec. 253.

A bond conditioned that on the payment of a certain sum a party should make a good general warranty deed for a certain tract of land cannot be construed to require a covenant of seisin in such deed. *Kirkendall v. Mitchell* (U. S.) 14 Fed. Cas. 676, 677.

### GOOD WHITE MARBLE.

In *Viall v. Hubbard*, 37 Vt. 114, involving a contract for the sale of a good white marble headstone, the headstone made and delivered was shown to have been tarnished and discolored on the face of the stone and partly across the inscription by some accident and artificial means; and such discoloration was held a defect that impaired the value of the stone, and that defendant was not bound to accept it as a compliance with the contract. *Lyndon Granite Co. v. Farrar*, 53 Vt. 585.

### GOOD WILL.

Good will is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or from celebrity or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices. *Haverly v. Elliott*, 57 N. W. 1010, 1011, 39 Neb. 201; *Munsey v. Butterfield*, 133 Mass. 492, 494; *Howard v. Taylor*, 8 South. 36, 37, 90 Ala. 241 (quoting Story on Partnership, § 99); *Carey v. Gunnison* (Iowa) 17 N. W. 881, 885 (cited in *Nelson v. Hiatt*, 56 N. W. 1029, 1032, 38 Neb. 478); *Bell v. Ellis*, 33 Cal. 620, 625; *Boon v. Moss*, 70 N. Y. 465, 473; *Howe v. Searing* (N. Y.) 10 Abb. Prac. 264, 277; *Id.*, 19 How. Prac. 14, 17; *Id.*, 19 N. Y. Super. Ct. (6 Bosw.) 354, 362; *People v. Roberts*, 53 N. E. 685, 688,

159 N. Y. 70, 45 L. R. A. 126; *Freeman v. Freeman*, 83 N. Y. Supp. 478, 479, 86 App. Div. 110; *Rice v. Angell*, 11 S. W. 338, 339, 73 Tex. 350, 3 L. R. A. 769; *Smith v. Gibbs*, 44 N. H. 335, 343; *Nelson v. Hiatt*, 56 N. W. 1029, 1031, 38 Neb. 478 (citing Bouv. Law Dict.); *Millsbaugh Laundry v. First Nat. Bank*, 94 N. W. 262, 263, 120 Iowa, 1.

"Good will," as defined by Lord Eldon, means nothing more than the probability that the old customers will resort to the old place. *Porter v. Gorman*, 65 Ga. 11, 14; *Bell v. Ellis*, 33 Cal. 620, 625; *Bradford v. Peckham*, 9 R. I. 250, 252; *Fenn v. Boles* (N. Y.) 7 Abb. Prac. 202, 203; *Myers v. Kalamazoo Buggy Co.*, 20 N. W. 545, 548, 54 Mich. 215, 52 Am. Rep. 811; *Obittenden v. Witbeck*, 15 N. W. 526, 534, 50 Mich. 401. Sir George Jessel, in *Ginesi v. Cooper*, 14 Ch. Div. 596, 601, pointed out that this definition was one which was applicable only to the facts and situation in that case, and in the same opinion gives the following wider definition of "good will" made by Vice Chancellor Wood in *Churton v. Douglas*, 5 Jur. (N. S.) 887, 890—a leading case: "It would be taking too narrow a view of what was laid down by Lord Eldon to say that good will is confined to that. Good will, I apprehend, must mean every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner, not carrying on the business himself, that has been acquired by the old firm in carrying on its business, whether connected with the premises on which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business." *Newark Coal Co. v. Spangler*, 34 Atl. 932, 033, 54 N. J. Eq. 354. See, also, *Menendez v. Holt*, 9 Sup. Ct. 143, 144, 128 U. S. 514, 32 L. Ed. 526; *Farewell v. Huling*, 23 N. E. 438, 439, 132 Ill. 112; *Glen & Hall Mfg. Co. v. Hall*, 61 N. Y. 226, 230, 19 Am. Rep. 278; *Lobeck v. Lee-Clarke-Andresen Hardware Co.*, 55 N. W. 650, 653, 37 Neb. 158, 23 L. R. A. 795; *Slack v. Suddoth*, 52 S. W. 180, 182, 102 Tenn. 375, 45 L. R. A. 589, 73 Am. St. Rep. 881. In *Oruttwell v. Lye*, 17 Ves. 335, "good will" is defined to be the probability that the old customers will resort to the old place. *Zeigler v. Sentzler*, 8 Gill & J. (Md.) 150, 158. "Good will" has been defined by the courts to be the favor which the management of a business wins from the public, and the probability that old customers will continue their patronage. *Obittenden v. Witbeck*, 50 Mich. 401, 15 N. W. 526. Lord Eldon, in *Crutwell v. Lye*, 17 Ves. 335, defined it simply as the probability that old customers will resort to the old place. *Williams v. Farrand*, 88 Mich. 473, 487, 50 N. W. 446, 14 L. R. A. 161.

The probable retention of customers is what is meant by "good will." Town of

*Bristol v. Bristol & Warren Waterworks*, 49 Atl. 974, 975, 23 R. I. 274.

"The good will of a business comprises those advantages which may inure to the purchaser from holding himself out to the public as succeeding to an enterprise which has been conducted in the past with the name and repute of his predecessor." *Knoedler v. Boussod* (U. S.) 46 Fed. 465, 466.

"Good will is the favor which the management of a business wins from the public, and the probability that old customers will continue their patronage and resort to the old place. Good will is an advantage or benefit which is acquired by business establishments, beyond the mere intrinsic value of the capital stock. It is the general public patronage and encouragement which a business receives from its customers on account of its local position. It is the subject of value and price, and of bargain and sale, though intangible. But in order to be conveyed, mention must be made of it in the act of sale." *Vonderbank v. Schmidt*, 10 South. 616, 617, 44 La. Ann. 264, 15 L. R. A. 462, 32 Am. St. Rep. 336.

The good will of a business is not the business, but is one result springing out of it. It would be too narrow to construe the word "business" to be the good will of the business. *McGowan v. Griffin*, 37 Atl. 298, 299, 69 Vt. 168.

It is difficult to define all of the elements embraced in the term "good will," but it is evident that the valuable elements of a good will are those which attract the customers. They are all—excluding from the present consideration the right to continue the business in the firm name—included in the right to succeed to the business, and to carry it on openly as the successor to the old firm. *Slater v. Slater*, 80 N. Y. Supp. 363, 367, 78 App. Div. 449 (citing *Thynne v. Shove*, 45 Ch. Div. 577; *Burchell v. Wilde*, 1 Ch. 551; *Knoedler v. Boussod* [U. S.] 47 Fed. 465; *People v. Roberts*, 159 N. Y. 70, 81, 53 N. E. 685, 45 L. R. A. 126).

The good will of a business is the custom which it attracts and the benefits or advantages it receives from constant or habitual customers, and the probability that the old customers will continue to come to the place. A vendor who sells the good will of a business guarantees nothing, for, in the nature of things, he can give no assurance that the patronage of the place will continue. It is the sale of a mere chance that a preference which has usually been extended will continue. He sells what he has, and if the purchaser, when he attempts to continue the business, discovers that there is no trade or custom connected with it, he is without remedy, unless he can show some fraudulent representation or suppression of fact on the

part of the vendor. *Johnson v. Friedhoff*, 27 N. Y. Supp. 982, 983, 7 Misc. Rep. 484.

The good will of a partnership may be defined as every possible advantage acquired by the firm in carrying on its business, whether connected with premises, name, or other matter. *Farwell v. Huling*, 132 Ill. 112, 119, 23 N. E. 438. No good will can exist except in cases of commercial or trade partnerships. None exists in a partnership engaged in the business of buying and selling grain and produce on commission, in the absence of a special contract. *Douthart v. Logan*, 86 Ill. App. 294, 309, 310.

#### **Engaging in same business.**

The sale of an established business, including good will, does not of itself imply a contract on the part of the seller not to engage in the same business so as to compete with the buyer. *Jackson v. Byrnes*, 54 S. W. 984, 985, 103 Tenn. 698.

"Good will," as used in sales of business or professional locations and the good will of the business, includes not only the established business and patronage or clientage thereof, but also an implied covenant that the seller will not engage in the same business in the same locality. *French v. Parker*, 14 Atl. 870, 872, 16 R. I. 219, 27 Am. St. Rep. 733.

#### **Insurance agency.**

On the dissolution of a partnership carrying on the business of an insurance agency in a firm name composed of the names of the partners, there is nothing left to which the good will, as a property right of the business, can attach, as neither partner has the exclusive right to carry on the old business; but, in the absence of stipulation, each is left to procure for himself alone the agency of the companies formerly represented by the firm. *Rice v. Angell*, 11 S. W. 338, 339, 73 Tex. 350, 3 L. R. A. 769; *Smith v. Smith*, 24 South. 618, 619, 51 La. Ann. 72.

#### **Profit distinguished.**

See "Profit."

#### **As property.**

See "Personal Property"; "Property."

#### **School.**

"Good will," as used in a contract for the sale of a school and the good will thereof, does not involve any personal effort on the part of the seller to use his personal influence to procure the attendance of pupils at such school. *McCord v. Williams*, 96 Pa. 78, 80.

#### **Solicitation of former customers.**

One who sells the good will of a business thereby warrants that he will not endeavor

to draw off any of the customers. *Merchants' Ad-Sign Co. v. Sterling*, 57 Pac. 468, 469, 124 Cal. 429, 46 L. R. A. 142, 71 Am. St. Rep. 94.

The good will of a business is the reputation it has established in the community, including the customers which usually trade there; and therefore if a business is sold, and with it the owner's good will, that amounts to a warranty that the seller will not thereafter attempt to draw off any of the customers which he had previously had, from the purchaser. *Snow v. Holmes*, 11 Pac. 856, 859, 71 Cal. 142.

"Good will," as used in a contract of purchase of the interest of one partner, including the good will, by the other partner, means simply the right to conduct an old business at the old stand, and does not prevent the retiring partner from lawfully establishing a similar business in the neighborhood, and, by advertisements, circulars, cards, and personal solicitation, invite the public generally, including the customers of the old firm, to come there and purchase of him. The good will which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place. *Cottrell v. Babcock Printing Press Mfg. Co.*, 6 Atl. 791, 800, 54 Conn. 122 (citing *Cruttwell v. Lye*, 17 Ves. 335, 346).

#### Use of trade-name.

The good will of a business is the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired. *Civ. Code Mont.* 1895, § 1371; *Rev. St. Okl.* 1903, § 4176; *Civ. Code Cal.* 1903, § 892; *Rev. Codes N. D.* 1899, § 3486; *Civ. Code S. D.* 1903, § 803; *Mapes v. Metcalf*, 88 N. W. 713, 716, 10 N. D. 601.

As used in the sale of the good will of a business, the term "good will" should not be construed to include the right to the use of the vendor's name of trade. *Howe v. Searing* (N. Y.) 19 How. Prac. 14, 17.

A sale of the good will of a business does not transfer the right to use the vendor's trade-name. *Howe v. Searing* (N. Y.) 19 How. Prac. 14, 25.

"Good will," as used in a partnership agreement providing that, on the death or withdrawal of a partner, the other partners could continue business, on paying for the stereotype and electrotype plates, engravings, publishing, patent and copy rights, good will, etc., a sum equal to the gross profits of the firm for the last two complete years preceding the time of settlement, includes the right to continue the business under the old firm name. *Blake v. Barnes*, 12 N. Y. Supp. 69, 72, 26 Abb. N. C. 208.

As used in a contract of sale, whereby a partnership is dissolved, and one of the

partners transfers to the others all his interests in the firm business and assets, together with the good will, with the understanding that they are to succeed to the business of the old firm, the term "good will" includes the firm name. *Brass & Iron Works Co. v. Payne*, 33 N. E. 88, 89, 50 Ohio St. 115 (citing *Churton v. Douglas*, *Johns. Eng. Ch.* 174).

The good will of a partnership includes, among other things, the trade-name, to the extent that the purchaser may stand as a successor of the former firm; and, upon the death of the last survivor of a firm, although no provision for the sale of the name is made by statute, and although that name itself is not assignable by the administrators, still they may sell, in addition to the property and trade-marks, the good will of the firm, which shall include the right of the purchaser to advertise himself to the public thereafter as being the successor to the property and business of the firm which has become extinct. *Fisk v. Fisk*, 79 N. Y. Supp. 37, 38, 77 App. Div. 83.

#### GOOD WORK.

A notice "to put the mill in repair, so as to do good work," is sufficient to cover all alterations necessary to accomplish that end. *Stillwell & Bierce Mfg. Co. v. Phelps*, 9 Sup. Ct. 601, 603, 130 U. S. 520, 32 L. Ed. 1035.

Good work in one place is not of necessity good work everywhere else. It means such work as is usual and common, taking into consideration the place of the work, the kind of work, and the price stipulated to be paid for the same. *Carter v. Adams* (Ohio) *Wright*, 471.

#### GOOD WORKING CONDITION.

"Good working condition," within the meaning of a covenant in a lease of a mine that it shall be left at the expiration of the term in good working condition, imports that supports and pillars shall not be removed from the mine, even though all the coal is exhausted, because if the pillars are removed the surface of the ground will become depressed. *Randolph v. Halden*, 44 Iowa, 327, 329.

#### GOODS.

See "Bottled Goods"; "Confusion of Goods"; "Fancy Goods"; "Household Goods"; "Lawful Goods"; "Personal Goods"; "Prize Goods"; "Shipwrecked Goods"; "Worldly Goods."

All other goods, see "All Other."

Any goods, see "Any."

Other goods, see "Other."

Perishable goods, see "Perishable Property."

"The word 'goods' is defined by Webster as follows: 'Goods, n. pl.: (1) Movables; household furniture. (2) Personal or movable estate, as horses, cattle, utensils, etc. (3) Wares; merchandise; commodities bought and sold by merchants and traders.' The word is defined by Worcester: 'Goods (gudz), n. pl.: (1) Movables; personal or movable estate; furniture; chattels; effects; "All your goods, lands, and tenements." Shak. (2) Wares; freight; merchandise; commodities. "When the goods of our English merchants were attached." Raleigh, Syn.' The term 'goods' comprehends a person's movable property, chattels, cattle, implements of husbandry, etc.; goods and chattels; personal estate and effects." *Vawter v. Griffin*, 40 Ind. 593, 600.

"Webster defines 'good' as a valuable possession or piece of property; especially and almost universally in the plural; goods, wares, commodities, chattels." *St. Joseph Hydraulic Co. v. Wilson*, 33 N. E. 113, 115, 133 Ind. 465.

"The first exposition I have found of the word 'goods,' is in Bailey's Large Dictionary of 1732, which defines it simply 'merchandise'; and by Johnson, who followed as the next lexicographer, it is defined to be movables in a house; personal or immovable estates; wares; freight; merchandise." *Passaic Mfg. Co. v. Hoffman* (N. Y.) 3 Daly, 495, 512.

Goods and merchandise are commodities bought and sold by merchants and buyers. *Chamberlain v. Transp. Co.* (N. Y.) 45 Barb. 218, 223; *Dyott v. Letcher*, 29 Ky. (6 J. J. Marsh.) 541, 543; *Vasse v. Ball* (Pa.) 2 Yeates, 178, 182.

Where an underwriter insures goods, he has no right to expect that they shall be all of one species. *Wilkinson v. Hyde*, 3 O. B. (N. S.) 30, 44.

The word "goods" imports that the things which it is used to specify are chattels. *Pickett v. State*, 60 Ala. 77, 78.

#### **As all personal property.**

"The words 'goods and chattels,' at common law, include all personal property in possession." *State v. Brown* (Tenn.) 9 Baxt. 53, 54, 40 Am. Rep. 81; *Hornblower v. Proud*, 2 Barn. & Ald. 327, 335.

"The term 'goods,' when used in contradistinction to 'real estate,' doubtless includes all kinds of personal property." *Curtis v. Phillips*, 5 Mich. 112, 113 (cited in *St. Joseph Hydraulic Co. v. Wilson*, 33 N. E. 113, 115, 133 Ind. 465).

"Goods," as applied to bequests or devises, taken simply and without qualification, comprise the whole personal estate, of every description. *Kendall v. Kendall*, 4

*Russ*, 360, 370; *Dowdell v. Hamm* (Pa.) 2 Watts, 61, 65; *Chamberlain v. Western Transp. Co.*, 44 N. Y. 305, 310, 4 Am. Rep. 681; *Commonwealth v. Keller*, 9 Pa. Co. Ct. R. 253, 255.

"The words 'goods and chattels' are the most comprehensive terms of description for passing personal property by will, yet they may be restricted by the context." *Foxall v. McKenney* (U. S.) 9 Fed. Cas. 645, 646.

"Goods and chattels," as words of description in a bequest, will pass all the personal estate, but, where used after the word "furniture," restrict the articles to the same kind as mentioned; that is, articles of furniture. *Stuart v. Marquis of Bute*, 11 Ves. 656, 665.

The word "goods," in common parlance, means goods only, and not the whole personal estate. *Crickton v. Symes*, 3 Atk. 61, 62.

Act Cong. May 20, 1862, empowering the Secretary of the Treasury to prevent transportation of any goods, wares, or merchandise intended for any place under the control of the insurgents, meant every species of property which was not real estate or freehold. In *re Gay's Gold*, 80 U. S. (13 Wall.) 358, 362, 13 L. Ed. 504.

The words "goods, wares, and merchandise," as used in Crimes Act, § 24, providing that every person who shall in the night season break and enter the store, shop, etc., of another, wherein goods, wares, or merchandise are deposited, with intent, etc., shall be imprisoned, on conviction thereof, for a certain term, mean "any personal property of which a larceny may be committed, and not those goods and chattels only which are offered for sale." *State v. Brooks*, 4 Conn. 446, 449.

The word "goods," in a statute relative to the recording of mortgages of negroes, goods, and chattels, means evidently what is usually understood by "goods, wares, and merchandise." The term would not embrace horses, cattle, plate, household furniture, and the like, with sufficient clearness. *Ex parte Leland* (S. C.) 1 Nott & McC. 460, 462.

The word "goods," in the definition of "bailment," to the effect that it is the delivery of goods, etc., includes every article of movable and tangible personal property. *McCaffery v. Knapp, Stout & Co. Company*, 74 Ill. App. 80, 85; *Knapp, Stout & Co. Company v. McCaffrey*, 52 N. E. 898, 900, 178 Ill. 107, 69 Am. St. Rep. 290.

The words "goods, wares, and merchandise," in the statute of frauds, are equivalent to the term "personal property," and are intended to include whatever is not embraced by the words "lands, tenements, and hereditaments," in the preceding section

*French v. Schoonmaker*, 54 Atl. 225, 69 N. J. Law, 6.

The words "personal property," as used in Rev. St. c. 120, § 254, providing that taxes assessed on personal property shall be a lien on the personal property of the person assessed, and the words, "goods and chattels," as used in section 137, providing that in all cases the collector's warrant shall authorize the town or district collector, in case any person named in such collector's book shall neglect to pay his personal property tax, to levy the same by distress and sale of the goods and chattels of such person, are to be construed as having the same meaning, and as comprehending every species of personalty which may, under the statute, be made the subject of levy and sale under execution issued under a judgment at law. *Loeber v. Leininger*, 175 Ill. 487, 51 N. E. 703.

The word "goods," as used in the provisions of the Code punishing the receiving of stolen goods, includes money and bank notes, as well as all other kinds of personal property. *Shannon's Code Tenn.* 1896, § 6556.

#### **As all property.**

Technically the word "goods" does not include lands or slaves, but, as used in the following devise, "and as touching my worldly goods, which it has pleased Almighty God to bless me with, I give and bequeath in the manner and form following," is construed to include all the testator's property of every description. *Bailey v. Duncan's Ex'x*, 18 Ky. (2 T. B. Mon.) 20, 22.

#### **Advancements.**

The term "goods and chattels," used in reference to the goods and chattels as to which a decedent dies intestate, does not include advancements made by the decedent to his children in his lifetime. *Knight v. Oliver (Va.)* 12 Grat. 33-37.

#### **Alcohol.**

The words "goods, wares, or merchandise," as used in Gantt, Dig. § 1618, providing for the punishment of every person who shall on Sunday keep open any store, or retail any goods, wares, or merchandise, should be construed to include alcohol. *Bridges v. State*, 37 Ark. 224, 225.

#### **Animals.**

The term "goods" includes things inanimate, furniture, farming utensils, corn, etc. *Pippin v. Ellison*, 34 N. C. 61, 62, 55 Am. Dec. 403; *Vaugun v. Town of Murfreesborough*, 2 S. E. 676, 677, 96 N. C. 317, 60 Am. Rep. 413.

"It is said in *Burrill's Law Dictionary* that the word 'goods' strictly seems to be applicable only to inanimate objects; being

in this respect less comprehensive than 'chattels,' which includes animals." *St. Joseph Hydraulic Co. v. Wilson*, 33 N. E. 113, 115, 133 Ind. 465.

"Goods," as used in a lease giving the landlord a lien on all goods in a store for rent unpaid, could include only inanimate movables, the term being less comprehensive than "chattels," and hence such term could not include animals. *Van Patten v. Leonard*, 55 Iowa, 520, 8 N. W. 334, 338.

The term "goods or articles" includes a horse, as used in Gen. St. p. 503, § 15, relating to the receiving of stolen goods or articles. *State v. Ward*, 49 Conn. 429, 442.

The word "goods," as used in Rev. St. U. S. § 3460, providing for the seizure of goods as subject to forfeiture under provisions of the internal revenue law, covers a team of mules used for the removal of spirits with intent to defraud the government. The term "goods" has often been construed to cover animate property. *Pilcher v. Faircloth*, 33 South. 545, 546, 135 Ala. 311 (citing *Hafley v. Patterson*, 47 Ala. 271; *Weston v. McDowell*, 20 Mich. 353).

Within a statute making goods and chattels the subject of larceny, a dog is included. *Rockwell v. Oakland Circuit Judge (Mich.)* 94 N. W. 378, 379.

The term "goods" is commonly applied to inanimate movables, but its full significance, especially in its legal sense, has a larger or more extensive application. As defined by Webster, it signifies movables, household furniture, personal or movable estate, as horses, cattle, utensils, etc. The primary meaning of the term refers to movable property, whether animate or inanimate. As used in Gen. St. p. 320, § 13, providing that the action of replevin may be maintained for goods unlawfully taken or retained from the owner thereof, it includes both animate and inanimate movable property. *Eddy v. Davis*, 35 Vt. 247.

While the word "goods" may in some instances include animals, yet such is not the case where the context or the particular enumeration of articles would seem to exclude them. *Bouvier* says the term "goods" is not as wide as "chattels," for it applies to inanimate objects, and does not include animals. A fire and storm insurance company, authorized to insure certain described properties—personal property, goods, wares, merchandise, and effects, etc.—held not authorized to insure horses. *Knapp v. North Wales Mut. Live Stock Ins. Co.*, 11 Montg. Co. Rep. 119, 121.

#### **Appurtenances or equipments of ship.**

The term "goods, wares, or merchandise," within the meaning of the revenue act of 1799, c. 128, § 50, requiring a permit before

a ship shall land goods, wares, or merchandise, does not include appurtenances or equipments of a ship, as a chain, cable, or other articles purchased bona fide for the use of the ship. *United States v. Chain Cable* (U. S.) 25 Fed. Cas. 391, 392.

#### **Baggage.**

A marine policy on goods means only such as are merchantable, and does not include baggage. *Vasse v. Ball* (Pa.) 2 Yeates, 178, 182.

The word "goods," as used in 1 Brightly, Dig. p. 834, § 1, providing that no owner or owners of any vessel shall be liable for loss or damage which may happen to any goods or merchandise which shall be shipped on such vessel, by any fire happening on such vessel, unless caused by the design or neglect of its owners, is to be construed in its broad sense, as meaning personal property, and hence includes the personal baggage of a passenger. *Chamberlain v. Western Transp. Co.*, 44 N. Y. 305, 310, 4 Am. Rep. 681.

#### **Bank notes.**

Bank notes are not goods, wares, and merchandise, in the meaning of an act incorporating a company as a carrier of goods, wares, and merchandise. *Sewall v. Allen* (N. Y.) 6 Wend. 335, 355.

Bank notes are personal goods. In form, a bank note is a chose in action, and, when dishonored, becomes the evidence of a right of action; a document for a debt. Bank notes have been held to be within the terms of "goods, wares, and merchandise." *United States v. Moulton* (U. S.) 27 Fed. Cas. 11, 12.

#### **Bonds.**

A devise of all the testator's goods passed a debt by bond. *Anon.*, 1 P. Wms. 267.

The words "goods, wares, and merchandise," in the sixth section of the statute of frauds, are equivalent to the terms "personal property," and intended to include whatever is not embraced by the phrase "lands, tenements, and hereditaments," and include a bond and mortgage. *Greenwood v. Law*, 26 Atl. 134, 55 N. J. Law (26 Vroom) 108, 19 L. R. A. 688. See, also, *Allen v. Sewall* (N. Y.) 2 Wend. 327, 339.

The words "goods and movables," when used in a will bequeathing testator's goods and movables, will include bonds belonging to the testator, unless there is something in the context of the whole will which will restrain such a construction. *Jackson v. Robinson* (Pa.) 1 Yeates, 101, 102, 1 Am. Dec. 293.

The words "goods or chattels," as used in Rev. Laws 174, § 2, providing that, where  
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any testator or intestate in his lifetime shall have taken or carried away or converted to his own use the goods or chattels of any person, such person could maintain the same action against the executors and administrators of such testator or intestate as he could have maintained against such testator or intestate, should be construed to include bonds and other documentary securities, for they are bona notabilia, and therefore property, though there is a distinction between rights and credits and goods and chattels. *Terhune v. Bray's Ex'rs*, 16 N. J. Law (1 Har.) 53, 54.

#### **Building.**

A declaration to recover for "goods, wares, and merchandise" sold and delivered should be construed to include a building which was movable property belonging to the plaintiff and the other proprietors. "The word 'goods,' as a technical term of the law, is nomen generalissimum, and has a very extensive meaning. In a strict sense, as the word is understood in the construction of penal statutes, it is limited to movables belonging to the property of some person, which have an intrinsic value, and does not include securities, which are not valuable in themselves, but merely representing value. In a will, where there is nothing to restrain its operation, it includes all the personal estate of the testator. In its legal sense, as answering to the law term 'biens,' it includes all tangible personal property, even including animals, and is broad enough to include a building standing on the land of another." *Keyser v. School Dist. No. 8 in Sunapee*, 35 N. H. 477, 483.

#### **Chattel distinguished.**

"Goods, wares, and merchandise" means all movable property that is ordinarily bought and sold, while "chattels" is a more comprehensive term, and includes animate property. *Smith v. Wilcox*, 24 N. Y. 353, 358, 82 Am. Dec. 802; *Chicago & A. R. Co. v. Thompson*, 19 Ill. (9 Peck) 578, 583; *Dowdel v. Hamm* (Pa.) 2 Watts, 61, 63, 65; *Pippin v. Ellison*, 34 N. C. 61, 62, 55 Am. Dec. 403. See, also, *Pearce v. City Council of Augusta*, 37 Ga. 597, 599.

#### **Chose in action.**

"Goods" is a general term, of wide import, including all personal property, not only corporeal, but choses in action, such as bills, notes, etc. *Epping v. Robinson*, 21 Fla. 36, 52; *Dowdel v. Hamm* (Pa.) 2 Watts, 61, 63, 65; *Gibbs v. Usher* (U. S.) 10 Fed. Cas. 303, 304; *Allen v. Sewall* (N. Y.) 2 Wend. 327, 339.

"Goods or chattels" includes, when taken in its broadest sense, any variety of personal property, whether corporeal or incorporeal; but the sense of the term may be

so limited by the context as to refer to corporeal personality only—as, for instance, in Rev. St. art. 2546, providing that gifts of goods or chattels shall not be valid unless actual possession be acquired by the donee, choses in action are construed not to be goods or chattels. This construction apparently proceeds on the ground that the owner of a chose in action, desiring to pass it to another, cannot give actual possession; written evidence of the right being, at best, but evidence of title in the donee, not possession of the property itself. *Cowen v. First Nat. Bank*, 63 S. W. 532, 533, 94 Tex. 547.

The term "goods and chattels," as used in Code 1873, p. 897, §§ 4-6, requiring every contract in writing made in respect to real estate or goods and chattels in consideration of marriage to be in writing and to be recorded, means such property and such goods and chattels as are visible, tangible, or movable. It does not include a mere chose in action. *Kirkland v. Brune* (Va.) 31 Grat. 126, 131.

The term "goods and chattels," as used in the recording act, means only personal property which is visible, tangible, and movable, and does not embrace choses in action. *Tingle v. Fisher*, 20 W. Va. 497, 511.

Choses in action are not, in the hands of an assignee thereof, "goods, effects or credits" of the assignor, so as to be liable to trustee process. *Lupton v. Cutter*, 25 Mass. (8 Pick.) 298, 300.

All the definitions of the word "goods" refer to things that are visible and in possession, while the definition of "chose in action" refers to something invisible, intangible, as a debt or demand or right of action. The statute of frauds, relating to the sale of goods, wares, and merchandise for the price of \$50 or upwards, has no application to the sale or contract to transfer a mere chose in action, such as a debt or evidence of a debt. *Vawter v. Griffin*, 40 Ind. 593, 601, 602.

A debt, though incapable of manual delivery, is "goods or effects," within Code Civ. Proc. § 657, relative to attachments. *Minor v. Gurley*, 80 N. Y. Supp. 596, 597, 89 Misc. Rep. 662.

An instrument in these words, "Pay to John Low or bearer \$1,500 in n. Myer's bills or yours," is not an order for the payment of money or the delivery of goods. *People v. Farrington* (N. Y.) 14 Johns. 348.

#### **Dredge, scow, or yacht.**

Dredges and scows are vessels, and are not dutiable as "goods, wares, and merchandise," under the tariff laws. The International (U. S.) 83 Fed. 840.

A pleasure yacht built in a foreign country, and purchased there by an American cit-

izen, is not dutiable as "goods, wares, and merchandise," after her entering port in this country. *The Conqueror*, 17 Sup. Ct. 510, 512, 166 U. S. 110, 41 L. Ed. 937.

#### **Execution.**

An execution in the hands of a sheriff for service is not "goods, effects, or credits" of the execution creditor, within the meaning of the statute empowering a creditor to attach the goods, effects, and credits of his debtor in the hands of a third person, where they may be found, and who for this purpose is considered as a trustee of the defendant. *Sharp v. Clark*, 2 Mass. 91, 93.

#### **Farm produce.**

The phrase "goods, wares, and merchandise," as used in Acts 1796, § 5, providing that all actions or suits founded upon accounts for goods, wares, or merchandise sold and delivered, etc., shall be commenced and sued within 12 months, as to the cause of such action or suit, etc., includes only those articles which are sold or kept for sale by a merchant; that which is sold by a merchant in the course of his business as such. It would not include property and produce sold by a farmer. *Dyott v. Letcher*, 29 Ky. (6 J. Marsh.) 541, 543.

Act April 17, 1846, § 1, forbidding the sale of goods, wares, and merchandise by any person as a hawker or peddler, was not intended to include farm products in the hands of farmers. *Commonwealth v. Gardner*, 19 Atl. 550, 551, 133 Pa. 284, 7 L. R. A. 666, 19 Am. St. Rep. 645.

#### **Fixtures.**

The words "goods, chattels, and effects," as used in a declaration in trespass for breaking and entering plaintiff's dwelling house and taking "goods, chattels and effects," would include fixtures. Fixtures may be taken in execution under a *fi. fa.* containing similar words. *Pitt v. Shew*, 4 Barn. & Ald. 206, 207.

#### **Flour.**

"Goods," as used in the statute of frauds, would include flour not prepared or in a state capable of immediate delivery. *Garbutt v. Watson*, 5 Barn. & Ald. 613.

#### **Gravel.**

Gravel falls under an original description in the act of Parliament (35 Geo. III) giving the commissioners for making the Eau Brink navigation a toll on "goods, wares, and merchandise." *Coulton v. Ambler*, 13 Mees. & W. 403, 417.

#### **Growing crops.**

Growing periodical crops are not goods and chattels, within the meaning of the statute of frauds, of which a sale, in order to be valid as against the creditors of the vendor,

must be accompanied by an immediate delivery and continued change of possession. *Davis v. McFarlane*, 87 Cal. 634, 638, 99 Am. Dec. 340.

#### Household furniture.

A marine policy on goods means only such as are merchantable, and does not include household furniture. *Vasse v. Ball* (Pa.) 2 Yeates, 178, 182.

#### Interest in unpatented invention.

The phrase "goods, wares, or merchandise," as used in the statute of frauds, requiring contracts for the sale of goods, wares, and merchandise to be in writing, does not include an interest in an unpatented invention. *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459.

#### Leasehold.

The expression "goods and chattels" means goods and chattels personal, and not real. Hence it does not include a leasehold. *Putnam v. Westcott* (N. Y.) 19 Johns. 73, 76.

A mortgage of leasehold interest does not come within the provision of Laws 1833, c. 279, requiring mortgages of goods and chattels to be filed. *State Trust Co. v. Casino Co.*, 41 N. Y. Supp. 1, 2, 18 Misc. Rep. 327.

"Goods and effects," within the meaning of Act June 13, 1836, relating to the service of foreign attachments on the goods and effects of the debtor, cannot be construed to include leaseholds of lands, and buildings on leaseholds. The meaning of the words is free from all ambiguity or doubt, whether used in the popular, lexicographical, or legal sense. The word "goods" is always used to designate wares, commodities, and personal chattels. The word "effects" is the equivalent of the word "movables." *Appeal of Vandergrift*, 88 Pa. 126, 129.

#### Land.

Under a statute authorizing the institution of trustee process to reach goods, effects, and credits of the debtor, it is held that land fraudulently conveyed is neither goods, effects, nor credits, within the statute. *Hunter v. Case*, 20 Vt. 195, 197.

Goods are valuable possessions or pieces of property; effects are goods, movables, or personal estate; and so goods and effects have never been held to include real estate, and will thus be construed as used in the treaty of 1873 between the United States and Sweden (page 1042, *Treaties and Conventions between the United States and Other Powers*), providing that subjects of the contracting parties may freely dispose of their goods and effects, either by testament, donation, or otherwise. *Meier v. Lee*, 76 N. W. 712, 715, 106 Iowa, 306.

#### Lottery tickets.

"Anything made the subject of traffic and sold as lottery tickets usually are, the right of property in which passes by the mere delivery thereof by the seller to the buyer, may properly be construed as coming under the denomination of 'goods, wares, and merchandise.'" *Yohe v. Robertson* (Pa.) 2 Whart. 155, 162.

#### Money.

"Goods and chattels," as used in Swan's St. 273, providing that if any person shall receive or buy any goods and chattels that have been stolen, with intent to defraud the owner, he shall be punished, includes coin. *Hall v. State*, 3 Ohio St. 575, 576.

The word "goods" has the same signification as the word "bona" in the civil law, under which name is comprehended almost every species of personal property. Act July 13, 1861, providing for the forfeiture of all goods coming from or proceeding to the insurrectionary districts, includes gold coin. *United States v. Candace* (U. S.) 25 Fed. Cas. 279, 280.

Code Va. 1887, § 20,655, provided that an action of trespass or trespass on the case may be maintained by or against a personal representative for the taking or carrying away of any goods, etc. It was held that the term "goods" is broad enough to include money, and, as used in the statutes, must be held to be so inclusive, for it would be strange that a cause of action for taking and carrying away 1,000 pieces of silver should survive the death of the defendant, while a like action for taking and carrying away \$1,000 in money should not. In *The Elizabeth & Jane* (U. S.) 8 Fed. Cas. 473, Mr. Justice Story said: "It cannot be doubted that money, and, of course, foreign coin, falls within the description of goods, at common law." *Patton v. Brady*, 22 Sup. Ct. 493, 494, 184 U. S. 606, 46 L. Ed. 713.

"Goods," as used in 1 St. 665, requiring a permit from the customhouse for the landing of goods, wares, and merchandise, includes coin. "It cannot be doubted that money, and, of course, foreign coin, falls within the description of goods, at common law; and a legacy of goods would, ex vi termini, carry money or coin, unless that construction were repelled by the context. And coin, dollars, and bullion are considered in commercial transactions as goods and merchandise, and may be insured as such in a policy of insurance." *The Elizabeth & Jane* (U. S.) 8 Fed. Cas. 473, 474.

"Goods and chattels," as used in an indictment charging the breaking into the house of a certain person with intent to steal the goods and chattels of such person, means the personal goods of such person, and in-



cludes bank bills and money. *Garfield v. State*, 74 Ind. 60, 65.

Rev. St. p. 279, § 72, making it a misdemeanor to receive or buy any stolen goods or chattels, cannot be construed to include bank notes. *State v. Calvin*, 22 N. J. Law (2 Zab.) 207.

"Goods, wares, and merchandise," as used in the statute of frauds requiring contracts of sale of goods, wares, and merchandise to be reduced to writing, does not include United States treasury checks. *Beers v. Crowell* (Ga.) Dud. 28, 29.

"Goods," as used in *Swan & C. Rev. St.* 105, § 1, providing that an action may be instituted against a steamboat company for damages arising out of any contract for the transportation of goods or persons, etc., means only such goods as the officers of the boat have power to contract for the transportation of, and does not include money or bank bills, since the owners of a steamboat are not liable for the loss of money received to be carried unless they have in some way assented, expressly or impliedly, to the practice of the boat's doing that kind of business. *Pumphry v. Steamboat Parkersburgh* (Ohio) 2 West. Law Month. 491, 492.

The word "goods" is of limited signification, and does not include money, so that under a statute authorizing the attachment of goods, effects, and credits by trustee process, money cannot be attached. *Morrill v. Brown*, 32 Mass. (15 Pick.) 173, 176.

A statute relating to the tax levied on goods, wares, or merchandise cannot be construed to include money in bank. *Boston Investment Co. v. City of Boston*, 33 N. E. 580, 581, 158 Mass. 461.

"Goods," as used in Code 1880, § 1178, declaring that no transfer of goods or chattels between husband and wife shall be valid, as against any third person, unless such transfer or conveyance be in writing, and acknowledged and filed for record as a mortgage or deed of trust of such property is required to be filed for record, etc., does not include money. *Leinlauf v. Barnes*, 5 South. 402, 405, 66 Miss. 207.

#### Music.

The words "goods, wares, and merchandise," in Acts 1852-53, § 30, declaring that no person shall sell any goods, wares, or merchandise, without obtaining a license, except, etc., include music, as the word is frequently used to import a kind of merchandise which is found exhibited for sale in the store of nearly every bookseller or stationer in the country; and an indictment charging the sale of music without a license is sufficient, without the use of words explaining the meaning of the term "music" as there used.

*Commonwealth v. Nax* (Va.) 13 Grat. 780, 791.

#### Newspaper.

The words "goods, wares, and merchandise," as used in a statute prohibiting the sale of "goods, wares, and merchandise" on Sunday, include all movable property that is ordinarily bought and sold, and include a newspaper which is made the subject of sale. *Smith v. Wilcox*, 24 N. Y. 353, 358, 82 Am. Dec. 302.

#### Note.

Act Nov. 18, 1789, providing for the punishment of a person who shall have gotten into his possession the money or goods of another, should be construed to include a promissory note of a bank. *Commonwealth v. Swinney*, 1 Va. Cas. 146, 149, 5 Am. Dec. 512.

The words "goods, wares, and merchandise," in the statute of frauds, requiring agreements for the sale of goods, wares, and merchandise to be in writing, do not embrace every variety of personal property, and do not include a promissory note. A promissory note is neither goods, wares, nor merchandise, in the common and ordinary sense of those terms. It is only by giving them a broad and unusual signification that bills of exchange and notes of hand can be included, and there is no occasion for extending the construction so as to include matters which are not within the well-understood meaning of the statute. *Whittemore v. Gibbs*, 24 N. H. (4 Post.) 484, 488.

Within the meaning of Rev. St. c. 81, § 8, giving the court jurisdiction to hear in equity all suits to compel the redelivery of any goods or chattels whatsoever taken and detained from the owner thereof, and secreted or withheld, so that the same cannot be replevied, notes and other securities for debts are goods and chattels, and may be recovered in such an action. *Clapp v. Shephard*, 40 Mass. (23 Pick.) 228, 230.

#### Right to office.

"Goods and chattels" include personal property, choses in action, and chattels real. The right to an office is neither personal property, nor a chose in action, nor chattels real, in the sense used in the law. *State v. Moores*, 76 N. W. 530, 533, 56 Neb. 1.

#### Safe.

A bill of sale from an insolvent debtor to his creditor, describing the property as all my stock of "goods, wares, and merchandise in my store," will include an iron safe, if such was the intention of the parties. *Rankin v. Vendiver*, 78 Ala. 562, 566.

A chattel mortgage given by a merchant on goods in the store includes only the mer-

chandise and commodities kept on hand for the purpose of sale, and does not include a safe kept in his store, not for sale, but for his own private use. The term "goods," as used in this chattel mortgage, cannot be given the broad meaning that is given when the word is used in contradistinction to "real estate," when it includes all kinds of movable personal property. *Curtis v. Phillips*, 5 Mich. 112, 113.

#### **Shares of stock.**

Shares of corporate stock are goods, wares, and merchandise, within the meaning of the statute of frauds, requiring a sale of goods, wares, and merchandise to be in writing. *Ellison v. Brigham*, 38 Vt. 64, 66; *North v. Forest*, 15 Conn. 400, 404; *Fine v. Hornsby*, 2 Mo. App. 61, 64; *Bernhardt v. Walls*, 29 Mo. App. 206; *Colvin v. Williams* (Md.) 3 Har. & J. 38, 42, 5 Am. Dec. 417; *Ayres v. French*, 41 Conn. 142, 151; *Boardman v. Cutter*, 128 Mass. 388, 390. Contra, see *Humble v. Mitchell*, 11 Adol. & E. 205; *Southern Life Ins. & Trust Co. v. Cole*, 4 Fla. 359, 378; *Rogers v. Burr*, 31 S. E. 438, 440, 105 Ga. 432, 70 Am. St. Rep. 50; *First Nat. Bank v. Holland*, 39 S. E. 126, 129, 99 Va. 405, 55 L. R. A. 155, 86 Am. St. Rep. 898.

A statute requiring the filing of mortgages on all goods and chattels means personal property of all kinds which is capable of visible possession, and hence a mortgage of capital stock of a corporation is not within the statute. *Williamson v. New Jersey South R. Co.*, 26 N. J. Eq. (11 C. E. Green) 398, 403.

"Goods and chattels," as used in *Nix*, Dig. 294, § 7, providing that the rights, credits, moneys or effects, goods and chattels, lands and tenements, of a defendant may be attached, should be construed to include corporate stock. *Curtis v. Steever*, 86 N. J. Law (7 Vroom) 304, 306.

The phrase "goods, wares, and merchandise," as used in a city ordinance declaring that a broker is one who, for a commission, is engaged in selling or negotiating the sale of goods, wares, and merchandise, includes and comprehends shares in capital stock of incorporated companies which are the subject of common barter and sale, and which are given visible and palpable form by means of certificates, bonds, or other evidences of indebtedness. *Banta v. City of Chicago*, 50 N. E. 233, 237, 172 Ill. 204, 40 L. R. A. 611.

#### **Steam engine.**

A steam engine erected for the purpose of working a colliery, to be used by the lessee during his term, and to be held as the property of the landlord, does not come within the description of goods and chattels. *Coombs v. Beaumont*, 5 Barn. & Adol. 72 (quoting 6 Geo. IV, c. 16, § 72).

#### **Wares, commodities, and chattels.**

The word "goods," as used in the definition of a retailer as one who sells goods by small quantities or parcels, includes wares, commodities, and chattels. Said in construing a city ordinance providing for the levy and collection of a license tax on lumber dealers. *Campbell v. City of Anthony*, 40 Kan. 652, 854, 20 Pac. 492, 493.

#### **GOODS AND CHATTELS.**

See "Goods."

As property, see "Property."

#### **GOODS AND EFFECTS.**

See "Effects."

#### **GOODS HELD ON STORAGE.**

An insurance policy on a hotel and its furniture, and excepting from its operation goods held on storage, cannot be construed to include furniture, etc., stored in the hotel, to be used or consumed in the business of the hotel whenever the patronage made such use necessary; being owned by the insured, and consisting of such articles as were contemplated to be covered by the policy; the deposit being merely incidental, with a view to be used and consumed in the business of the hotel. *Continental Ins. Co. v. Pruitt*, 65 Tex. 125, 129.

#### **GOODS IN TRUST.**

See "Held in Trust."

#### **GOODS KEPT IN COUNTRY STORES.**

A fire policy on a stock of merchandise, described in the written part as including goods usually kept in country stores, includes gasoline, if gasoline is an article usually kept in a country store, although the policy contains a printed condition that, unless otherwise provided, it shall be void if gasoline is kept on the premises. *Yoch v. Home Mut. Ins. Co.*, 44 Pac. 189, 190, 111 Cal. 503, 34 L. R. A. 857.

An insurance policy on a building, and also on a stock of goods therein, such as are usually kept in country stores, should be construed to include all articles of merchandise coming within the said description, even though it includes articles generally prohibited, except at special rates. Therefore such a policy must be construed as insuring spirits of turpentine and gunpowder, where they are articles of merchandise usually kept in country stores, as much as though these articles had been specifically mentioned as insured in the policy. *Pindar v. Kings County Fire Ins. Co.*, 86 N. Y. 648, 649, 93 Am. Dec. 544.

**GOODS OF SIMILAR DESCRIPTION.**

A duty on certain specified goods and on "goods of a similar description" means a similarity in respect to the product, and its adaptation to use, and to its uses, and not merely to the process by which it was produced. *Greenleaf v. Goodrich*, 101 U. S. 278, 283, 25 L. Ed. 845; *Schmieder v. Barney*, 5 Sup. Ct. 624, 113 U. S. 645, 28 L. Ed. 1130.

An additional duty on all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, woolen, mohair, or goats' hair, and on all "goods of similar description," not exceeding a certain value per yard, means completed fabrics, composed wholly or in part of worsted, woolen, mohair, or goat's hair, and used for dress goods, which also, as completed fabrics, possessed qualities of general appearance, character, and texture like unto, or nearly corresponding to, or generally resembling the qualities which distinguish delaines or cashmere delaines or barege delaines or muslin delaines, in determining which question the material of which the goods are composed, the method of their manufacture, their weave, their weight, their texture, their surface or finish, their appearance, their feel, their color, their uses, and their adaptation to uses, are all to be considered. The single fact that goods are used for the same purpose as delaines is not sufficient to make them goods of similar description, nor will the process of manufacture determine such question. *White v. Barney* (U. S.) 43 Fed. 474, 475.

Tariff Act 1890, par. 395, relating to the duty on "women's and children's dress goods, or goods of similar description and character," applies to gloria cloth, which is composed of silk and worsted, silk being the material of chief value. *Bister v. United States* (U. S.) 59 Fed. 452, 453, 8 C. C. A. 175.

**GOODS ON HAND.**

A contract by the proprietors of a scribbling and fulling mill, stipulating that all goods on hand should be subject to a lien for a general balance, meant goods manufactured, and not articles used incidentally in the process. The term could only apply to such goods as were frequently on hand—that is, goods on which the labor of the defendants' mill was employed; and the proprietors having received certain wool and cloth to be scribbled and fulled, and certain oil and dyeing materials to be used by the owner on the wool, for which purpose the owner had access to the oil and dyes in a room of which the proprietors kept the key, the proprietors had no lien for their general balance on the oil and dyeing materials. *Cumpston v. Haight*, 2 Bing. N. O. 449.

**GOODS, WARES, AND MERCHANDISE.**

See "Foreign Goods, Wares, and Merchandise"; "Goods."

All goods, wares, and merchandise, see "All."

**GOODYEAR RUBBER.**

"Goodyear rubber" is a term descriptive of a well-known class of goods manufactured by the process known as "Goodyear's Invention." *Goodyear India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 9 Sup. Ct. 166, 167, 128 U. S. 598, 32 L. Ed. 535.

**GOOSENECK.**

The "gooseneck" of a tender and "dead-wood" of a car are terms which designate the fixtures or parts of the respective cars which come in contact when they are being coupled. *Grannis v. Chicago, St. P. & K. C. R. Co.*, 46 N. W. 1067, 81 Iowa; 444.

**GORGE.**

"Gorge," as applied to an outlet of surface water, means a defile between hills or mountains; that is, a narrow throat or outlet from a district of country. *Gibbs v. Williams*, 25 Kan. 214, 217, 37 Am. Rep. 241.

**GOSPEL.**

According to the common and more general acceptation of the term, "Gospel" is synonymous with Christianity or the Christian religion; and a devise to be applied to the "dissemination of the Gospel at home and abroad" is sufficiently certain and specific. *Attorney General v. Wallace's Devisees*, 46 Ky. (7 B. Mon.) 611, 617.

**GOVERN.**

Other governing body, see "Other."

The power to govern implies the power to ordain and establish suitable police regulations, and, it has often been decided, authorizes municipal corporations to prohibit the use of locomotives in the public streets, when such action does not interfere with vested rights. *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 528, 24 L. Ed. 734.

**GOVERNED BY LAW.**

"To be governed by the law" is to be governed not only by a part but by the whole law relating to the subject. And the term in Act 1883, reading, "In making loans and disbursing interest collected, the trustee and auditor of the state shall be governed by the law now in force regulating the manner

of making loans of the University fund," was so used. *Fisher v. Brower*, 64 N. E. 614, 618, 159 Ind. 139.

### GOVERNING BOARD.

In the act relating to the authority of municipal corporations to issue bonds, the term "governing board" shall mean the selectmen of a town, the commissioners of a village, district, or precinct, and the school board of a school district. Pub. St. N. H. 1901, p. 491, c. 43, § 1.

The expressions in Laws 1902, c. 195, "the common council or other governing board," and "the common council or other governing body," used with reference to cities, were used in order to include a general board or body, not styled a common council; and, as applied to a city governed by a board of aldermen, such board was the governing body. Dillon on Municipal Corporations says: "A city is a corporation with a governing body usually styled the 'council,' which council, he says, is in some instances composed of two bodies, the members being called the 'aldermen,' 'councilmen,' or 'trustees,' and that the governing body of the municipal corporation may be either the councilmen or the aldermen, as they may be styled in the charters in respective cities. *Fitzgerald v. City of Jersey City*, 53 Atl. 819, 821, 69 N. J. Law, 152.

### GOVERNMENT.

See "Arbitrary Government"; "De Facto Government"; "Foreign Government"; "Military Government"; "Popular Government"; "Provisional Government"; "Town Governments."

The word "government" is a synonym of "management," and means control. *City of St. Louis v. Howard*, 24 S. W. 770, 771, 119 Mo. 41, 41 Am. St. Rep. 630.

Government is the exercise of authority in the administration of the affairs of a state, community, or society; the authoritative direction and restraint exercised over the actions of men in communities, societies, or states. *People v. Pierce*, 18 Misc. Rep. 83, 85, 86, 41 N. Y. Supp. 858 (citing Cent. Dict.).

"In a political sense, 'government' signifies that form of fundamental rules by which the members of a body politic regulate their social action, and the administration of public affairs according to established constitutions, usages, and laws." *Winspear v. District Tp. of Holman*, 37 Iowa, 542, 544.

"Government is the ligament that holds the political society together, and when that is destroyed the society, as a political body, is dissolved. It is the public political au-

thority which guides and directs the body politic, or society of men called a 'state,' united together to promote their safety and advantage by means of their union." *Thomas v. Taylor*, 42 Miss. 651, 706, 2 Am. Rep. 625.

"Government" is a very comprehensive term, and one of the most important subjects included in it is that of finances, including assets in property as well as in money. In re Sugar Notch Borough, 43 Atl. 985, 986, 192 Pa. 349.

As used in Acts 1865-66, pp. 217, 220, consolidating certain railroads under a new name, and providing that the new road should, for its government, be entitled to all the powers and privileges, and subject to all the restrictions and liabilities, conferred and imposed on one of the railways consolidated, naturally "government" means regulation and control, and was not used as intending or imposing a limitation on the powers and privileges of the new corporation. In reality, it neither adds to nor takes from the force of the other words, and simply implies that the new corporation shall have the same charter rights and privileges, and be subject to the same charter restrictions and liabilities, as the old company. *Tennessee v. Whitworth*, 6 Sup. Ct. 649, 653, 117 U. S. 139, 29 L. Ed. 833.

#### State distinguished.

In discussing the question as to the force of an act of the Legislature not authorized by the Constitution, the court, in *Polindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 914, 29 L. Ed. 185, say the distinction between the government of the state and the state itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical, and as ordinarily the acts of the government are the acts of the state, because within the limits of its delegation of power, the government of the state is generally confounded with the state itself. The state itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of its agency, a perfect representative. This same distinction is to be observed in determining the effect of the acts of a Governor as binding the state. *Grunert v. Spalding* (Wis.) 78 N. W. 606, 613.

### GOVERNMENT CONTRACT.

A government office is different from a government contract. The latter, from its nature, is necessarily limited in its duration and specific in its objects. The term "office" has reference to functions conferred by public authority, and for a public purpose. *Moll v. Shliss*, 25 South. 141, 142 51 La. Ann. 290.

A government contract is different from a government office, since, from its nature, it is necessarily limited in its duration and specific in its object. The terms agreed upon define the rights and obligations of both parties, and neither has the right to depart from them without the consent of the other, while an office is a public situation or employment conferred by the appointment of the government; the term embracing the idea of tenure, duration, emolument, and duties. *United States v. Hartwell*, 73 U. S. (6 Wall.) 385, 393, 18 L. Ed. 830.

#### GOVERNMENT LANDS.

St. c. 75, § 3, providing for taxation of improvements on government lands, means improvements made by homestead settlers and entrymen on their respective homestead claims. *Crocker v. Donovan*, 30 Pac. 374, 878, 1 Okl. 165.

#### GOVERNMENT OFFICE.

A "government office" is defined to be a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. In re House Bill No. 166, 21 Pac. 473, 9 Colo. 628.

#### GOVERNMENT OFFICER.

Under the term "officer of the government," as used in the chapter defining and punishing the misapplication of public money, are included the State Treasurer and all other heads of departments who may receive or keep in their care public money of the state, tax collectors, and all other officers who by law are authorized to collect, receive, or keep money due to the government. *Pen. Code Tex.* 1895, art. 100.

A clerk in the office of a district attorney is not a government officer, so as to make him a creditor of the government, and authorizing him to maintain an action for his pay. *United States v. McDonald* (U. S.) 72 Fed. 898, 900, 21 C. C. A. 347.

#### GOVERNMENTAL POWER.

There exists in each state the power, by appropriate enactments not forbidden by its own Constitution or the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good; and this is so whether it is called police, governmental, or legislative power. *Lake Shore & M. S. R. Co. v. Ohio*, 19 Sup. Ct. 465, 470, 173 U. S. 285, 43 L. Ed. 702.

#### GOVERNMENTAL PURPOSES.

Const. § 170, provides that "public property used for public purposes is exempt from taxation." "Public property," as here used, has been construed to mean such property as is necessarily used for governmental purposes. "Governmental purposes," as used in this sense, can only mean the punishment for crime, for prevention of a wrong, the enforcement of a private right, or in some manner preventing wrong from being inflicted upon the public or an individual, or redressing some grievance, or in some way enforcing a legal right or redressing or preventing a public individual injury. *City of Owensboro v. Commonwealth*, 49 S. W. 320, 323, 105 Ky. 344, 44 L. R. A. 202.

#### GOVERNOR.

A governor is a mechanical appliance contained within a gasometer, which regulates the pressure of the gas therein. *Consolidated Gas Co. v. City of Baltimore*, 62 Md. 588, 591, 50 Am. Rep. 237.

#### GOVERNOR OF STATE.

"Governor," as used in *Bat. Rev. St. c. 35, § 8*, regulating acknowledgments of foreign deeds, and providing that the certificate of a certain judge, with the certificate of the Governor of the state or territory, annexed to such deed, that he was such judge, should be sufficient to admit the deed to probate and registration in North Carolina, should be construed as meaning the chief executive of a state or territory, and to include the chief of the Cherokee Nation; and hence the certificate of the chief of the Cherokee Nation, under its great seal, that a certain judge, before whom the probate of the deed is taken is such judge, etc., is sufficient to entitle a deed to probate and registration. *Whitsett v. Forehand*, 79 N. C. 230.

The words "Governor of the state," as used in a complaint alleging that a certain person, "Governor of the state," claimed an interest in the mortgaged premises subsequent to the plaintiff's lien, are merely descriptio personæ, and have no more signification than any other title or description that might have been given. They certainly do not show that he is sued in his official capacity, as chief magistrate, or that he represents any interest which concerns the state. The fair inference is that such person is a subsequent mortgagor, or in some other way personally interested in the mortgaged premises, or interested in the mortgaged property, as trustee or otherwise. The fact that he is Governor will not prevent a foreclosure of the order, or deprive the court of the power of making a decree barring his equities in the real estate. *Bridgeport Sav. Bank v. Randall*, 15 Wis. 541.

The words "the Governor" are equivalent to "the executive of the state," or "the person having the executive power." Code W. Va. 1899, p. 133, c. 13, § 17; Code Va. 1887, § 5; Code Supp. Va. 1898, § 5.

## GRACE.

See "Days of Grace"; "Free of Grace"; "Of Grace."

## GRADE.

A grade is a step in a series; a rank. *Schuetze v. United States* (U. S.) 24 Ct. Cl. 299, 305.

Grade, as defined by lexicographers, is a degree, or rank, in order or dignity—a step or degree in any ascending series. *People v. Rawson* (N. Y.) 61 Barb. 619, 631.

### In army or navy.

The term "grade," in reference to officers of the army and navy, is a step or degree in either office or rank, and has reference to the divisions of the one with the other, or both, according to the connection in which the word is employed. *Wood v. United States* (U. S.) 15 Ct. Cl. 151, 160.

Rev. St. § 1588 [U. S. Comp. St. 1901, p. 1086] provided that, on the retirement of a naval officer, his pay shall be equal to "one-half his sea pay provided for the grade or rank held by him at the time of his retirement." In the navy there are grades for duty, for honor and for pay—some by name and others by description. A lieutenant has the grade of his class, and also a grade in his class upon which his pay is ascertained, dependent upon the length of his own personal service. The one is called a grade in the law, the other is only described as such. The sea pay of a lieutenant during the first five years of service is \$2,400, and during the second five years \$2,600; and, where a lieutenant retired before he had served as such for five years, his pay must be computed upon the former basis. *McClure v. United States* (U. S.) 18 Ct. Cl. 347, 348.

Rev. St. § 1588 [U. S. Comp. St. 1901, p. 1086], authorizing the retirement of navy officers after a certain service at a compensation based on their grade or rank, was construed to include all navy officers, whether they were classified according to duty, office, or title, according to relative importance or honor, or according to compensation. "All these classes come within the normal meaning of the words 'grade and rank.' The law designates some of them as grades and ranks by name; others only by description." *Rutherford v. United States* (U. S.) 18 Ct. Cl. 839, 848.

The periods of five-years service mentioned in Rev. St. § 1556 [U. S. Comp. St.

1901, p. 1067], for increase of pay, are "grades," within the meaning of section 1588 [U. S. Comp. St. 1901, p. 1086], fixing the pay of retired officers at 75 per cent. of the sea pay of the grade or rank held at the time of retirement. *Thornley v. United States* (U. S.) 18 Ct. Cl. 111, 115.

### Of crime.

Grades of crime in legal parlance are always spoken of and understood as higher or lower in grade or degree according to the measure of punishment attached and meted out on conviction, and the consequences resulting to the party convicted. Punishments are attached by law to offenses according to what is deemed to be their heinousness and their injurious consequence upon society. In this way they are ranked and graded, and by this rule the rank or grade of a crime or of a class of crimes, as of a higher or lower grade, is determined. *People v. Rawson* (N. Y.) 61 Barb. 619, 631.

### Of employment.

"Grade," as used in Laws 1893, p. 120, § 2, providing that co-employees to be fellow servants must be in the same grade of employment, means the rank or relative positions occupied by the employees while engaged in the common service. *Gulf, C. & S. F. Ry. Co. v. Warner*, 35 S. W. 364, 365, 89 Tex. 475.

"Grade," as used in relation to employment, means the rank or relative positions occupied by the employees while engaged in the common service. *Gulf, C. & S. F. Ry. Co. v. Warner*, 35 S. W. 364, 365, 89 Tex. 475.

### Of lumber.

"Grades," as used in an agreement to pile grades of lumber separately, as might be designated, refers to the quality into which lumber is classified. *Tompkins v. Gardner & Spry Co.*, 87 N. W. 43, 44, 69 Mich. 58.

In an action involving the question whether certain lumber ordered and charged for as "No. 3 siding" was in fact No. 3 or No. 4 siding, where the witnesses and the court sometimes used the word "grade" to designate the difference between the different kinds of lumber, and it was objected that the word "grade" really distinguished only a quality, and not a kind, the court said: "We can see no difference in the words themselves, as expressive of the same idea. The word 'grade' is perhaps somewhat more technical, but it is perfectly manifest that the classification of the lumber into numbered grades, as Nos. 1, 2, 3, and 4, was, in the trade, a practical division of it into different kinds. At any rate, this was the sense in which the witnesses and the court used the word 'grade,' and the jury could not be misled by it. It is a mere play upon words to say that, because 'grade' means also 'quality,' therefore only quality

was meant when the word 'grade' was used. It is true that No. 4 siding was, in quality, inferior to No. 3, and this was necessarily developed in the examination of the witnesses; but that circumstance does not alter, but, rather, confirms, the fact that, in the trade, No. 3 siding was one kind, and No. 4 another." *Whitehall Mfg. Co. v. Wise*, 13 Atl. 298, 299, 119 Pa. 484, 21 Wkly. Notes Cas. 268.

#### Of street.

Change of grade, see "Change."

A pleading in an action against a city alleging that it had raised the grade of a street to a certain height necessarily implies that it was done in pursuance of some ordinance, as the city could only act in such matter by ordinance. *Werth v. City of Springfield*, 78 Mo. 107, 109.

The grade of a street is the degree of its inclination from a horizontal line, and, as used in a street improvement act, includes the height of its surface above the line of its established base. *Palmer v. Burnham*, 52 Pac. 864, 120 Cal. 364.

In reference to streets, "grade" has two distinct meanings. By the first, it signifies the line of the street's inclination from the horizontal; by the second, a part of a street inclined from the horizontal. That is, it sometimes signifies the line established to guide future construction, and at other times the street wrought to the line. As used in an ordinance granting a franchise to a street railway company, in which the city reserved the right to change the grade of its streets, and provided that the company should lay its tracks in accordance with the grades as they were then, or might thereafter be, established, it signifies the line of the street's inclination as established or to be established by the city. *City of Little Rock v. Citizens' St. Ry. Co.*, 19 S. W. 17, 58 Ark. 28.

The term "grade," as used in a decree laying out a street of a certain width, and prescribing the grade along its center line, refers to the physical condition of the street when its construction is complete. *Como v. City of Worcester*, 59 N. E. 444, 177 Mass. 543.

The use of the word "graded" in a municipal ordinance directing that a street be graded includes grading, grubbing, guttering, and curbing the street. *City of Spokane v. Browne*, 36 Pac. 26, 27, 8 Wash. 317.

"Grade," as used in Gen. St. Conn. § 2708, authorizing recovery of damages for change of the grade of a highway, does not signify a level precisely established by mathematical points and lines, but the surface of the highway as it in fact exists. Any elevation or depression of this surface by the municipal authorities resulting from an at-

tempt to establish a grade is a change of grade. *McGar v. Borough of Bristol*, 42 Atl. 1000, 1002.

#### Same—Change of level.

In Act Feb. 12, 1851, incorporating the Warren Railroad Company (section 9), making it the duty of the company to "erect and keep in repair good and sufficient bridges or passages over or under the said railroad where the public or other road \* \* \* shall cross the same, and so to alter and grade said road that the passage of carriages," etc., "shall not be impeded thereby," "grade" means simply to change its level—such being its common usage—and does not confer the power to make other alterations in a road at the place of crossing, as, for instance, a fence or rails at the side of a necessary embankment. *Warren R. Co. v. State*, 29 N. J. Law (5 Dutch.) 353, 355.

Grading includes cutting as well as filling. Technically, it is the reducing of the surface of the earth to a given line fixed by the city as the grade, and may involve filling or excavating, or both, as shall be necessary to accomplish that object. *Ryan v. City of Dubuque*, 83 N. W. 1073, 1074, 112 Iowa, 284 (citing *Smith v. Washington City*, 61 U. S. [20 How.] 135, 15 L. Ed. 858).

"The ordinary meaning of the term 'grade' is the amount of difference between a grade line and a level or horizontal line, and to grade a street is to bring the surface of the street to the grade line. The extension of the level of a street by filling in the sides thereof, without raising the level of the street above the established grade, does not constitute a change or alteration of grade, within Laws 1897, c. 414, § 159, providing that a change of grade, to the extent of damages resulting therefrom, shall be deemed a taking of adjacent property for public use. *Bissell v. Village of Larchmont*, 67 N. Y. Supp. 962, 963, 57 App. Div. 61.

#### Same—Moving dirt from out to fill.

A contract between a city and a contractor whereby the latter agrees to grade, curb, fill, and remove the dirt from a certain street for a certain consideration per cubic yard for all the work mentioned, should be construed to mean the removal of dirt from one point and placing it at another on the street, to bring the surface to a certain line. "The object of the proposed arrangement was to grade a certain street; that is, to bring the surface to a certain line. To accomplish this, it may have been necessary to remove earth from one point to another within the street. The language used would cover either or all of these operations, and the word 'grade' was intended to include them all. It was to be graded for the stated consideration per cubic yard." *City of Leavenworth v. Rankin*, 2 Kan. 357, 373.

**Same—Macadamizing.**

"Grade," as used in an order of the common council to the board of public works to grade a street, should be construed to include macadamizing the street, as well as putting down stone gutters and curbing. *State v. District Court of Ramsey County*, 22 N. W. 295, 296, 33 Minn. 164.

**Same—As order.**

In St. 1871, c. 382, which provides that at any time within two years after any street or highway or other way is laid out, altered, widened, graded, or discontinued, an assessment may be made, etc., and also in section 5 of the same act, which provides that the owner of any real estate which may abut on any street which may be laid out, graded, etc., may, at any time before the estimated damages are made, give notice of his objection to the assessment, etc., "grade" refers to an order to grade.—*Hitchcock v. Board of Aldermen of Springfield*, 121 Mass. 382, 385.

**Same—Preparatory work.**

In a street-paving ordinance, providing for the establishing of a grade line, and that the streets should be so graded that the surface of the pavement, when finished, should be a certain number of inches above the grade line, it was not necessary to state specifically that the inequalities should be even, as the word "grade," taken in the context, included all that was necessary to put the roadway in condition for pavement. *McChesney v. City of Chicago*, 96 N. E. 217, 219, 201 Ill. 344.

The ordinary meaning of the term "grade" is the amount of difference between the grade line and a level or horizontal line. And to grade a street is to bring the surface of the street to the grade line. The term includes excavations and filling so as to make the surface conform to the grade line.—*Davies v. City of East Saginaw*, 66 Mich. 37, 39, 32 N. W. 919.

Pub. Laws, c. 310, provides that whenever the grade of any street or highway shall be lawfully changed, and the estate of any abutting proprietor injured thereby, the town in which such change of grade shall have been made shall be liable to pay the damages occasioned, etc. Held, that the word "grade" should be construed to involve more than to simply prepare it for travel, and that it included grades made or established by surveyors of highways. *Aldrich v. Board of Aldermen of City of Providence*, 12 R. I. 241, 244.

**Same—Widening.**

To grade a street is to reduce it, either by filling or excavation, to a fit or established degree of ascent or descent, and is not au-

thorized by an act providing for the widening of a street. *Wilcoxon v. City of San Luis Obispo*, 35 Pac. 988, 989, 101 Cal. 508.

**GRADE CROSSINGS.**

Grade crossings of railroads with common roads are places of obvious peril to the traveler upon the common road. *Giberson v. Bangor & A. R. Co.*, 38 Atl. 400, 401, 89 Me. 337.

**GRADERS' REJECTION.**

A contract for the sale of wool subject to graders' rejection means that, on the receipt of the wool by the purchasers, they should place it in the hands of persons skilled in grading wool, known as "wool graders," for the purpose of ascertaining what portion, if any, of the wool is taggy and scabby—the examination to be fleece by fleece—and, if any portion of it should be found to be taggy and scabby, the purchasers should forthwith notify the sellers, and furnish them with a certificate of the graders to that effect, giving the weight and amount of the wool found taggy and scabby, which should be deducted from the gross amount delivered to the purchasers, and returned to the sellers, and the balance of such gross amount should be paid for forthwith at the rate agreed upon; the sellers to be apprised of the result of the grading within a reasonable time from the delivery of the wool. *Merehin v. Ball*, 8 Pac. 886, 68 Cal. 205.

**GRADUAL.**

In the statement that, to constitute accretions, the additions to the soil must be gradual, and not sudden, the term "gradual" means that, though witnesses are able to perceive from time to time that the land is encroaching on the sea line, the process was such that they could not perceive the progress at the time it was made. *Mulry v. Norton*, 3 N. E. 581, 583, 100 N. Y. 424, 53 Am. Rep. 206.

**GRADUATE.**

"The word 'graduate,' philologically considered, is one of elastic import, having various meanings. Of the definitions given in the dictionaries," the one most applicable to Const. art. 206, providing that the General Assembly may levy a license tax, and in such case shall "graduate" the amount of such tax to be collected from the persons pursuing the several trades, professions, and callings, "is the following: 'To regulate by degrees; to proportion; to adjust, as to graduate punishments.' Worcester. The standards and methods of graduation, proportion, and adjustment are susceptible of infinite varia-



tion." *State v. Liverpool, L. & G. Ins. Co.*, 4 South. 504, 505, 40 La. Ann. 463.

In Const. art. 206, providing that the Legislature may levy a license tax, and in such case shall graduate the amount of such tax to be collected from the persons pursuing the several trades, professions, vocations, and callings, "graduate" should be construed as synonymous with the word "proportion," so that the section shall read that the Legislature shall proportion the amount of the tax, etc. *State v. O'Hara*, 36 La. Ann. 93, 95.

The word "graduate," as used generally, has a broad meaning. It embraces steps, degrees, grades, or intervals—that is, division into degrees, grades, or intervals; and the imposition of a license tax upon retail dealers in a certain branch of business was within the constitutional provision relative to graduating licenses, the method of which graduation is left to the Legislature. *Browne v. Selser*, 31 South. 290, 291, 106 La. 691.

#### In medicine.

"Graduate," as used in County Government Act, § 25, subd. 5, providing that the board of supervisors shall appoint some suitable graduate in medicine to attend the indigent sick or otherwise dependent poor, means one legally licensed to practice medicine and surgery under the laws of the state. Technically the word "graduate" implies a degree and regular curriculum, and Webster defines the verb "graduate" as "to pass through, or to receive a degree in, a college or university"; but the word is not used in its strict and technical sense in the statute. *People v. Eichelroth*, 20 Pac. 364, 365, 78 Cal. 141, 2 L. R. A. 770.

#### Of Naval Academy.

Under Rev. St. § 1520 [U. S. Comp. St. 1901, p. 1046], the course of instruction of cadet engineers in preparation for the duties of the engineer corps, was required to be four years at the Academy, and two years' service in naval steamers. Their pay was, before final academic examination, \$500; after final academic examination, and until warranted as assistant engineers, when on duty at sea, \$1,000. By Appropriation Act Aug. 5, 1882, c. 391, 22 Stat. 286 [U. S. Comp. St. 1901, p. 1042], the grades of engineers were fixed as chief engineers, passed assistant engineers, assistant engineers, cadet engineers (graduates), and cadet engineers. In considering the question whether engineers who had taken the four years' course at the Academy, and received their diploma, and entered upon the two years' service on naval steamers, should be classed as graduates, it should not be forgotten that the two additional years required to fill up the six-year course are not years of study, but of service. They do not go to sea in practice ships, in large numbers, mainly for educational pur-

poses. They are not subject to academic orders, nor are they expected to pursue academic studies, but to take charge of and run the engines. Their school exercises are ended, and their life work begun. They are as much in the service, and as subject to all its requirements, as they ever will be. When at the end of the two years—or, rather, at the end of a cruise, which may last three years or more—they are examined, it is for promotion only. This examination is not at the Academy, nor before the academic board, but is the same kind of examination that every officer, at each step in his advancement, is required to undergo. So emphatically does the law consider these two years as years of service, that it doubles the pay. In the universities the students who have honorably passed through the prescribed course of study and received certificates to that effect are known and catalogued as graduates. According to the dictionaries, it is a proper designation. Cadet engineers, who have successfully completed their academic course, passed the closing examination, and received from the academic board certificates to that effect, have hitherto been called in navy parlance, "graduates." In the Navy Register, under the head of "Date of Graduation" the time when they left the Academy is given. Under the head of "Sea Service since Graduation" all sea service after leaving the Academy is recorded. Congressmen, especially those on naval committees, become familiar with these registers. As every Representative in the House nominates a cadet at the Academy, and naturally takes a deep interest in him and the institution, this classification and designation could scarcely escape his attention. Under these circumstances it is not unfair to presume that in using the terms "graduate" and "undergraduate" Congress followed the definition of the schools, the dictionaries, and the Navy Register. *Leopold v. United States (U. S.)* 18 Ct. Cl. 546, 557.

In speaking of the graduates of the United States Naval Academy before Act Cong. 1882, relative to the pay of those attending at that institution, graduates are those who have completed a four years' course on land at the academy, but who have not yet completed their two years' sea service, but within the meaning of the law of 1882, which makes appropriation for the payment of attendants at the naval academy, would include only those who have completed the full six years' course, four years on land and two on the sea. *United States v. Redgrave*, 6 Sup. Ct. 444, 449, 116 U. S. 474, 29 L. Ed. 697.

#### GRADUATED.

"Graduated," means to mark with degrees, regular intervals, or divisions; and this is its use when speaking of a "grad-

uated" circle in machinery. *Chandler v. Ladd* (U. S.) 5 Fed. Cas. 452, 458 (citing *Craig*, Dict.).

### GRADUATED PHYSICIAN.

"Graduated physician," as used in Act March 6, 1877, as amended by Act March 5, 1879, prohibiting the sale of vinous or alcoholic liquors, except for medical, chemical, or sacramental purposes, on a prescription or recommendation of a graduated physician, or a regular practitioner of medicine, who has taken the oath prescribed by the act, is not equivalent to a regular practitioner of medicine. One may be a graduated physician without being a regular practitioner of medicine. *Thompson v. State*, 37 Ark. 408, 410.

### GRAIN.

See "Artificial Grains"; "Green Grain"; "Standing Grain."  
Other grain, see "Other."

Webster defines the word "grain," when used without a definitive, to mean corn in general, or the fruit of certain plants which constitute the chief food of man and beast, as wheat, rye, barley, oats, and maize. *Smith v. Clayton*, 29 N. J. Law (5 Dutch.) 357, 358; *Holland v. State*, 34 Ga. 455, 457.

"Grain" is defined in Cent. Dict. as "a small hard seed, specifically, a seed of one of the cereal plants; wheat, rye, oats, barley; corn in general; the gathered seeds of certain cereal plants in mass; also the plants themselves, whether standing or gathered." *Norris v. Farmers' Mut. Fire Ins. Co.*, 65 Mo. App. 632, 638, 639.

The term "stock, tools, hay, and grain belonging to him," in a contract to lease a farm, with various descriptions of other property, which provides that at the expiration of the term the tenants shall return to the landlord the stock, tools, hay, and grain belonging to him, does not mean the identical articles received from the landlord, but only a return in kind or value equivalent to that received. *Brockway v. Rowley*, 86 Ill. 99.

The use of the word "grain" as descriptive of the subject of a legacy is so uncertain as to render the legacy void, because the heir could liberate himself from such legacy by giving a grain of corn. *Succession of Trouard*, 5 La. Ann. 390.

#### Barley.

An indictment for setting fire to a "stack of barley" was sufficient under a statute prescribing the punishment for setting fire to a "stack of corn or grain." *Rex v. Swatkins*, 4 Car. & P. 548, 552.

#### Broom corn.

The term "grain," as used in an insurance policy, is sufficient to include broom corn in the bale, but the baled panicles, from which the seed or grain is threshed, is no more grain than the straw of wheat, oats, rye, or millet, after the grain has been threshed therefrom. *Reavis v. Farmers' Mut. Fire Ins. Co.*, 78 Mo. App. 14, 17.

#### Corn and millet hay.

The word "grain," in a fire policy, includes corn and millet hay. *Norris v. Farmers' Mut. Fire Ins. Co.*, 65 Mo. App. 632, 638.

#### Flax.

In Gen. St. 1894, § 7645, providing that, when any grain shall be delivered for storage, such delivery shall be deemed a bailment, etc., "grain" will be held to include flax, from the common custom of farmers to store flax in warehouses, and the fact that warehouse receipts use the term "grain" and "flax" interchangeably. *State v. Cowdery*, 81 N. W. 750, 751, 79 Minn. 94, 48 L. R. A. 92.

A policy of insurance, in which grain in stacks and granary on the farm was insured, includes flax. *Hewitt v. Watertown Fire Ins. Co.*, 7 N. W. 596, 55 Iowa, 323, 39 Am. Rep. 174.

#### Grain in straw.

An officer's return to a writ of attachment, describing the property attached as all the hay and grain in the barns in a particular place, should be construed to include grain in the straw. *Briggs v. Taylor*, 35 Vt. 57, 66.

#### Millet or sugar cane.

In a statute declaring that it shall not be lawful for any person in this state to make any spirituous liquors out of any corn, wheat, rye, or other grain, except for medicinal purposes, "grain" includes sugar cane seed and millet. *Holland v. State*, 34 Ga. 455, 457 (quoted in *Bethune v. State*, 48 Ga. 505, 510).

#### Oats.

A lease stipulating that if the lessor should sell the lot leased the lease should be void, but if such sale was made at any time after the lessee had planted it he should have the privilege of sowing grain on the same, should be construed to include oats. *Smith v. Clayton*, 29 N. J. Law (5 Dutch.) 357, 358.

#### Peas.

"Grain," as used in Act 1826, declaring any person guilty of larceny who shall take from any field not belonging to such person any cotton, corn, rice, or other grain fraudulently, etc., should not be so construed as to apply to only the same class of products according to the classification of botanists

as corn and rice, but should be construed as words of common parlance, so as to include peas. *State v. Williams* (S. C.) 2 Strob. 474, 477.

#### GRAIN MERCHANT.

A grain merchant or produce broker, is defined, in an ordinance of the city of Chicago requiring such brokers to be licensed, as one who for commission or other compensation is engaged in selling or negotiating the sale of goods, wares, merchandise, produce, or grain belonging to others. *O'Neill v. Sinclair*, 39 N. E. 124, 125, 153 Ill. 525.

#### GRAIN OF WHEAT.

"A 'grain of wheat' may be described generally as follows: It consists of a pellicle or outside covering, known as bran, an inner envelope, consisting of cells and their contents of gluten, the most nutritious portion of the berry, and an interior white mass, composed mainly of starch, extending to the head of the berry. At one end of the berry, under an irregularly curved surface layer of bran, technically called the 'shield,' is the embryo or germ. The germ is a yellow, waxy substance, and the bran is consistent and tough." *Downton v. Yeager Milling Co.*, 3 Sup. Ct. 10, 12, 108 U. S. 466, 27 L. Ed. 789.

#### GRAIN RENT.

The term "grain rent" means a payment for the use of land in grain or other crops; the return to the landlord paid by croppers or persons working the land on shares. *Fremont, E. & M. V. R. Co. v. Bates*, 58 N. W. 959, 963, 40 Neb. 381.

#### GRANARY.

A "granary," according to Webster, is a storehouse or repository for grain after it is threshed; a corn house. The term, rather than the term "barn," characterizes a building, sitting on blocks in a barnyard, which is used for the storage of corn and other products of the farm, and therefore the burning of such a building is not made criminal by Rev. Code, c. 34, § 2, which provides a punishment for the burning of barns. *State v. Laughlin*, 53 N. C. 455, 458.

"Granary," as used in Comp. St. 1850, c. 229, § 10, which punishes as a distinct offense stealing in a warehouse or granary, after entering in the nighttime or breaking and entering in the daytime, should be construed to mean a building devoted to the storage of grain, the principal and main use of which is the storage of grain, and not to include a building, 21 feet by 15 feet, placed on a market garden and used for storing the tools and agricultural implements used there, such

seeds as were sown there, and manures employed in the garden. *State v. Wilson*, 47 N. H. 101.

In an indictment charging burglary in the granary, warehouse, and building of W., the word "granary" is used as an adjective describing the particular character of warehouse, indicating that warehouse was for the storage of grain, and does not render the indictment void for duplicity. *State v. Watson*, 42 S. W. 726, 727, 141 Mo. 838.

#### GRANDCHILD.

Webster says that the word "grandchild" means a son's or daughter's child. *Otterback v. Bohrer*, 12 S. E. 1013, 1014, 87 Va. 548.

Where testator bequeathed his estate to his aunt for life, and at her death to his cousin, "to descend to his female children and grandchildren, and to their heirs, forever," and such aunt and cousin both died before testator, the cousin leaving a grandchild, who was daughter of a deceased daughter, and also a daughter, who had one daughter living, the word "grandchildren," as used in the will, would not include the children of the living daughter of such cousin. *Hallstead v. Hall*, 60 Md. 209, 213.

#### Child of stepchild.

A will providing that, in case of the death of any of testator's children or stepdaughter without lawful issue, the share which by the will would go to such issue should be equally divided among the survivors of testator's children or grandchildren, should be construed to include the issue of testator's stepdaughter. In re *Hallet* (N. Y.) 8 Paige, 375, 376.

A will, after giving testator's wife a life estate in his farm, directed that after her death "I give to my grandchildren and their heirs, forever, my said farm, as follows, to wit: To the children of my stepdaughter M. lot No. 1, and to the children of my daughter S. lot No. 2." A subsequent clause directed that, in case of the death of any of testator's children or stepchildren without lawful issue, the share or portion of the estate which would have gone to such issue should be equally divided among the survivors of "my children or grandchildren." Held, that the term "grandchildren," as used in the latter clause, should be construed to include the children of testator's stepdaughter, as well as the children of his son and daughters, as testator's intention to use the word in such meaning was shown from the first clause. *Cutter v. Doughty* (N. Y.) 7 Hill, 305.

#### Great-grandchild.

"Grandchildren" will not be held to include great-grandchildren, when used in a

will, where at the time of the execution of the will no great-grandchildren were living. *Smith v. Lansing*, 53 N. Y. Supp. 633, 639, 24 Misc. Rep. 566.

"Grandchildren," as used in a will devising a life estate to the testator's children, and providing that upon their death the estate was to go to his "grandchildren" then living, cannot be construed to extend to great-grandchildren. *Bragg v. Carter*, 50 N. E. 640, 171 Mass. 324.

A will giving and devising to each of testator's grandchildren a certain sum, should be construed to include great-grandchildren, such being the intention of the testator made apparent by the rest of his will, though ordinarily, and without something further to extend its natural signification, the term "grandchildren" does not include great-grandchildren. *Hone v. Van Schaick* (N. Y.) 3 Barb. Ch. 498, 505.

Chief Justice Tilghman, in *Pemberton v. Parke* (Pa.) 5 Bin. 601, 6 Am. Dec. 432, quotes Lord Northington, in *Hussey v. Dillon*, Amb. 555, as saying that "in common parlance the word 'grandchildren' includes great-grandchildren, and all other descendants," and says: "In this I think he goes too far. In common parlance we understand grandchildren to mean children of children, but it is certain that, when it appears by the will that the testator meant to comprehend great-grandchildren, the courts having given it a construction agreeably to the intent." In *re Coates St.* (Pa.) 2 Ashm. 12, 23.

#### As minor grandchild.

A will devising certain property to the testator's grandchildren living at the time of his death, to be paid on their respectively attaining the age of 21 years or on their marriage, whichever event should take place first, does not include a grandchild who was both of age and married at the time the testator made his will. *Hone v. Van Schaick*, 3 N. Y. (3 Const.) 558, 540.

#### As name of class of devisees.

A will directed the balance of the estate, if any, "to be equally divided among his children and grandchildren, each grandchild having their equal proportion of what their ancestor would have drawn, had they lived." The words "children and grandchildren" embraced all those persons who constituted the testator's heirs at law at the time of making the will. Held, that the words "children and grandchildren" should be construed as not having been used to designate the persons who would take, but as naming the classes who were to take, because they embraced all those persons who constituted his heirs at law, and the phrase meant that only those grandchildren whose parents were not living at the time when the legacy

vested would take within the terms of the will, to the exclusion of such grandchildren as had parents living when the legacy vested. *Hamilton v. Lewis*, 13 Mo. 184, 188.

#### Posthumous grandchild.

A will providing: "All the rest of my estate, real and personal, to be equally divided between my grandchildren"—should be construed so as to include a posthumous grandchild, who was in ventre sa mere at the testator's death. *Smart v. King*, 19 Tenn. (Meigs) 149, 152, 33 Am. Dec. 137 (citing *Swift v. Duffield* [Pa.] 5 Serg. & R. 38).

A will giving and bequeathing to testator's grandchildren a certain sum, to be paid to them on their severally attaining the age of 25 years, and, in the event of the decease of either of such grandchildren prior to attaining the age of 25 years, the share of such deceased should be equally divided between the "surviving grandchildren," means the grandchildren living at the time of testator's death, excluding after-born grandchildren. In *re Herrick's Estate*, 12 N. Y. Supp. 105, 107.

A will devising "all the residue of my estate in trust for my grandchildren, to be divided equally as they shall respectively arrive at the age of 25 years, the share of each grandchild to be determined by a division of the whole amount of the fund then existing by the number of grandchildren to whom no share has been distributed," should be construed so as to include in the term "my grandchildren" a grandchild born six months after the death of the testator. *Cowles v. Cowles*, 13 Atl. 414, 417, 58 Conn. 240.

#### As a word of purchase.

"Grandchildren," as used in a will devising and bequeathing all of testator's property to his wife for life, with power to dispose of the same by will between testator's children and grandchildren, is not used in a substitutionary sense, but as a word of purchase. The words must, in the absence of anything in the context to lead to a different construction, be construed according to their natural import. *Wright v. Wright*, 4 Atl. 855, 857, 41 N. J. Eq. (14 Stew.) 382.

#### GRANDDAUGHTER.

A testator bequeathed a slave to his daughter E. for life, with remainder to his "granddaughter" Harriet. He had two granddaughters named Harriet, one of whom was illegitimate and the daughter of E., and the other legitimate and the daughter of a son. Held, that the term "granddaughter" should be construed in its established legal sense to apply strictly to the legitimate granddaughter Harriet, rather than to the other. The long-established rule is that a

gift to children, sons, daughters, or issue, imports legitimate children or issue, excluding those who are illegitimate; nor will expressions or a mode of disposition affording mere conjecture of intention be a ground for their admission. To entitle illegitimate children to take, the intention to include them under the description of children, etc., must appear from the will itself, either by express designation or necessary implication collected from the instrument itself. *Ferguson v. Mason* 34 Tenn (2 Sneed) 618, 626.

## GRAND JURY.

The institution of the grand jury is of very ancient origin in the history of England. It goes back many centuries. For a long period its powers were not clearly defined, and it would seem from the accounts of commentators on the laws of that country that it was at first a body which not only arrested, but also tried, public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony, except in certain special cases, could be put upon his trial. *Ex parte Bain*, 7 Sup. Ct. 781, 783, 121 U. S. 1, 30 L. Ed. 849.

"The grand jury had its origin at the time when there raged a fierce conflict between the rights of the subject and the power of the crown. It was established to secure to the subject a right of appeal to his peers, under the immunity of secrecy and irresponsibility, before the government could bring him to trial. It was a right wrung from the government to secure the subject against oppression. The Constitution of the United States and the Constitutions of all the states show that it is adopted here as a means of protection to the citizen as well as a necessary aid to public justice." *In re Gardiner*, 64 N. Y. Supp. 760, 761, 81 Misc. Rep. 364.

The grand jury is a constituent of the court of oyer and terminer, and its proceedings are a part of the proceedings of the court of oyer and terminer. The court inquires by the grand jury, and tries and determines with the petit jury. It has been repeatedly held that when the grand jury is in session it is completely under the control of the court, and the court can at any time recommit an imperfect finding or may take measures on the suggestion of a defendant to determine whether 12 assented to the bill. *People v. Naughton* (N. Y.) 7 Abb. Prac. (N. S.) 421, 423.

While the grand jury is a constituent of a court of criminal jurisdiction, it is a distinct, independent body, and must deliberate

and act free from influence, fear, favor, affection, reward, or the hope thereof, proceeding from or without the court. They are selected and drawn by a body of officers appointed by the statute and not under any order or process made or issuing under the authority of the court. When selected and drawn, the clerk of the court, who is one of the officers charged with the duty of selecting the drawing, issues a venire, directed to the sheriff, commanding him to summon the persons so drawn to appear at the succeeding term of the court and serve in the capacity of grand jurors. *Finley v. State*, 61 Ala. 201, 204.

A grand jury is a body of men selected, chosen, and summoned according to and in the manner prescribed by law to serve as grand jurors at a competent court, and by such court impaneled, sworn, and charged to inquire in regard to crimes committed within their jurisdiction, and to present all offenders against the law in the mode and manner defined by it. *People v. Duff* (N. Y.) 65 How. Prac. 365, 369.

A grand jury is a body of men, returned at stated periods from the citizens of the county, before a court of competent jurisdiction, and chosen by lot, and sworn to inquire of crimes committed or triable in the county. *Cr. Code N. Y. 1903, § 223.*

### Examination of witnesses.

A grand jury is a lawful body empowered to hear and investigate charges of a criminal nature against persons within their proper county. A grand jury has a power to examine witnesses and compel witnesses to testify before them. The foreman of the grand jury can administer the oath to a witness. The statute law makes false swearing before such body perjury, and a charge that a person swore to a lie before the grand jury is actionable without any inducement. Every person in the community who hears such a charge against another person understands at once that the person accused has been charged with the crime of perjury. *Perselly v. Bacon*, 20 Mo. 330, 336.

### Number of jurors.

A grand jury is a body of men, seven in number, drawn by lot from the jurors in attendance upon the court at the particular term, and sworn to inquire of public offenses committed or triable within the county. *Ann. Codes & St. Or. 1901, §§ 961, 1265.*

A grand jury is a body of persons, seven in number, returned in pursuance of law from citizens of a county before a court of competent jurisdiction, and sworn to inquire into public offenses committed or triable within the county. *Rev. St. Utah 1898, § 1293.*

A grand jury is a body of men, consisting of not less than six nor more than eight jurors, impaneled and sworn to inquire into and true presentment make of all public offenses against the state committed or triable within the county or subdivision for which the court is holden. Code Cr. Proc. S. D. 1903, § 161.

A grand jury is a body of men, 16 in number, returned in pursuance of law from citizens of the county before a court of competent jurisdiction, and sworn to inquire of public offenses committed or triable within the county. Code Civ. Proc. Idaho 1901, § 8045.

A grand jury is a body of men, not less than 12 nor more than 17 in number, impaneled and sworn to inquire of public offenses committed or triable within the county. Ballinger's Ann. Codes & St. Wash. 1897, § 4732.

A grand jury is a body of men, consisting of not less than 16 nor more than 23 persons of the county, possessing the qualifications prescribed by law, and impaneled and sworn to inquire into and true presentment make to the district court of all crimes or public offenses against the laws of this state committed or triable within the county or judicial subdivision for which the court is holden. Rev. Codes N. D. 1899, § 7988.

A grand jury is a body of men, 19 in number, returned in pursuance of law from the citizens of a county, or city and county, before a court of competent jurisdiction, and sworn to inquire of public offenses committed or triable within the county or city and county. Code Civ. Proc. Cal. 1903, § 192.

A grand jury is a body of men, to consist of 21, returned at stated periods from the citizens of the county, before a court of competent jurisdiction, chosen by lot, and sworn to inquire of public offenses committed or triable in the county. Comp. Laws N. M. 1897, § 957.

A grand jury composed of all the regular venire in attendance on the court, being 12 in number, and 2 persons summoned by the sheriff under the direction of the court from the bystanders, is a good and legal grand jury. Dowling v. State, 13 Miss. (5 Smedes & M.) 664 (cited and followed in Johnston v. State, 15 Miss. [7 Smedes & M.] 58, 62).

A grand jury at common law anciently consisted of only 12 persons, but in later times it was composed of not less than 12 nor more than 23, and the concurrence of 12 was absolutely essential to the finding of an indictment; and hence the term "grand jury," as used in the Bill of Rights, providing that no person shall be tried for a capital

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crime or other felony unless on presentment or indictment by a grand jury, has its common-law meaning, and an act making the grand jury consist of 12, and authorizing 8 of the 12 to find an indictment, is invalid. English v. State, 12 South. 689, 691, 81 Fla. 840.

Under a constitutional provision that grand and petit juries shall be composed of 12 men, but that 6 members of a grand jury shall be a quorum to transact business and present bills, it is held that the constitutional grand jury must be composed of the exact number of 12 persons. Rainey v. State, 19 Tex. App. 479, 481.

The common law required that 24 should be summoned to attend on the grand jury, but not more than 23 were sworn, because of the inconvenience which might arise, in case 12, who were sufficient to find a true bill, were opposed by the other 12, who should be against the finding. Whatever number were sworn constituted the grand jury, and it was never claimed that the death or discharge by the court of any of those sworn, provided 12 remained, rendered the action before a grand jury illegal. The same rule obtains in California. People v. Hunter, 54 Cal. 65, 68.

#### Secrecy of vote.

Every grand jury consists of 12 men at least, and these 12 must concur in the finding of an indictment. How any juror voted is a secret no juror is permitted to disclose, but whether 12 of their number concurred in finding a bill is not a secret of the state, of their fellows, or of their own. It is a fact they of necessity profess to disclose every time they promulgate their decision upon any bill laid before them. Accordingly it is proper, where a claim is made that a finding of a bill was not concurred in by the requisite number, for the court to inquire into the truth of the statement, and permit the defendant, if in his power, to prove such fact by the foreman and his fellows of the grand jury. In re Low's Case, 4 Me. (4 Greenl.) 439, 452, 453, 16 Am. Dec. 271.

#### GRAND JURY BOX.

A "grand jury box" is the box in which are placed the names, on separate pieces of paper, of the 72 persons named in a properly made out list. A box which does not contain such names is not a grand jury box. State v. Greenman, 23 Minn. 209, 211.

#### GRAND LARCENY.

As felony, see "Felony."

At common law the stealing of goods above the value of 12 pence was "grand larceny." State v. Young, 43 Pac. 881, 882, 18 Wash. 584.

Where a jury returns a verdict of "guilty of grand larceny," the term "grand larceny" is sufficient to indicate the value of goods stolen, so as to render the verdict sufficient. The common law divided the crime of larceny into grand and petit larceny; the former being where the value of the goods is over 12 pence, and the latter where the value was not over that sum. Our statute divides the crime in much the same way, and graduates the punishment on the basis of value above \$7. The terms "grand larceny" and "petit larceny" are generally used in our courts to designate the degrees in which the crime is divided, and they are well understood to mean, respectively, larceny of goods above \$7 in value and larceny of goods not above that value. As all reasonable presumptions will be made in this court in favor of the correctness of proceedings in the trial court, it will not be assumed that the court omitted to instruct the jury what it was necessary to find in respect of the value of property in order to warrant a verdict of guilty of the higher grade of the offense. *State v. Bean*, 52 Atl. 269, 270, 74 Vt. 111.

Every person who shall be convicted of feloniously stealing, taking, and carrying away any money, goods, right in action, or other personal property or valuable thing whatsoever, of the value of \$20 or more, shall be deemed guilty of grand larceny. Gen. St. 1897, c. 100, § 82. *State v. Start*, 63 Pac. 448, 10 Kan. App. 583.

Grand larceny is the felonious taking and carrying away of the personal property of another of the value of more than \$25. 2 Rev. St. p. 679, § 83; *Fallon v. People*, \*41 N. Y. (2 Keyes) 145, 147.

Grand larceny consists in stealing the personal goods of another of the value of \$50 or more. *People v. Murray*, 8 Cal. 519, 520; *People v. Swain*, 22 Pac. 67, 68, 80 Cal. 46, 13 Am. St. Rep. 96.

Grand larceny consists of stealing the goods of another of the value of \$50 or more, and is punishable by imprisonment in the state prison, and is therefore a felony. *People v. Murray*, 8 Cal. 519, 520; *Territory v. Duncan*, 6 Pac. 353, 354, 5 Mont. 478.

Grand larceny is larceny committed in either of the following cases: (1) When the property taken exceeds \$50 in value; (2) when the property is taken from the person of another. *State v. Woolsey*, 57 Pac. 426, 427, 19 Utah, 486. Any property of value taken from the person of another is grand larceny, without regard to its value. *People v. Holmes*, 58 Pac. 917, 918, 126 Cal. 462.

Grand larceny is defined to be larceny committed of a horse, mare, gelding, cow, steer, bull, calf, mule, jack, jenny, goat, sheep, or hog. Pen. Code, § 487, subd. 3; *People v. Salorse*, 62 Cal. 139, 142.

Under Rev. St. § 1309, larceny committed in a dwelling house is grand larceny, without reference to the value of the property stolen; so where defendant was indicted for burglary and larceny, and acquitted of the burglary, but convicted of larceny of property taken from the dwelling house, he was properly convicted of the offense of grand larceny, though the value of the stolen property was only \$30. *State v. Kennedy*, 88 Mo. 341, 343.

## GRAND LIST.

The terms "list" and "grand list," as they are used in our statutes relative to taxation, mean a schedule of the polls and ratable estate of the inhabitants upon which taxes are to be assessed. A list that only represents real estate answers the requirement of the statute as fully as would a list that represented the real and personal property. Such is the meaning of the term in Gen. St. p. 1036, providing that every male citizen of the age of 21 years, whose list shall have been taken in any town or city at the annual assessment next preceding any town or city meeting, shall be a legal voter in town meetings, as it is obvious that the intention of the law was to allow such persons as are subject to taxation in towns and are residents therein to vote in the annual meetings of such towns. *Wilson v. Wheeler*, 55 Vt. 446, 452.

## GRAND LODGE.

The words "grand lodge," or "supreme lodge," when used "in their ordinary and popular sense, apply only to secret organizations or supreme bodies constituted from and having jurisdiction over secret societies." The term is so used in Laws 1885, c. 131, § 30, in reference to insurance, which provides that the act shall not apply to any association of religious or secret societies now existing or under the supervision of a grand or supreme lodge. *State v. National Ass'n of Farmers' & Mechanics' Mut. Aid Ass'n*, 9 Pac. 956, 960, 35 Kan. 51.

## GRAND RAFFLE.

"Grand raffle" is a game where there are 50 prizes of jewelry, etc., placed on the numbers from 10 to 60, the whole not amounting to over \$500 in value; every person paying 50 cents being entitled to a throw of 10 dice, which, when thrown, will exhibit numbers in the aggregate not less than 10 nor more than 60. The prizes are not less than 25 cents, and not more than \$125, each; the highest prizes being placed on the numbers which are the most difficult to throw, such as 10, 11, 12, etc., while the small prizes are placed on the medium numbers—

that is, both ways from the number 35. At every throw the bettor must get a prize of 25 cents at least, and in that case, if he does not want the prize, the keeper hands him back 25 cents in money and retains the jewelry. The effect of the whole contrivance is that the bettor gives the keeper 25 cents for the improbable chance of winning some of the tempting prizes. The real fund which the bettor stakes his money against is the money in the keeper's pocket or on his table, as he may choose to keep it. On the side of the bettors it is a game of perfect chance; on the side of the keeper there are both chance and skill, and his skill is exercised in so placing the prizes of any value that the bettor will have but a remote possibility of winning them. The bettors, however numerous, may all throw in turn for the same prizes, which may still remain on the table, being paid for by the keeper if accidentally won by any bettor. Here is found the leading characteristic of a common gaming table or bank; one against the many, the exhibitor with an interest in the game against the bettors, and that not disguised even." *Stearnes v. State*, 21 Tex. 692, 694.

## GRANT.

Agree synonymous, see "Agree."

To grant means to give over, to make conveyance of, to give the possession or title to, to convey—usually in answer to petition; to confer or bestow, with or without compensation, particularly in answer to prayer or request; to admit as true when disputed or not satisfactorily proved; to yield belief to; to allow; to yield; to concede. Grant is usually regarded as synonymous with give, confer, bestow, convey, transfer, admit, allow, concede. As a noun, the term signifies: (1) The act of granting; a bestowing or conferring; concession; admission of something as true. (2) The thing granted or bestowed; a gift; a boon. (3) A transfer of property by deed or writing, especially an appropriation or conveyance made by the government, as a grant of land. *State ex rel. Orr v. City of New Orleans*, 24 South. 666, 670, 50 La. Ann. 880.

A grant implies a disposition of the thing in esse, or potentially so, as the clip of the wool for a term of years of the sheep which a man then has. The grantor owns the property from which the wool actually grows, so that he may be said to be the potential owner. *Everman v. Robb*, 52 Miss. 653, 658, 24 Am. Rep. 682.

### Of administration.

Pub. St. c. 189, § 13, provides that no heir or devisee shall have power to alien or incumber the real estate of any decedent, so as to affect the testator's sale thereof, with-

in three years and six months after the grant of administration, but that after that period he may alien or incumber the same, and the same shall not be liable for the decedent's debts in the hands of the purchaser. Held, that the phrase "grant of administration" meant, not only a tender of administration by the court, but an acceptance of the trust by the one to whom the tender is made. *Dawley v. Probate Court of New Shoreham*, 19 Atl. 248, 249, 16 R. I. 694.

### Of discharge.

The word "grant," as used in a statute providing that the commander of a regiment, on a proper certificate of the troop, battery, or company commander, could grant an enlisted man a full and honorable discharge, does not imply that the enlisted man's consent or request is necessary. The word "grant" refers, not to the wish of the enlisted man, but to the fact of the discharge, and to the benefits supposed to be attached to its honorable character, to its release from further service, and its exemption forever from jury duty. Except as the word aptly harmonizes with these benefits, it has no greater significance than such words as "give," "furnish," or "deliver." *North v. Appleton*, 12 N. Y. Supp. 72, 73, 25 Abb. N. C. 380.

### Of incorporation.

Mr. Justice Buller, in the case of *King v. Passmore*, 3 Term R. 246, says that the "grant of incorporation" is a compact between the crown and a number of persons, the latter of whom undertake, in consideration of the privileges bestowed, to exert themselves for the good government of the place. *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 658, 4 L. Ed. 629.

### Of injunction.

An order of injunction, issued on a motion after notice, though preceded by a temporary restraining order, would be an order granting an injunction, rather than an order continuing it. But an order denying a motion to dissolve an injunction previously granted is not the granting of an injunction, within the statute authorizing an appeal within a certain time after the granting of any injunction. *Dreutzer v. Frankfort Land Co.* (U. S.) 65 Fed. 642, 643, 13 C. C. A. 73.

### Of license.

St. 1894, c. 351, § 2, provides that the police board should exercise all power conferred by the statutes upon the mayor and aldermen and city clerk relative to granting and signing licenses. Pub. St. c. 100, § 19, provides that, when a person holding a license is convicted of violating any law relative to the business which he is licensed to pursue, the court should send to the board



issuing the license a certificate of such conviction. Section 23 of the same chapter provides that, if a judgment recovered under another section thereof remains unsatisfied for 30 days, the board granting the license shall revoke it; and the general act of 1894 (St. 1894, c. 428), which established boards of license commissioners, provides that such commissioners shall exercise the powers imposed on the mayor and aldermen of the cities. Held, that the granting and signing of licenses in chapter 351, § 2, gives the board power to also revoke licenses. *Sullivan v. Borden*, 40 N. E. 859, 860, 163 Mass. 470.

#### Of pardon.

To grant pardons implies that the sovereign power of the state or its representative has executed and delivered, and the prisoner has agreed to accept and has accepted, a pardon or forgiveness of the offense which he has committed, or some part of it, and a remission of and release from the penalties attached to the offense, or some of them. *People v. Potter* (N. Y.) 1 Edm. Sel. Cas. 235, 240.

#### Of trial.

Under a statute authorizing a court of common pleas to grant a trial in certain cases, that court has authority to set aside a default judgment and reinstate the case, which is the same thing as granting a trial. *Kinhead v. Keene*, 47 Atl. 887, 22 R. I. 336.

#### GRANT (In Conveyancing).

See "Give, Grant, and Convey"; "Legislative Grant"; "Lost Grant"; "New Grant"; "Perfect Grant"; "Private Land Grant"; "Public Grant."

A grant is the method by the common law of transferring the property of incorporeal hereditaments, or such things whereof no livery can be had. *Jordan v. Indianapolis Water Co.*, 64 N. E. 680, 682, 159 Ind. 337 (citing 2 Bl. Comm. p. \*317).

"The term 'grant,' in a treaty, comprehends not only those which are made in form, but also any concession, warrant, order, or possession, to survey, possess, or settle, whether evidenced by writing or parol, or presumed from possession." *Bryan v. Kennett*, 5 Sup. Ct. 407, 413, 113 U. S. 179, 28 L. Ed. 908; *Strother v. Lucas*, 37 U. S. (12 Pet.) 410, 436, 9 L. Ed. 1137.

The word "grant," as used in the form of a deed provided by statute for conveying land, must have a thing for it to operate upon, a thing in the objective case, and its operation is limited to the thing specified as granted, the thing shown by the whole deed to have been intended to be granted; and, if

that is only a right of way, the word "grant" passes that only. *Uhl v. Over River R. Co.*, 41 S. E. 340, 344, 51 W. Va. 106.

The word "grant," in Rev. St. U. S. § 2477 [U. S. Comp. St. 1901, p. 1567], providing that the right of way for the construction of highways over public lands not reserved to public uses is hereby granted, is very significant. The word "grant" is defined to be an act evidenced by letters patent under the great seal granting something from the king to a subject; a transfer by deed of that which cannot be passed by levy; a generic term applicable to all transfers of real property; a technical term made use of in deeds of conveyance of land to import a transfer—and as used in such section conveys a property right in the highway. *Estes Park Toll Road Co. v. Edwards*, 32 Pac. 549, 550, 3 Colo. App. 74.

The word "grant" has two significations, it being oftentimes used technically to refer to lands in place, which are spoken of as granted lands in contradistinction to lands which are to be selected or indemnity lands, and then it is oftentimes used both in land legislation and opinions to refer to all lands the title to which has passed either as lands in place or by selection. *Barney v. Winona & St. P. R. Co.* (U. S.) 24 Fed. 889, 891.

A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is therefore always estopped by his own grant. *State of Illinois v. Illinois Cent. R. Co.* (U. S.) 33 Fed. 721, 774 (citing *Fletcher v. Peck*, 10 U. S. [6 Cranch] 87, 3 L. Ed. 162).

A transfer in writing is called a grant, or conveyance, or bill of sale. The term "grant" includes all these instruments, unless it is specially applied to real property. Civ. Code S. D. 1903, § 921.

The word "grant," in the chapter relating to the forfeiture of grants, includes all grants and charters of lands made by the supreme executive or legislative power of the state, and all acts of incorporation and laws giving to individuals powers and rights not common to all of them. Pub. St. N. H. 1901, p. 750, c. 240, § 1.

The word "grant," as used in the chapter relating to forfeitures of grants, shall mean grants or charters of lands situated in this state, made by the king of Great Britain, or by this state or any other government; acts of the General Assembly, granting to individuals rights or privileges not common to all the citizens of the state; and acts of incorporation for any purpose. V. S. 1566.

#### Bounty distinguished.

"The word 'grant' is more comprehensive in meaning than the term 'bounty.' It im-

plies the conferring by the sovereign power of some valuable privilege, franchise, or other right of like character upon a corporation, person, or class of persons. Under the ancient laws of England this was deemed in many cases to be the prerogative of the king, who possessed large powers for the regulation of trade and commerce. It is stated, for example, by Macaulay, as follows: 'In addition to his [King James I's] undoubted right to grant special commercial privileges to particular societies and to particular individuals, he long claimed a right to grant special commercial privileges to particular societies and individuals.' And again: 'He readily granted oppressive patents of monopoly.' 4 Macaulay, Hist. Eng. pp. 222, 223. A well-known instance of a similar grant was in the great Case of Monopolies (Coke, pt. 11, p. 86), where a patent had been granted to the plaintiff, giving him the sole right to import playing cards and the entire traffic in them, and the sole right to make such cards within the realm. The court held that 'the grant to have the sole benefit of making them was against the common law and the benefit and liberty of the subject.' See comment on this case in *Butchers' Benevolent Ass'n of New Orleans v. Crescent City Livestock Landing & Slaughter House Co.*, 83 U. S. (16 Wall.) 36, 103, 21 L. Ed. 394. In more modern times, the grant of special privileges by the Louisiana Legislature to a particular class of persons, giving them a monopoly of establishing slaughter houses in the city of New Orleans, is another illustration. The supreme court, per Miller, J., speaking of the act of the Legislature, remarked: 'It is true that it grants for a period of 25 years exclusive privileges.' And again: 'We think it may be safely affirmed that the Parliament of Great Britain \* \* \* continued to grant to persons and corporations exclusive privileges, privileges denied to other citizens,' etc. These cases are cited for the purpose of illustrating the broad and comprehensive meaning of 'grant,' which differs in many respects from 'bounty.' While it involves the idea of a favor or benefit conferred by the government, sometimes of an exclusive character, it does not necessarily embrace the act of appropriating or paying money out of the public treasury. Indeed, the word 'grant,' in its broad signification, may well include the remission of a tax already levied and assessed by the authority of government." *Downs v. United States* (U. S.) 113 Fed. 144, 147, 51 C. C. A. 100.

#### Condemnation proceeding.

The taking of title by the exercise of the right of eminent domain is not "by grant," in the common acceptation of that term. It imports concession. Blackstone says a grant differs but little from a feoffment, except in the subject-matter, for the operative words therein commonly used are

"dedi et concessi"—have given and granted. At common law a grant was a conveyance applicable to incorporeal hereditaments, and not to livery of seisin. In this was the difference between a grant and feoffment. In this state the mode of conveyance by feoffment and livery is abolished, and the name of "conveyance by bargain and sale" is absorbed in the term "grant." *Archer v. Eckerson*, 42 N. Y. Supp. 137, 139, 10 App. Div. 598.

Gen. St. S. C. § 9, providing that the jurisdiction of the state, except for the administration of criminal law and the service of civil process, is ceded to the United States over so much land as is necessary for the public purposes of the United States, provided, however, that the jurisdiction shall not vest until the United States shall have acquired the title to the lands by grant or deed from the owner or owners thereof, includes not only voluntary grants or deeds of the property, but also title acquired by condemnation proceedings. In *re Rugheimer* (U. S.) 36 Fed. 369, 372.

#### Convey synonymous.

As used in an instrument providing that, in consideration of the right of way granted for the purpose of building a railroad track the grantee agrees to pay, etc., the word "grant" is synonymous with "convey," and the instrument is an absolute conveyance of such right of way. *Des Moines County Agricultural Soc. v. Tubbessing*, 54 N. W. 68, 87 Iowa, 138.

In a conveyance, the word "convey" means to transfer the title or property. The word "convey" means to transfer the title from one person to another. It has the same legal effect as the word "grant," which has become a generic term applicable to the transfer of all classes of real property. In New York the operative word of conveyance is "grant"; but Chancellor Kent says: "As other modes of conveyance operate equally as grants, any words showing the intention of the parties would be sufficient." The word "convey," then, or "transfer," in a deed, is of equivalent signification and effect as "grant"; and to construe a deed containing the words "have bargained, sold, and conveyed, and by these presents do bargain, sell, and convey," as a bargain and sale, is to ignore the word "convey," and give it no effect in the conveyance, which is executed with the formalities required by the statute. *Lambert v. Smith*, 9 Or. 185, 198.

#### Conveyance in fee implied.

A contract of sale whereby the owner of land agrees to "grant the right and privilege of digging all the ore on his land" amounts to an equitable conveyance of the ore in fee, not the mere license to take the minerals. *Fairchild v. Dunbar Furnace Co.*, 18 Atl. 443, 128 Pa. 485.

"A grant of lands by the government is equivalent to a deed in fee." *United States v. Northern Pac. R. Co.*, 12 Pac. 769, 770, 6 Mont. 351.

**Covenant for quiet enjoyment imported.**

The word "grant," in a lease, implies a covenant for quiet enjoyment. *Gallup v. Albany Ry.* (N. Y.) 7 Lans. 471, 479.

**Declaration of trust.**

A declaration of trust is not a grant, and therefore, under a statute requiring that a trust should be created or declared by deed or conveyance in writing, subscribed by the party creating or declaring the trust, it may appear in the recitative part of the conveyance as well as any other. *Wright v. Douglass*, 7 N. Y. (3 Seld.) 564, 569.

The word "grant" is not a technical word, like the word "enfeoff," and although, if used properly, without limitation or restriction, it would carry an estate or interest in the thing granted, still it may be used in a more restricted sense, and be so limited that the grantee will take but a mere naked trust or power to dispose of the thing granted, and to apply the proceeds arising out of it to the use and benefit of the grantee. Consequently, where an act of Congress granting land to a territory restricted its use to the one purpose of making or aiding to make a certain public improvement of general interest, permitting the territorial Legislature to dispose of the land for the public purpose specified, and no other, and declaring that no title should vest in the territory, nor patent issue for any part of the lands until a specified portion of the public improvement be completed, such provisions were not inconsistent with the use of the word "grant" in the same and previous sections of the act. *Rice v. Railroad Co.*, 66 U. S. (1 Black) 358, 378, 17 L. Ed. 147.

**Deed of bargain and sale.**

"Grant," as used in Rev. St. c. 95, § 3, providing that any married female may receive by inheritance, or by gift, grant, devise, or bequest, from any person other than her husband, includes deeds of bargain and sale, and entitles a married woman to acquire title to land by purchase. *McVey v. Green Bay & M. R. Co.*, 42 Wis. 532, 537.

A grant is of the same nature as a deed of bargain or sale, which is an executed contract between bargainor and bargainee, differing in the fact that the state is grantor, instead of an individual. *Higdon v. Rice*, 26 S. E. 256, 119 N. O. 623.

**Executed contract.**

A grant is a contract executed—that is, one in which the object of the contract is

performed—and in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right; and the obligations created by such grant cannot be impaired by subsequent legislation, though the grant be by the state. *Fletcher v. Peck*, 10 U. S. (6 Cranch) 87, 137, 3 L. Ed. 162.

**Feoffment created.**

The words "enfeoff" or "grant" are sufficient words in a deed to create a feoffment. *Perry v. Price*, 1 Mo. 553, 555.

**Grant in presenti imported.**

An act of Congress granting lands in the aid of railroad telegraph line from Lake Superior to the Pacific coast, approved July 2, 1864, meant that the grant was one in presenti, not in futuro, and on the location of the road the grant took effect as of the date of the act, and attached to the specific lands ascertained by the location and survey. *Northern Pac. Ry. Co. v. Majors*, 2 Pac. 322, 327, 5 Mont. 111; *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 11 Sup. Ct. 389, 390, 139 U. S. 1, 35 L. Ed. 77.

**Indefeasible estate implied.**

The language of Act Cong. Sept. 28, 1850, enabling the state of Arkansas and other states to reclaim the swamp lands within those states, and declaring that the swamp lands "shall be and the same are hereby granted to the state," gives the states an indefeasible estate in the lands granted. *Whiteside County Sup'rs v. Burchell*, 81 Ill. 68, 78.

"Grant," as used in Act April 4, 1864, § 4, providing that the grant of interest on a railroad company's bonds in aid of the construction of its road was made on the express condition and in consideration that the company should do certain things and enter into an agreement promising to comply with the terms and conditions set forth in the act, was a grant in the present, the conditions of which were to be performed in the future. *People v. Central Pac. Ry. Co.*, 18 Pac. 90, 93, 76 Cal. 29.

**Lease.**

The word "grant," as used in Civ. Code, § 1093, providing that no estate of a married woman passes by any grant purporting to be executed or acknowledged by her, unless the "grant or instrument" is acknowledged by her in a certain manner, should be construed to include a lease from a married woman. *Carlton v. Williams*, 19 Pac. 185, 186, 77 Cal. 89, 11 Am. St. Rep. 243.

The term "grant," although anciently used as applicable more particularly to a conveyance of incorporeal hereditaments, or all such property or rights as could not be

transferred by livery of seisin, has now a more comprehensive signification, and includes a demise or lease. So, under Laws 1849, p. 528, providing that any married female may take by inheritance, or by gift, grant, devise, or bequest from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, etc., as if she were unmarried, and that the same shall not be subject to the disposal of her husband, she can take and hold a lease for a term of years, and dispose of the same without her husband's consent or control. *Darby v. Callaghan*, 16 N. Y. 71, 74, 75.

"Granted," as used in Gen. St. § 2018, which declares that no leases shall at any time be assigned, granted, or surrendered, unless it be by deed or note in writing, etc., may be construed to mean the original execution of a lease, or the transfer of an existing leasehold interest. *Davis v. Pollock*, 15 S. E. 718, 720, 86 S. C. 544.

The words "grant or demise" in a lease pertain to an estate in lands, and not to the mere privilege of occupation or possession upon the payment of rent. *Mershon v. Williams*, 44 Atl. 211, 214, 63 N. J. Law, 398.

#### **License distinguished.**

A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation. There is a clear distinction between it and a license to enter land uncoupled with an interest, as a license is a personal privilege, can be conferred by parol or in writing, conveys no interest or estate, and is revocable at the pleasure of the party making it. *Jensen v. Hunter* (Cal.) 41 Pac. 14, 17.

#### **Mortgage.**

A mortgage is a "grant or conveyance," within Rev. St. U. S. § 2262, which provides that any grant or conveyance made by a settler of lands pre-empted before final receipt shall be null and void, except in the hands of a bona fide purchaser for value. *Bass v. Buker*, 12 Pac. 922, 924, 6 Mont. 442. Contra, see *Norris v. Heald*, 29 Pac. 1121, 12 Mont. 282, 33 Am. St. Rep. 581.

A mortgage is technically a grant. It is a sale or assignment, so that under the statute, after condition broken, the title vests absolutely in the mortgagee. *Everman v. Robb*, 52 Miss. 653, 658, 24 Am. Rep. 682.

The word "grant" is a generic term, applicable to the transfer of all classes of real property. *Patterson v. Carneal's Heirs*, 10 Ky. (3 A. K. Marsh.) 618, 13 Am. Dec. 208; *Lambert v. Smith*, 9 Or. 185. Thus, where a lessee, who had erected on the leased lands elevator buildings which could not be removed without injury to them and to the freehold, and whose

lease gave him no right to remove fixtures, gave a mortgage thereof, which, though in form a chattel mortgage, purported to grant and convey the elevator, the mortgage was valid as a mortgage of the leasehold estate, although it was realty. *Cross v. Wear*, Commission Co., 38 N. E. 1038, 1041, 153 Ill. 499, 46 Am. St. Rep. 902.

#### **Perfect title not imported.**

In California the term "grant" has not only been used by the people to designate all concessions of the Mexican government, but such use of the term has also been so general in legal proceedings as to have acquired this signification in the legal language of the state; so it is held that a stipulation that a party to an action involving title to land claimed by grant does not necessarily import that he has a perfect title. *Seale v. Ford*, 29 Cal. 104, 107.

#### **Purchase.**

The word "grant," as used in the statute securing to a married woman "any real or personal estate acquired before her marriage, either by her own personal industry, or by inheritance, gift, grant, or devise, or to which she may at any time after her marriage be entitled by inheritance, gift, grant, or devise," includes purchase, and applies alike to corporeal and incorporeal, personal and real, property. In other words, the statute was intended to secure to a married woman any property acquired by her before marriage by whatever means, or acquired after marriage by any means except her own personal industry. *Rich v. Rich*, 12 Minn. 468 (Gil. 369, 376).

#### **Quantity not imported.**

Where the word "grant" is used in a deed, it is not to express or designate in the slightest degree the quantity of estate intended to be conveyed, but merely for the purpose of passing from the seller to the purchaser the estate therein described by words introduced specially for that end. *Krider v. Lafferty* (Pa.) 1 Whart. 308, 314-316.

#### **Quitclaim deed.**

The word "grant," as used in Civ. Code, § 1243, providing that a homestead can be abandoned only by a declaration of abandonment or a grant thereof, executed and acknowledged by the husband and wife, should be construed in its generic, and not in its technical, sense, and as so used is applicable to all transfers of real estate, including a quitclaim deed. Washburn says: "Though the word 'grant' was originally made use of in treating of conveyances of interest in land, denoting a transfer by deed of that which could not be passed by livery, and of course was applied only to incorporeal

hereditaments, it has now become a generic term, applicable to the transfers of all classes of real property." Wood, in his treatise on Conveyancing, said: "The word 'grant,' taken largely, is where anything is granted or passed from one to another, and in this sense it comprehends feoffments, bargains and sales, gifts, leases in writing or by deed, and sometimes by word without writing." *Faivre v. Daley*, 29 Pac. 256, 257, 98 Cal. 664.

#### Deed of release of shares.

A deed of release of shares in a corporation will be held to operate as a grant, in order to effect the intent of the parties. *Hastings v. Turnpike Co.*, 26 Mass. (9 Pick.) 80, 81.

#### Transfer of corporeal hereditaments.

"A grant, in the original signification of the word, is a conveyance of an incorporeal hereditament. As livery of seisin could not be had of incorporeal hereditaments, the transfer of them was always made by writing in order to give them a notoriety which was produced in the transfer of corporeal hereditaments by the delivery of possession." *French v. French*, 8 N. H. 234, 260.

"The ancient technical description of a grant is that it is the regular method by the common law of transferring the property of incorporeal hereditaments, or such things whereof no livery can be had." As used in legislation the word "grant" means, not a transfer of incorporeal hereditaments, "but of lands and houses by deed, or by other effectual conveyance." And it is true that "grant" is used by the most accurate modern writers as comprehending more than a transfer of incorporeal hereditaments; a conveyance of corporeal hereditaments. *Dudley v. Summer*, 5 Mass. 438, 470.

#### Transfer of personalty.

The term "grant" is only applicable to transfers of real property. Personal property is not conveyed by grant. *Hopkins v. Noyes*, 2 Pac. 280, 282, 4 Mont. 550.

While the word "grant" is technically applicable to real estate, yet where other language in a deed created a trust, speaking of the trust fund as the sum of \$100,000, the word "grant" will not be held to be controlling as creating a trust in real estate. *New York Life Ins. & Trust Co. v. Hoyt*, 52 N. Y. Supp. 819, 821, 31 App. Div. 84.

#### Title transferred.

The words "give, grant, and convey" are as comprehensive as any that can be used to convey legal title, and are as efficient in law to transfer the title. *Young v. Ringo*, 17 Ky. (1 T. B. Mon.) 80, 31.

The term "grant" is defined as the passing of real estate from one to another. *Whitney v. Richardson*, 13 N. Y. Supp. 861, 862, 59 Hun, 601.

#### Use conveyed.

The words "make over and grant," in a deed, are sufficiently operative to convey land in the way of a use. *Jackson v. Alexander* (N. Y.) 8 Johns. 484, 496, 3 Am. Dec. 517.

#### Whole interest transferred.

The word "grant," or the phrase "bargain and sell," in a deed, or any other words purporting to transfer the whole estate of the grantor, shall be construed to pass to the grantee the whole interest and estate of the grantor in the lands therein mentioned, unless there be limitations or reservations showing, by implication or otherwise, a different intent. Pub. Gen. Laws Md. 1888, p. 254, art. 21, § 12.

#### GRANT, BARGAIN, AND SELL.

The words "grant, bargain, and sell," when used in a conveyance in fee, do not imply any covenants. *Bethell v. Bethell*, 54 Ind. 428, 429, 23 Am. Rep. 650; *Frost v. Raymond* (N. Y.) 2 Caines, 188, 2 Am. Dec. 228; *Burwell v. Jackson*, 9 N. Y. (5 Seld.) 535, 541; *Phillips v. City of Hudson*, 31 N. J. Law (2 Vroom) 143, 151 (citing Rawle, 272); *Allen v. Sayward*, 5 Me. (5 Greenl.) 230, 17 Am. Dec. 221; *Bates v. Foster*, 59 Me. 157, 160, 8 Am. Rep. 406; *Young v. Hargrave's Adm'r*, 7 Ohio (7 Ham.) 63, 70, pt. 2 (citing Co. Litt. 384a, Butler's note; 2 Bl. Comm. 300); *Ricketts v. Dickens*, 5 N. C. 343, 347, 4 Am. Dec. 555; *Wheeler v. Wayne County*, 24 N. E. 625, 626, 132 Ill. 599; *Douglass v. Lewis*, 9 Pac. 377, 379, 3 N. M. 845.

"The words 'demise and grant,' in a lease, are held to import a covenant for quiet enjoyment." *Burwell v. Jackson*, 9 N. Y. (5 Seld.) 535, 541 (quoting *Grannis v. Clark* [N. Y.] 8 Cow. 36); *Barney v. Keith* (N. Y.) 4 Wend. 502; *Stott v. Rutherford*, 92 U. S. 107, 109, 23 L. Ed. 486.

The words "grant, devise," etc., in leases for years, were originally held at common law to imply a covenant on the part of the lessor to pay damages to the tenant if the possession was lost. *Young v. Hargrave's Adm'r*, 7 Ohio (7 Ham.) 63, 69, pt. 2.

The word "grant" in a deed imports a warranty in law during the lifetime of the grantor, and this warranty is not taken away by the insertion of an express warranty in the deed. *Hoxton's Lessee v. Gardiner* (Md.) 1 Har. & M. 437, 451.

The words "grant, bargain, and sell," in all conveyances in which any estate in fee

simple is limited, operate by the express provision of Rev. St. § 675, unless restrained by the express terms contained in the conveyance, as a covenant for further assurance of such realty, made by the grantor and his heirs to the grantee and his heirs. *Cockrill's Adm'r v. Bane*, 7 S. W. 480, 481, 94 Mo. 444.

The words "grant, bargain, and sell," when used in a conveyance of real estate, create a covenant that the grantor has not done any act or created any incumbrances whereby the estate granted by him may be defeated, and it extends to and includes a tax for a municipal improvement assessed on the land during the grantor's title; but an entry on land by the authority of the state in the exercise of the right of eminent domain is not a breach of such a covenant. *Ake v. Mason*, 101 Pa. 17, 20.

The words "grant, bargain, and sell," when used in a deed made in Illinois to convey land in that state, are to be held to contain express covenants that the grantor is seised of an indefeasible estate in fee simple, free from every incumbrance upon or suffered by the grantor, as also for quiet enjoyment against the grantor and his heirs and assigns. *Mosely v. Hunter*, 15 Mo. 322, 328.

The statutory covenants of seisin, quiet enjoyment, and against incumbrances implied in the words "grant, bargain, and sell," are not general covenants, but only covenants against acts done or suffered by the grantor and his heirs. *Heflin v. Phillips*, 11 South. 729, 96 Ala. 561; *Armstrong v. Darby*, 26 Mo. 517; *In re Wood's Estate*, 15 Wkly. Notes Cas. 94, 96; *Winston v. Vaughan*, 22 Ark. 72, 73, 74, 76 Am. Dec. 418 (citing *Gratz's Lessee v. Ewalt* [Pa.] 2 Bin. 95; *Whitehill v. Gotwald* [Pa.] 3 Pen. & W. 313; *Cain's Lessee v. Henderson* [Pa.] 3 Bin. 108; *Dorsey v. Jackman* [Pa.] 1 Serg. & R. 52; *Funk v. Voneida* [Pa.] 11 Serg. & R. 109; *Roebuck v. Duprey*, 2 Ala. 535; *Latham v. Morgan* (Miss.) *Smedes & M. Ch.* 611, 619; *Roebuck v. Duprey*, 2 Ala. 535, 539; *Cadwalader v. Tyron*, 37 Pa. 318, 322.

The words "grant, bargain, and sell," in a deed, though Code 1892, § 2440, provides that they shall operate as an express covenant that the grantor is seised of the estate, do not create an implied covenant that he is seised in fee, even though the habendum is to have and hold the fee simple. *Cunningham v. Dillard*, 13 South. 882, 883, 71 Miss. 61.

The phrase "grant, bargain, and sell," in a deed of conveyance, imports a covenant of general warranty of title and against incumbrances and for quiet enjoyment. *Bush v. Cooper*, 26 Miss. (4 Cush.) 599, 612, 59 Am. Dec. 270.

The words "grant, bargain, and sell," in a deed containing a covenant of warranty of title, but no express covenant of seisin, will not amount to a covenant of seisin. *Hoy v. Tallaferro*, 16 Miss. (8 Smedes & M.) 727, 742; *Duncan v. Lane*, Id. 744, 753.

The words "grant, bargain, and sell," in a deed, operate as an express covenant that the grantee was seised, etc., only when not limited by express words contained in the conveyance. *Hart v. Gardner*, 20 South. 877, 879, 74 Miss. 153.

The words "grant, bargain, and sell," when used in a conveyance, must be construed, when not limited by any express language in the deed, as an express covenant against incumbrances done or suffered by the grantors. *Brodie v. Watkins*, 31 Ark. 319, 326.

The words "grant, bargain, and sell," when used in a conveyance in which an estate of inheritance in fee simple is limited, amount to a covenant of seisin of the estate so limited, and the covenant runs with the land. *Schnelle & Queri Lumber Co. v. Barlow* (U. S.) 34 Fed. 853.

"Grant, bargain, sell," as used in a deed reciting that the party of the first part had granted, bargained, sold, released, and conveyed, and did by those presents grant, bargain, sell, release, and convey, to the party of the second part, his heirs and assigns, forever, said real estate, amounts to a covenant that the grantor has done no act nor created any incumbrance whereby the estate granted by him could be defeated, and are an express covenant that the grantor was seised of an indefeasible estate in fee simple, as also for quiet enjoyment by the grantee. *Hawk v. McCullough*, 21 Ill. (11 Peck) 220, 221.

#### After-acquired title.

A deed in which the grantor "grants, bargains, and sells all the right, title, and interest" is merely a quitclaim conveyance, and inoperative to convey an after-acquired title. *Butcher v. Rogers*, 60 Mo. 138, 139.

Under a statute providing that if any person convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterwards acquire the same, the legal title thus acquired is immediately passed to the grantee, the words "grant, bargain, and sell," in a deed, served to convey the after-acquired title. *McDermott Min. Co. v. McDermott*, 69 Pac. 715, 717, 27 Mont. 143.

The operative words of a quitclaim deed are "remit, release, and quitclaim." Accordingly a deed containing the words "grant, bargain, sell, and convey" as the operative words is not a mere quitclaim, but operates to transfer any interest which the grantor

had in the land at the date of the deed. *Muller v. Boggs*, 25 Cal. 175, 187.

The term "granted, bargained, and sold," in a deed stating that the premises are granted, bargained, and sold, but which contains a subsequent declaration that the deed is understood to be a quitclaim, will not be construed to change the character of the deed from that of a quitclaim, as, when the parties to a contract expressly define the meaning of the terms which they use, such meaning will be given them, regardless of their natural meaning. *Morrison v. Wilson*, 30 Cal. 344.

The words "grant, bargain, and sell," when used in a deed, imply a general warranty, and a subsequently acquired title inures to the grantee. *King v. Gilson's Adm'x*, 32 Ill. 348, 350, 83 Am. Dec. 269.

The words "grant, bargain, and sell," by virtue of the act of 1715 (1 Dall. Laws, p. 109, § 6), have the force of a general warranty, unless restrained by subsequent expressions; and a mere special warranty will not be sufficient so to restrain them. There is no contradiction in making one covenant against yourself and your heirs, and another against all mankind. *Bender v. Fromberger*, 4 U. S. (4 Dall.) 436, 440.

#### GRANT TO A PUEBLO.

A "grant to a pueblo," as the term was used in the Mexican law, was not a private land grant, in the sense which took title out of the state. It was the mere vesting in the pueblo of the use of the land in trust for the benefit of the inhabitants thereof, and with power as the representative of the state to make grants which should vest title in private ownership of "solares," or house lots, and "suertes," or sowing lots, to settlers; the remainder to remain vacant, to the end that gifts thereof might be made to new settlers. These "grants," as they are generally called, did not deprive the state itself, at any subsequent period, of making what are technically denominated "private land grants," vesting title in natural persons to any portion of the lands lying within the four leagues of the pueblo which had not already passed into private ownership; and this power on the part of the state was not unfrequently exercised. *United Land Ass'n v. Knight*, 24 Pac. 818, 827, 85 Cal. 448.

#### GRANTED AND TO FREIGHT LET.

The words in a charter party whereby the shipowner "granted and to freight let," though ordinarily words granting possession of the ship, are not absolutely so in every particular case, but the opposite construction may be shown from the entire agreement. *Christie v. Lewis*, 2 Brod. & B. 410, 441.

#### GRANTED LANDS.

In the construction of land grants in aid of a railroad, there is a well-established distinction observed between "granted lands" and "indemnity lands." The former are those falling within the limits specially designated, and the title to which attaches when the lands are located, by an approved and accepted survey of the line of the road filed in the Land Department, as of the date of the act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation, for other purposes, and the title to which accrues only from the time of their selection. *Barney v. Winona & St. P. R. Co.*, 6 Sup. Ct. 654, 656, 117 U. S. 228, 29 L. Ed. 858; *Altschul v. Clark*, 65 Pac. 991, 994, 39 Or. 315; *Northern Pac. R. Co. v. Amacker* (U. S.) 53 Fed. 48, 54.

#### GRANTEE.

The word "grantee" may include every person to whom any estate or interest in land passes in or by any deed. *Pub. St. N. H. 1901, p. 64, c. 2, § 16; V. S. 5.*

The word "grantee" may be construed as including every person to whom any freehold estate or interest passes in or by any deed. *Rev. St. Wis. 1898, § 4971; Ky. St. 1903, § 461; Rev. Laws Mass. 1902, p. 88, c. 8, § 5, subd. 3; Comp. Laws Mich. 1897, § 50, subd. 5; Rev. Code Del. 1893, p. 42, c. 5, § 1, subd. 3; Rev. St. Me. 1883, p. 59, c. 1, § 6, subd. 5.*

The word "grantee," as used in the chapter relating to the forfeiture of grants, shall mean the person to whom such land rights or privileges were granted, and the representatives or assignees of such person, and the corporation thus created. *V. S. 1567.*

The word "grantee," as used in the chapter relating to the forfeiture of grants, includes the person or corporation to whom a grant is made, and all persons having the right of such person or corporation therein. *Pub. St. N. H. 1901, p. 570, c. 240, § 2.*

A grantee is one to whom a grant is made. In its largest sense the word comprehends everything that is granted or passed from one to another, and is applied to every species of property. The word is, however, a generic term, peculiarly applicable to all transfers of real property and incorporeal rights. It is, indeed, so seldom, if ever, applied to the transfer of a chose in action, that nothing short of a manifest purpose to apply it will carry that meaning in the use of the word. Hence its use in a statute providing that no party to a civil action shall be allowed to testify in any action where the adverse party is one claiming or defending as "heir, grantee, or devisee" does not

prevent the party from testifying where the adverse party is the assignee of a chose in action of the deceased person. Indeed, its use between the words "heir" and "devisee" would indicate rather that its meaning should be known by its association, and that it should apply exclusively to real property. *Elliott v. Shaw*, 32 Ohio St. 431, 433.

"A grantee is one who has transferred to him in writing the exclusive right under the patent to make and use, and to grant to others to make and use, the thing patented only throughout some specified part or portion of the United States. Such right must be an exclusive, sectional right, excluding the patentee therefrom." *Potter v. Holland* (U. S.) 19 Fed. Cas. 1154, 1157.

#### Heirs and assigns of grantee.

The word "grantee," as used in a mortgage wherein the grantor's wife relinquished her right in the premises to the grantee, cannot be construed to include the heirs and assigns of the grantee. *Allendorff v. Gauggigl*, 16 N. E. 283, 286, 146 Mass. 542.

#### Mortgages.

"Grantee" is a word of well-known signification, and means the purchaser of an estate. A mortgagee is held not to be a grantee, within the meaning of an act authorizing the owner of an estate, or his grantee, to redeem from a sale under execution. *Van Rensselaer v. Sheriff of Albany* (N. Y.) 1 Cow. 501, 502.

#### As representative.

See "Legal Representative"; "Representative."

### GRANTEE OF A POWER.

The term "grantee of a power" is used as designating the person in whom a power is vested, whether by grant, devise, or reservation. *Gen. St. Minn. 1894, § 4361; Rev. St. Wis. 1898, § 2158.*

### GRANTOR.

The word "grantor" may be construed as including every person from or by whom an estate in lands passes in or by a deed. *Comp. Laws Mich. 1897, § 50, subd. 5; V. S. 1894, § 5; Pub. St. N. H. 1901, p. 64, c. 2, § 16.*

The word "grantor" may be construed as including every person from or by whom any freehold estate or interest passes in or by any deed. *Rev. St. Wis. 1898, § 4971; Ky. St. 1903, § 461; Rev. Laws Mass. 1902, p. 88, c. 8, § 5, subd. 3; Rev. St. Me. 1883, p. 59, c. 1, § 6, subd. 5; Rev. Code Del. 1893, p. 42, c. 5, § 1, subd. 8.*

The ancient technical definition of a grantor was he who transferred the property

in a corporeal hereditament by a grant thereof. In its more modern and comprehensive meaning, it signifies one who conveys land. *Dudley v. Sumner*, 5 Mass. 438, 470.

The word "grantors," in the phrase "that we, the grantors, have hereunto set our hands and seals," occurring in a quitclaim deed, is not to be understood in its strict technical sense; for, it being a deed of release, the word was undoubtedly intended to refer to all persons who signed the deed. Hence it was sufficient to show that the seal attached was the seal of all the signers, though two of them had only a dower interest in the land. *Tasker v. Bartlett*, 59 Mass. (5 Cush.) 359, 365.

#### Assignee.

The term "grantor" being the proper and customary word to designate the party who conveys by deed, an assignee, when he conveys any trust property by deed, is properly and accurately described as the grantor in the deed, and he is such a grantor within the statute providing that, as between the grantor and grantee of any property, when there is no express agreement in writing as to which shall pay the taxes that may be assessed thereon of the property as conveyed on or after the 1st day of January, then the grantor shall pay the taxes thereon for that year. *Carey v. Foster*, 51 Pac. 206, 207, 7 Wyo. 216.

#### Husband of grantor.

A husband, joining in a deed of his wife's property which contains the words "grant, bargain, and sell," is as much bound by the statutory covenant as though he was an owner in fee. In contemplation of the statute he was a grantor, and as much bound by his statutory covenant as if he owned the land. *Pratt v. Eaton*, 65 Mo. 157, 161, 165.

*Pub. St. c. 120, § 6*, authorizing the acknowledgment of deeds by the grantors, or one of them, and chapter 3, § 3, providing that the word "grantor" may include every person by whom a freehold estate or interest passes by deed, authorize a husband, before issue born, to acknowledge a deed by his wife of her separate land. *Hayden v. Peirce*, 43 N. E. 119, 120, 165 Mass. 359.

#### Vendor distinguished.

See "Vender—Vendor."

### GRANTOR OF A POWER.

The "grantor of power" is used as designating the person by whom a power is created, whether by grant or devise. *Gen. St. Minn. 1894, § 4361; Rev. St. Wis. 1898, § 2158.*



## GRANULATED.

The phrase "granulated linoleum composition" may mean linoleum composition which has been separated into grains, or it may mean, not a material which has been granulated, but that particular composition in a thorough state of combination from which granulated linoleum is made, as distinguished from the somewhat differently constituted composition from which linoleum cement is made. Thus, in construing the language in a claim for a patent, as it is susceptible of either of two constructions, its meaning must be read in the light of the actual condition of things, and, if technical, be given the meaning by which it would be understood by those skilled in the art. *Melvin v. Thomas Potter Sons & Co.* (U. S.) 91 Fed. 151, 154.

"Granulated tobacco," as used in Rev. St. U. S. § 3368, par. 2, is a term unknown in the tobacco business, and, since it has no definite meaning among tobacco dealers, while the term "snuff" has such a meaning, granulated tobacco must be held to be some species of chewing or smoking tobacco, and not synonymous with snuff. *Venable v. Richards* (U. S.) 28 Fed. Cas. 1144, 1145.

## GRAPEVINES.

A contract requiring a party to plant grapevines should be construed to mean indifferently either cuttings or rooted plants, according to the common usage. The word is so indiscriminately used in common usage, and may mean either, and, as both cuttings and rooted plants are used in planting vineyards, the party was at liberty, under the contract, to use either. *Remy v. Olds* (Cal.) 34 Pac. 216, 218, 21 L. R. A. 645.

## GRAPHIC SLATE.

Drawing, or graphic, slate is a soft kind of slate, containing carbon, which is used for pencils. *Plastic Fireproof Construction Co. v. City and County of San Francisco* (U. S.) 97 Fed. 620, 623.

## GRASS.

The term "grass" means the flora growing in a meadow before it is severed, and is therefore distinguished from the term "hay," which is the grass after it is severed and cured. An allegation, however, in a suit for the conversion of grass and hay, did not necessarily import a joinder of two causes of action, one relating to real estate and the other to personalty, since cases may arise where, even before severance, grass belongs to persons other than the owner of a fee, or even the owner of a possessory estate therein, which ownership may de-

pend on contract. *Reed v. McRill*, 59 N. W. 775, 41 Neb. 206. See, also, *Baumgartner v. Sturgeon River Boom Co.*, 79 N. W. 566, 567, 120 Mich. 321.

Hay is grass cut and cured for fodder, and so the words "grass standing in the field," in a statute defining arson, may well include haystacks. *State v. Harvey*, 42 S. W. 938, 939, 141 Mo. 343.

## GRATES.

In a colloquial sense to refer or speak of "the grates of the engine" would be understood not to mean any part of that particular contrivance by which the steam itself is applied to the wheels, but as one of the component parts which go to make up and complete a machine in position to propel railroad cars by steam, and an allegation that an engine was defective and dangerous was broad enough to cover a defect in the grates. *Brown v. Benson*, 29 S. E. 215, 217, 101 Ga. 753.

## GRATUITOUS.

Without valuable or legal consideration; a term applied to deeds of conveyance. In old English law, voluntary, without force, fear, or favor. *Black, Law Dict.*

A gratuitous bailment is a bailment for the sole benefit of the bailor. *Prince v. Alabama State Fair*, 17 South. 449, 450, 106 Ala. 340, 28 L. R. A. 716.

## GRATUITOUS BAILMENT.

"Gratuitous bailment" is a term used to designate a depositum or naked bailment, in which there is no change but to the depositary. *Foster v. Essex Bank*, 17 Mass. 479, 499, 9 Am. Dec. 168.

## GRATUITOUS CONTRACT.

A gratuitous contract is defined to be one the object of which is the benefit of the person with whom it is made, without any profit received or promised as a consideration for it, as, for example, a gift. *Georgia Penitentiary Co. v. Nelms*, 65 Ga. 499, 505, 38 Am. Rep. 793 (quoting *Bouv.*).

## GRATUITOUS DEPOSIT.

A gratuitous deposit is a deposit for which the depositary receives no consideration beyond the mere possession in the thing deposited. *Civ. Code Cal.* 1903, § 1851. *Rev. St. Okl.* 1903, § 2844; *Rev. Codes N. D.* 1899, § 4020; *Civ. Code S. D.* 1903, § 1372.

## GRATUITY.

"Gratuity," as used in Rev. St. § 5501 [U. S. Comp. St. 1901, p. 3709], providing for

the punishment of every officer of the United States who asks, accepts, or receives any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, etc., is limited by the words "for the payment of money, or for the delivery or conveyance of anything of value." *United States v. Kessel* (U. S.) 62 Fed. 57, 58.

## GRAVE OPENING.

The term "grave openings" can only be construed as referring to graves, and not to cemetery lots. Thus, in a contract in which it was agreed, on the sale of land to a cemetery association, that the purchaser should have \$40 for each lot of 400 square feet, and a proportionate sum for larger or smaller lots, which the association should dispose of for burial purposes, and \$3 for each "grave opening," until the lands had been sold for cemetery purposes only. It was held that the term was limited to a single grave sold, and not to include graves on lots sold. *Bennet v. Washington Cemetery*, 62 N. Y. Supp. 87, 88, 47 App. Div. 365.

## GRAVEL.

As goods, wares, or merchandise, see "Goods."

The meaning of the words "gravel and sand," in a deed from a town reserving the right to enter on the land and take sand and gravel for the purpose of making and repairing highways, is to be determined by evidence to prove the meaning of the words as generally understood in such locality. *Brown v. Brown*, 49 Mass. (8 Metc.) 573, 576.

In St. 1849, c. 437, § 1, authorizing the selectmen of a town to select and lay out a lot of land for a gravel pit for the purpose of securing earth and gravel to be used in the repair of roads, "earth and gravel" should be construed to include any earth, gravel, or stones suitable for use in repairing and constructing roads, and capable of being dug out of the ground and removed by ordinary excavation. The words "earth and gravel" are not to be taken with such extreme strictness as to require that the gravel should be screened or that the question should be raised and decided judicially how large a piece of gravel or stone may be included in the general description of earth and gravel. *Hatch v. Hawkes*, 126 Mass. 177, 181.

To "gravel a street" is to cover the surface of a street already existing with some durable substance, and is not authorized by an act authorizing the widening of a street. *Wilcoxon v. City of San Luis Obispo*, 35 Pac. 968, 969, 101 Cal. 508.

Act Nov. 28, 1883, § 8, authorizing the city of Olympia to "curb, grade, and gutter" its streets, and to levy a special tax to pay the expenses of the "graveling and paving" said streets, construed to include "curbing, paving, and guttering" the street, and hence the statute authorized a special assessment therefor. *McNair v. Ostrander*, 23 Pac. 414, 415, 1 Wash. St. 110.

## GRAVEYARD.

See "Family Graveyard."

Land used exclusively as graveyard, see "Exclusively Used."

By Code 1854, a graveyard was defined to be a place where the bodies of six or more persons are buried. *City of Stockton v. Weber*, 38 Pac. 332, 333, 98 Cal. 433.

## GRAVEYARD INSURANCE COMPANY.

"Graveyard insurance company" is a term employed to designate an insurance company engaged in the business of issuing wagering policies, etc. *Appeal of McCarty*, 4 Atl. 925, 927, 110 Pa. 379.

## GRAVING DOCK.

A graving or dry dock is a water-tight chamber fitted with timber or iron gates, which are shut against the tide after the vessel has entered for the purpose of being inspected or repaired. When admitted, she is placed on certain blocks in the center of the dock, and as the tide recedes the water is let out until it is level with low water, and, if it becomes necessary for examination or repair, the water below low tide is generally pumped out by steam, and the vessel must be continually shored up as the process of emptying is carried on, that she may be kept on an even keel and prevented from straining or careening; and, notwithstanding a vessel during inspection may rest high and dry on the bottom of the dock, and, indeed, ships and other water craft are frequently thus left alongside a wharf on the recession of the tide, yet when a vessel enters a dry or graving dock she floats in, and when she leaves it she floats out. *The Vidal Sala* (U. S.) 12 Fed. 207, 211.

## GRAVITY SYSTEM.

The term "gravity system," as applied to sewer drainage, means a system in which gravitation alone is depended upon for the discharge of sewage. *McChesney v. Village of Hyde Park*, 37 N. E. 858, 861, 151 Ill. 634.

## GRAVITY YARD.

Where a switch track is constructed on a downgrade for a certain distance, and from

there on on a level, so that cars are switched by allowing them to run down by gravity, thereby saving the handling of cars. Locomotive, such arrangement is known as a "gravity yard." *Haesley v. Winona & N. W. R. Co.*, 46 Minn. 233, 234, 48 N. W. 102. Am. St. Rep. 220.

## GRAY.

The term "gray mare mule," when used in an indictment charging the stealing of a gray mare mule, is sufficient to designate an iron gray mare mule, or dark iron gray mare mule; and hence proof that the mule stolen is of the latter description does not constitute a variance. *State v. Hill*, 65 Mo. 84.

## GREASE.

Grease may include oily or unctuous matter of any kind, and where vaseline, which is one of the solvents used in producing a pomade, which is admittedly an enfeurage grease, and vegetable oils, are used in making enfeurage grease, inasmuch as the pomade is a grease in its physical character in the same sense as vaseline, it is admissible free of duty as enfeurage grease, within the tariff act of 1894. *United States v. Dodge* (U. S.) 94 Fed. 481, 482.

## GREAT.

Webster defines "great" to be "more than ordinary in degree; very considerable in degree; as to use great caution; to be in great pain." *Gulf, C. & S. F. Ry. Co. v. Smith*, 28 S. W. 520, 522, 87 Tex. 348.

## GREAT BODILY HARM.

"Great bodily harm" means "great bodily injury." *State v. West*, 12 South. 7, 9, 45 La. Ann. 14.

"Great bodily harm" is interchangeable or synonymous with "serious bodily harm," as used in a statute relating to self-defense. The word "serious," when used to define the degree of bodily harm or injury apprehended, requires and implies as high a degree as "great." The latter, as used in a statute, means high in degree as contradistinguished from trifling. Such, likewise, is the meaning of "serious," when used in the same connection. The definition given by lexicographers of the word "serious" is "important, weighty, momentous, and not trifling." *Lawlor v. People*, 74 Ill. 228, 231.

The adjective "great," as used in connection with "bodily harm," as "great bodily harm," authorizing the use of self-defense on apprehension thereof, is not synonymous with "enormous." The word "enormous" has more intensity and deeper color of ex-

pression than the word "great," and thus, when the court used the phrase "great or enormous bodily harm," it must have intended a higher degree of meaning and something more than could have been experienced by "great," which rendered the charge erroneous. *McDonald v. State*, 14 S. W. 487, 488, 89 Tenn. 161.

"Great bodily harm," in the law of self-defense, means something more than mere slight injury, like a simple assault and battery, from which only a slight injury is likely to be suffered. It means a serious and severe injury of a greater degree. *Boykin v. People*, 22 Colo. 503, 45 Pac. 419, 422.

## GREAT BODILY INJURY.

The words "great bodily injury," as used in the Criminal Code, imply an injury of a graver and more serious character than an ordinary battery. *Murphey v. State*, 61 N. W. 491, 492, 43 Neb. 34; *State v. Murdy*, 47 N. W. 867, 871, 81 Iowa, 603; *Whitner v. State*, 64 N. W. 704, 705, 46 Neb. 144; *Smith v. State*, 78 N. W. 1059, 1060, 58 Neb. 531; *Likens v. State*, 88 N. W. 506, 507, 63 Neb. 249.

"Great bodily injury," as used in criminal law, means a great bodily injury, as distinguished from one that is slight or moderate, such as would ordinarily be inflicted by an assault and battery with the hand or fist without a weapon. *Rogers v. State*, 29 S. W. 894, 895, 60 Ark. 76, 31 L. R. A. 465, 46 Am. St. Rep. 154.

The expression "great bodily injury" is equivalent to the expression "great bodily harm." *Terre Haute Electric Ry. Co. v. Lauer*, 52 N. E. 703, 706, 21 Ind. App. 466.

## GREAT CARE OR DILIGENCE.

"High or great diligence" is, of course, extraordinary diligence, as that which very prudent persons take of their own concerns. *Union Pac. Ry. Co. v. Rollins*, 5 Kan. 167, 180.

"High or great diligence" is that with which prudent persons take care of their own concerns. It differs from "common or ordinary diligence," which is that which men in general exert with respect to their own concerns, or "slight diligence," which is that with which persons of less than common diligence, or, indeed, of any prudence at all, take care of their own concerns. *Litchfield v. White*, 7 N. Y. (3 Seld.) 438, 442, 57 Am. Dec. 534.

"Great care" is that degree of care usually bestowed upon the matter in hand by the most competent, prudent, and careful class of persons engaged in the business to which such matters belong, no matter how few

such persons may be, if they are numerous enough to have a recognized existence as a class. Great care, therefore, is care greater than that usually bestowed by persons of ordinary prudence under like circumstances. *Gulf, C. & S. F. Ry. Co. v. Smith*, 28 S. W. 520, 522, 87 Tex. 348.

As compared with other kinds of business, the care required of telegraph companies may be called "great care," which term, while meaning really the same, is variously stated as "due and reasonable care," "ordinary care and vigilance," "reasonable and proper care," "reasonable degree of care and diligence," "care and diligence adequate to the business which they undertake," "with skill," and "with care and attention, and a high degree of responsibility." *Fowler v. Western Union Telegraph Co.*, 15 Atl. 29, 31, 80 Me. 381, 6 Am. St. Rep. 211.

The words "great care and diligence," as used in the statute requiring telegraph companies to exercise great care and diligence in the transmission and delivery of messages, includes the employment of proper instruments and competent operators. *Western Union Telegraph Co. v. Cook* (U. S.) 61 Fed. 624, 628, 9 C. C. A. 680; *Hart v. Western Union Telegraph Co.*, 6 Pac. 637, 639, 66 Cal. 579, 56 Am. Rep. 119.

Great care or diligence is such as persons of ordinary prudence usually exercise about their own affairs of great importance. Rev. Codes N. D. 1899, § 5109; Rev. St. Okl. 1908, § 2782.

#### GREAT PERSONAL INJURY.

"Great personal injury," as used in Comp. Laws, § 692, providing that a homicide is justifiable when committed in lawful defense, when there is reasonable ground to apprehend a design to do some great personal injury, and there is imminent danger of such design being accomplished, means something more than apprehension, however imminent, of a mere battery not amounting to a felony. *Territory v. Baker*, 13 Pac. 30, 40, 4 N. M. (Gild.) 236.

#### GREAT PONDS.

Natural ponds, exceeding 10 acres in extent, which have not been devoted by the proprietors to the artificial cultivation or maintenance of useful fishes, are "great ponds," the fish in which may be lawfully taken by one who obtains lawful access to the ponds, according to the Maine colonial ordinance. *Barrows v. McDermott*, 73 Me. 441, 447, 450, 451.

The term "great ponds" was given in the colonial ordinance of Massachusetts of 1641-47 to ponds containing more than 10 acres; the ordinance prohibiting towns from

great ponds, and providing that they should be free to the public for fishing and swimming. *Lamprey v. Metcalf*, 53 N. W. 1141, 52 Minn. 181, 18 L. R. A. 670, 18 Am. St. Rep. 541.

"Great ponds," within the meaning of a statute making ponds of a certain size not appropriated by private persons prior to a certain date public property, to be for common use, includes all ponds of the designated description, whether at the time included within the term granted to a town or to any body of proprietors for the plantation of a town. *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158.

#### GREAT PREJUDICE.

2 Rev. St. p. 830, § 81, authorizing a sale of property held in common where it appears that the premises are so circumstanced that a partition cannot be made without great prejudice to the owners, will not justify a decree of sale where the aggregate amount of the benefits to the parties from a sale, instead of an actual partition, will be small in reference to the value of the property of which a partition or sale is sought. The statute refers to comparative prejudice to the owners between the actual partition and a sale of the property, so that if either a partition or a sale will be greatly prejudicial to the owners, compared with the use of the property in common, still an actual partition must be made, unless the injury to the interests of the owners collectively in reference to the rights of each in the common property will be much greater by an actual partition than by a sale. *Smith v. Smith* (N. Y.) 10 Paige's Ch. 470, 474.

#### GREAT ROADS.

The term "great roads" is commonly used to designate main or principal roads or highways. *Ex parte Withers* (S. C.) 3 Brev. 83, 86; *State v. Mobley* (S. C.) 1 McMul. 28, 30.

#### GREAT SEAL.

There is no ambiguity in the word "great seal." It is a seal of a nation and not of a state, no matter whether the government be a monarchy or a republic, and all courts are bound judicially by this insignia of nationality. It is authentic *per se*. *Phillips v. Lyons*, 1 Tex. 392, 393.

#### GREAT WASTE OF PROPERTY.

The "great waste of property" mentioned in the rule that work to prevent great waste of property is a work of necessity within the meaning of a Sunday law prohibiting Sunday work, but excepting works of necessity, must not be understood as necessarily

meaning property of great value. The circumstances and financial condition of the owner, and the value to him and his need of the property, are to be considered in determining the true application and meaning of the phrase. *Johnson v. People*, 42 Ill. App. 594, 599.

#### **GREATER PART IN INTEREST.**

Gen. St. c. 148, § 2, providing that the proprietors of meadow and swamp lands, or the "greater part of them in interest," may apply by petition to the superior court for the improvement of the lands, means "proprietors having the greatest interest in value, and not to those owning the largest territorial area." *Henry v. Thomas*, 119 Mass. 583.

#### **GREATER SUM.**

The words "greater sum," in a statute providing that in civil actions in a justice's court, where defendant tenders plaintiff judgment for a specific amount, plaintiff shall not recover attorney fees or other costs subsequent to such tender, unless he shall recover on a trial of the action a greater sum than that tendered, means a sum actually greater than the tender; and therefore interest on the latter amount between the date of the tender and that of the recovery is not to be deducted from the amount recovered, at least where it does not appear that the jury included interest in the verdict. *Erd v. N. W. B. Co.*, 41 Wis. 65, 69.

#### **GREATEST NUMBER OF VOTES.**

Under St. 5 & 6 Wm. IV, c. 75, § 35, providing that in municipal elections such persons "as shall have the greatest number of votes shall be deemed to be elected," where the party receiving a majority of the votes cast was disqualified, such fact being known to the voters at the time they cast their votes, the votes cast for such person were deemed to be the same as if not voted at all or voted for a nonexistent person, and the candidate receiving the next greatest number of votes was deemed to have received the greatest number of votes, within the meaning of the act. *Regina v. Coaks*, 3 Bl. & Bl. 249, 254.

#### **GREEN GRAIN.**

"Green grain in the ground," as used in a contract for the sale of land, reserving the green grain in the ground, means "the whole of the crop, grain and straw. It is an entirety, and cannot be separated into its component parts. Under the contract the vendors are entitled to the crop in its largest sense." *Hendrickson v. Ivins*, 1 N. J. Eq. (Saxt.) 562, 570.

#### **GREEN SUGAR.**

The words "green sugar" include both concentrated molasses and concentrated melado or syrup. *Belcher v. Linn*, 65 U. S. (24 How.) 508, 518, 16 L. Ed. 754.

#### **GREENBACKS.**

"Greenbacks" is but a nickname originally; a slang word, derived from the color of the engraving on the backs of the currency so denominated, and not either the legal designation or a proper description of money alleged to have been feloniously taken. The fact that the word, from its convenience, came into common use, does not make it by itself, without connection with something else indicating the notes called by that name, a proper designation for them in an indictment. *Wesley v. State*, 61 Ala. 282, 287.

"One \$10 treasury note of the United States, usually called a 'greenback,' and one \$10 national bank bill, usually called a 'greenback,'" is a sufficient description in an indictment for larceny. *Sallie v. State*, 39 Ala. 691.

##### **As bank notes.**

"Currency issued by or under the authority of the United States, and so called from the back of the notes being of a green color. The term is more frequently applied to United States treasury notes issued by the government, but is also sometimes used to designate the national currency or bank notes issued under its authority." *Levy v. State*, 79 Ala. 259, 261.

"Greenbacks" is a term sometimes employed to denote national bank bills, as well as United States treasury notes. *Duvall v. State*, 63 Ala. 12, 17.

##### **As currency of United States.**

The term "greenbacks" is used to designate a certain species of the currency of the United States. Evidence of the stealing of "greenbacks" is sufficient, under an indictment charging the larceny of currency of the United States. *Gady v. State*, 3 South. 429, 430, 83 Ala. 51.

"Greenback currency," as used in a note payable in greenback currency, means the same as United States currency or legal tender notes, and is of the same validity as if the term "dollars" alone had been used. Greenback money or currency is not defined by law, and if we refer to the common use of the term "greenback" we find it applied to the issues of currency circulated by the government during the late Rebellion. *Burton v. Brooks*, 25 Ark. 215, 216.

##### **As treasury notes.**

The term "greenback" is the popular and almost exclusive name applied to almost all

United States treasury notes, and is not applied to any other species of paper currency; and, this being the case, it is as certain in the description of property stolen as if the phrase "treasury notes" had been used. *Hickey v. State*, 23 Ind. 21, 23.

United States notes, which are public, and not private, obligations, provided for by acts of Congress, are commonly known as "greenbacks," a particular and distinct kind of obligation of the United States. *United States v. Howell* (U. S.) 64 Fed. 110, 114.

Where, in an action to recover for the services of an attorney, witnesses as to the value of such services testify "that the services were worth \$1,000 in greenbacks, or \$500 in coin," the term "greenbacks" is intended to designate treasury notes of the United States, made by act of Congress a legal tender in payment of debts, and the term "coin" to signify coin of the United States, also made a legal tender. Greenbacks are lawful money. They are a legal tender for all debts, and are therefore a legal standard for the measurement of values in all other lawful money, and of all commodities bought and sold, services rendered, etc. *Spencer v. Prindle*, 28 Cal. 276, 277, 279.

## GRIEVANCE.

"Grievance," as used in Act 1851, § 27, authorizing a complaint to be filed in the court of quarter sessions for any grievance in consequence of any ordinance, means an injury, a wrong done, or that which causes a ground of complaint because it is unjust or oppressive; and hence an ordinance compelling property owners to remove a newly constructed sidewalk and replace it with a narrower one constituted a grievance. *Appeal of Borough of Charters* (Pa.) 8 Atl. 181-182.

A "grievance," to give a person a right to an appeal from the decision or doings of any school committee, district meeting, or trustees, does not imply a wrong growing out of some infraction of law or a litigated question of right. A deprivation of school privileges is a grievance. *Appeal of Cottrell*, 10 R. I. 615, 616.

## GRINDSTONE.

The term "grindstone," as used in a declaration in tort for the conversion of one grindstone, would include, not only the stone, but the frame and hangings, which are necessary for its use. *Patterson v. Dudley*, 78 Mass. (12 Gray) 375.

## GRIST.

"Grist work" is the grinding of grain by a miller for toll for farmers in the neighbor-

hood, the doing of which characterized the old-fashioned gristmill. *Sparks Mfg. Co. v. Town of Newton*, 41 Atl. 385, 403, 57 N. J. Eq. 367.

## GRISTMILL.

The term "gristmill," as used in a fire insurance policy, insuring the contents of a flouring mill, and prohibiting the buildings from being used for the purpose of a "gristmill," should be construed to include a kiln-drying corn meal mill, which is not an incidental part of the flouring mill. The term "gristmill" is a general term, comprehending all kinds of mills for grinding corn for food. A corn meal mill belongs to a particular class of gristmills, the use of which may be a distinctive business of itself, and if the kiln-drying corn meal apparatus be not an invaluable and essential part of the corn meal mill, the latter may or may not have that appendage. At this day there should be no uncertainty as to the distinctive significance of the terms "flouring mill" and "gristmill," which are words of common use. A flouring mill, in its most restrictive sense, is, to say the least, a mill used for grinding one kind of grain for food, to wit, wheat. Flour is the product of grain, both ground and bolted; while meal is the pulverized grain, ground, but not bolted. The making of flour, therefore, consists in grinding the grain and bolting the meal, while the making of meal consists of the simple process of grinding. The grinding or gristmill, therefore, is an essential part of all flouring mills, while the bolting apparatus is not an indispensable part of a gristmill. *Washington Mut. Ins. Co. v. Merchants' & Manufacturers' Mut. Ins. Co.*, 5 Ohio St. 450, 480.

"Gristmill on the Little Blue river," as used in county bonds issued to persons named on their executing a satisfactory bond to the county commissioners conditioned for the erection of a gristmill on the Little Blue river, implies that it was a mill propelled by water. *State v. Clay County*, 30 N. W. 528, 529, 20 Neb. 452.

A representation that an insured building is a gristmill is not falsified by the fact that a workbench and tools are kept in the mill for the purpose of keeping it in repair. *Jennings v. Chenango County Mut. Ins. Co.* (N. Y.) 2 Denio, 75, 83.

## GRIT.

Where, on a trial for murder, a witness testified that he knew the defendant and his brother, and that they had good grit, it was not error to refuse defendant the right to prove what the witness meant. Under the circumstances in which the word "grit" is used, the jury could have no difficulty in understanding its meaning, to wit, as defined

in dictionaries, "to indicate firmness of mind, courage, spunk." *Mitchell v. State*, 41 S. W. 816, 817, 38 Tex. Cr. R. 170 (citing *Webst. Dict.*).

## GROAT.

"Groat" is the name of an English coin of the value of four pence, and is synonymous with "four pence." A groat in Edward III's reign weighed a great deal more than a four penny piece of 1842. *Reg. v. Connell*, 1 Car. & K. 190, 191.

## GROCER.

As a merchant, see "Merchant."

"Webster defines the meaning of the word 'grocer' to be a trader who deals in tea, sugar, spices, coffee, liquors, fruits, etc." Thus it was held that an answer in an application for life insurance that the applicant was a grocer will not alone avoid the policy, because he also sold liquors. *McGurk v. Metropolitan Life Ins. Co.*, 16 Atl. 263, 265, 56 Conn. 528, 1 L. R. A. 563.

## GROCERIES.

In a mortgage on all flour, soap, sugar, spices, and all groceries and fixtures of a country and village grocery store, belonging to the mortgagor, "groceries" is to be construed in its natural and accepted meaning, and does not include all articles which are usually kept in such a store, such as shovels, pails, and buckets. *Fletcher v. Powers*, 131 Mass. 333, 335.

An insurance policy, insuring the stock of a merchant "keeping a store of dry goods and groceries," covers all such goods and merchandise as are usually kept in such stores as are called "dry goods and grocery stores" in the place where the insured did business. *Germania Fire Ins. Co. v. Francis*, 52 Miss. 457, 468, 24 Am. Rep. 674.

Where a fire policy describes the insured premises as a grocery store, the term "groceries" cannot be construed to include oil and sulphur kept in the store, where such articles are enumerated as hazardous, and the keeping of hazardous articles prohibited. *Whitmarsh v. Charter Oak Fire Ins. Co.*, 84 Mass. (2 Allen) 581, 583.

Whether the word "groceries," as used in a policy of fire insurance, covers alcohol and spirituous liquors kept in the store, in violation of the prohibitory law, was a question of fact for the jury. *Niagara Fire Ins. Co. v. De Graff*, 12 Mich. 124, 126.

A misspelling of the word "groceries" as "groclers," in an indictment for the forgery of an order for groceries, does not invalidate

the indictment. *Myers v. State*, 101 Ind. 379, 382.

## GROGSHOP.

A grogshop is a place where liquor is sold, and formerly represented that class of the liquor traffic now filled by saloons and barrooms. *Town of Leesburg v. Putman*, 29 S. E. 602, 603, 103 Ga. 110.

## GROOM.

A groom is the mere servant, menial as it were, and not the general agent, of the owner of the horse, and an understanding or misunderstanding of the law in the neighborhood, or by a portion of the people in the neighborhood, cannot enlarge the powers of a lackey into those of an agent, capable of controlling the contracts of the master. *Moore v. Tickle*, 14 N. C. 244, 246.

## GROOVE.

The meaning of the word "groove" in an application for a patent, providing that certain rods should be fitted loosely in the engagement of its grooves, is unmistakably and perfectly clear. It conveys to the mind the idea of a noticeable depression of some length in a surface. It is absurd to imagine a groove in a perfectly smooth, even surface. *Schreiber & Conchar Mfg. Co. v. Adams Co. (U. S.)* 117 Fed. 830, 833, 54 C. C. A. 128.

## GROSS.

See "In Gross."

"Gross means whole, entire, total." *Appeal of Braun*, 105 Pa. 414, 415.

## GROSS AMOUNT.

*Hurd's Rev. St.* 1899, p. 1042, providing that all foreign insurance companies should at the time of filing their annual statement pay as taxes 2 per cent. of the gross amount of premiums received by them for business done in the state the previous year, means the whole or entire amount of premiums received for business done in the state during the year. The word "gross" is opposed to "net," and in its ordinary meaning is the entire amount of the receipts of a business, while the net receipts are those remaining after deductions for the expenses and charges of conducting the business. *German Alliance Ins. Co. v. Van Cleave*, 61 N. E. 94, 96, 191 Ill. 410.

## GROSS AVERAGE.

"Gross average" means a contribution by all the parties concerned in a mercantile

voyage, either as to the cargo or vessel, toward a loss sustained by some of the parties in interest for the benefit of all. *Wilson v. Cross & Co.*, 33 Cal. 60, 69.

### GROSS DRUNKENNESS.

Where a statute (St. 1889, c. 447) makes gross and confirmed drunkenness caused by the excessive use of opium and other drugs a ground for divorce, the use of the drug, in order to justify a divorce thereunder, must be excessive and habitual. The mere use, without the abuse, of the drug, is not sufficient. *Burt v. Burt*, 46 N. E. 622, 623, 168 Mass. 205.

### GROSS EARNINGS.

Laws Ex. Sess. 1858, c. 1, § 18, subd. 1, enacts that the Minnesota & Pacific Railway Company shall pay to the state 3 per cent. of its gross earnings in lieu of all taxes, and provides that for the purpose of ascertaining said earnings an accurate account shall be kept by said company of all receipts and expenditures on account of the operation of said railroads. Held, that the "gross earnings" meant receipts arising from the operation of the railroad, and hence did not include the compensation paid to such company by another company for the right to run trains over lines of the former. *State v. St. Paul, M. & M. R. Co.*, 15 N. W. 307, 30 Minn. 311 (quoted in *State v. Northern Pac. R. Co.*, 32 Minn. 294, 295, 20 N. W. 234, 235).

"Gross earnings," as used in Laws 1896, c. 908, § 184, providing that every steam surface railroad company shall pay an annual tax upon its gross earnings within the state, which shall include its gross earnings from its transportation or transmission business, means all receipts arising from or growing out of the employment of its capital, whether that capital is employed in the transportation or transmission business, or otherwise. *People v. Roberts*, 52 N. Y. Supp. 859, 860, 32 App. Div. 113.

In a contract by a ferryman to transport all the passengers presented for ferriage by a railway company from its terminus to a certain town, in consideration of one-fifth of the gross earnings of the railway on such passengers, the term "gross earnings" includes the entire sum received from passengers, including the amounts paid to a transfer company to which the railway has let the contract of hauling its passengers from the terminus to a specified town, where the railway company sells the tickets of the transfer company and manages it as a part of its system. *Dardanelle & R. Ry. Co. v. Shinn*, 12 S. W. 183, 184, 52 Ark. 93.

In a lease providing that the "gross earnings and receipts" of the railroad leased

shall be the basis of computing the rent, the phrase means the same thing as the receipts of the entire railroad and the property. *Cincinnati, S. & O. R. Ry. Co. v. Indiana, B. & N. Ry. Co.*, 44 Ohio St. 287, 315, 7 N. E. 139.

### GROSS FAULT.

"Gross fault" is that which proceeds from inexcusable negligence or ignorance. It is considered as nearly equal to fraud. *Civ. Code La. 1900, art. 3556, subd. 12.*

### GROSS IMMORALITY.

"Gross," as used in modifying the word "immorality," does not mean great and excessive, but rather willful, flagrant, or shameless, showing a moral indifference to the opinions of the good and respectable members of the community, and to the just obligations of the position held by an officer; and a public prosecutor whose duty it is to prosecute the keeper and inmates of a house of ill fame, who resorts thereto for prostitution, is guilty of gross immorality. *Moore v. Strickling*, 33 S. E. 274, 278, 46 W. Va. 515, 50 L. R. A. 279.

### GROSS INADEQUACY.

A gross inadequacy of consideration of a contract, such as will avoid it on the ground of fraud, means such inadequacy as will shock the conscience and furnish satisfactory and decisive evidence of fraud. *Cleere v. Cleere*, 3 South. 107, 111, 82 Ala. 581, 60 Am. Rep. 750; *Clark v. Freedman's Trust Co.*, 100 U. S. 149, 152, 25 L. Ed. 573.

### GROSS INCOME.

"Gross income," as used in a contract by which an employé was to receive his salary out of the gross income of the mill property belonging to the firm, should be construed as the total income less the annual current expense of carrying on the business, and hence, in making an account of the gross income, there should not be deducted from it the amounts spent for the improvement of the mill property, since that was in the nature of permanent improvements. Such improvements, adding to the value of the real estate, though they may have been necessary for the preservation of the property, must be regarded as capital invested, and not as a part of the expenses of the business. *Appeal of Braun*, 15 Pittsb. Leg. J. 94, 105 Pa. 414, 416.

### GROSS LEWDNESS.

V. S. 444, § 8, providing that, if any man or woman shall be guilty of "open and gross lewdness and lascivious behavior," etc., he



shall be imprisoned, etc., should be construed to include an indecent exposure of a man's person to a woman and his solicitation of sexual intercourse, and his persistence in such conduct, notwithstanding her remonstrances. The common sense of the community and the sense of decency and morality is sufficient to point out in each particular case what conduct is rendered criminal by the statute. The crime does not depend on the number of persons to whom one thus exposes himself, whether one or many. *State v. Millard*, 18 Vt. 574, 577, 46 Am. Dec. 170.

### GROSS MISBEHAVIOR.

Rev. St. c. 139, § 2, authorizing a divorce for "gross misbehavior and wickedness" repugnant to and inconsistent with the marriage contract, should be construed as including two distinct moral elements or qualities; that is, it must be of such a character as in the first place to amount to gross misbehavior and wickedness, and in the second place to be repugnant to and in violation of the marriage contract. There are consequently many kinds of gross misbehavior and wickedness which are not, under the clause, grounds for divorce, such as embezzlement or forgery; and so, on the other hand, there are doubtless many violations of marital duty and much conduct repugnant to and in violation of the marriage contract which are nevertheless not sufficient as grounds of divorce, for the reason that they do not take, in the statutory sense, the form of gross misbehavior and wickedness. The statute authorizes a divorce only where there is a concurrence of both elements, and hence does not justify a divorce on the ground that the respondent husband, for a period shorter than the period required by the statute in cases of desertion, has lived in the same house with, or previously been the daily companion of, another woman, each avowing for the other entire affection, though no criminal relation has existed between them. *Stevens v. Stevens*, 8 R. I. 557, 561.

### GROSS MISTAKE.

The gross mistake which will authorize an abatement from the purchase price on account of deficiency in the quantity of the premises, occurs where the difference between the actual and estimated quantity of land represented is so great as to clearly warrant the conclusion that the parties would not have contracted, had they known the truth. *Melick v. Dayton*, 34 N. J. Eq. (7 Stew.) 245, 249; *McMichael v. Webster*, 35 Atl. 663, 666, 54 N. J. Eq. 478. It is hardly necessary to say that a difference of 35 acres in a farm of 150 acres would be a gross mistake. *McMichael v. Webster*, 35 Atl. 663, 666, 54 N. J. Eq. 478.

The words "gross mistake," used in reference to the gross mistake of a log scaler, is a mistake which is clearly shown to have left out some of the logs, or increased the scale by a mistake in the tally, or any addition of the amounts on the tally sheets or something of that kind, and not an honest mistake of judgment in the scaler; for it is well understood and established that in estimating the merchantable lumber in a given log the judgment of scalers varies more or less, and that the scale cannot be made so accurate that all scalers will agree upon it. *Malone v. Gates*, 49 N. W. 638, 639, 87 Mich. 332.

### GROSS NEGLIGENCE.

Gross negligence is the want of even slight care and diligence. *Louisville & N. R. Co. v. McCoy*, 81 Ky. 403, 409; *Illinois Cent. R. Co. v. Walters (Ky.)* 56 S. W. 706, 707; *Louisville & N. R. Co. v. Kelly's Adm'r*, 38 S. W. 852, 855, 100 Ky. 421, 19 Ky. Law Rep. 69, 78; *Canton, C. & H. Turnpike Co. v. McIntire*, 48 S. W. 980, 982, 105 Ky. 185; *McLaughlin v. Louisville Electric Light Co.*, 18 Ky. Law Rep. 693, 699, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; *Louisville & N. R. Co. v. Walden (Ky.)* 74 S. W. 694, 695; *Litchfield v. White*, 7 N. Y. 438, 442, 57 Am. Dec. 534; *Riley v. Western Union Telegraph Co.*, 28 N. Y. Supp. 532, 535, 6 Misc. Rep. 221; *Michigan Central R. Co. v. Carrow*, 73 Ill. 348, 357, 24 Am. Rep. 248; *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512, 523; *Chicago, B. & Q. R. Co. v. Dougherty*, 12 Ill. App. (12 Bradw.) 181, 199; *Union Pac. Ry. Co. v. Rollins*, 5 Kan. 167, 180; *Union Pac. Ry. Co. v. Henry*, 14 Pac. 1, 3, 36 Kan. 565; *Memphis & L. R. R. v. Sanders*, 43 Ark. 225, 229; *Thackston v. Port Royal & W. C. Ry. Co.*, 18 S. E. 177, 178, 40 S. C. 80; *Whiting v. Chicago, M. & St. P. R. Co.*, 37 N. W. 222, 224, 5 Dak. 90; *Coit v. Western Union Telegraph Co.*, 63 Pac. 83, 85, 130 Cal. 657, 53 L. R. A. 678, 80 Am. St. Rep. 153; *Murdock v. Clarke (Cal.)* 24 Pac. 272, 274; *Bennett v. New York, N. H. & H. R. Co.*, 57 Conn. 422, 428, 18 Atl. 668; *Rev. St. Okl.* 1903, § 2784; *Rev. Codes N. D.* 1899, § 5111.

Gross negligence is the want of that diligence which even careless men are accustomed to exercise. *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230, 235; *McGrath v. Hudson River R. Co. (N. Y.)* 19 How. Prac. 211, 220 (quoting *Jones*, Bailm. 21, 22); *White v. Western Union Telegraph Co. (U. S.)* 14 Fed. 710, 717; *Campbell v. Monmouth Mut. Fire Ins. Co.*, 59 Me. 430, 436; *Illinois Cent. R. Co. v. Coleman (Ky.)* 59 S. W. 13, 15.

Gross neglect is the want of that care which every man of common sense, however inattentive he may be, takes of his own property. *Civ. Code Ga.* 1895, § 2900; *French v. Buffalo, N. Y. & E. R. Co.*, \*43 N. Y. (4

Keyes) 108, 113; Seybel v. National Currency Bank, 54 N. Y. 288, 299, 13 Am. Rep. 583; Van Nostrand v. New York Guaranty & Indemnity Co., 39 N. Y. Super. Ct. (7 Jones & S.) 73, 80; Annas v. Milwaukee & N. R. Co., 30 N. W. 282, 288, 67 Wis. 46, 58 Am. Rep. 848. In giving such definition it is erroneous for the court to omit the words "how inattentive soever he may be." Seaboard & R. R. Co. v. Cauthen, 41 S. E. 653, 654, 115 Ga. 422.

By "gross negligence" is meant exceeding negligence; that which is mere inadvertence in a superlative degree. It is a convenient designation of a real thing, and in this sense "gross" is merely intensive, and not vituperative. Holwerson v. St. Louis & S. Ry. Co., 57 S. W. 770, 777, 157 Mo. 216, 50 L. R. A. 850 (quoting Beach, Contrib. Neg. § 62).

"It is said that the term 'gross negligence' conveys no definite legal idea; and the language of learned judges in some recent cases cited in Ang. Carr. §§ 22, 23, 168, appears to sustain the assertion. However that may be, there is no doubt that in the ordinary use of language and in the popular sense of the words, it signifies negligence of an aggravated character, as distinguished from that which is merely careless or not palpably culpable." A stipulation limiting the liability of a trustee to his own "gross negligence or willful misconduct" exonerates him from the consequences of want of caution and of every degree of negligence except that which at first blush would strike the mind as manifestly culpable or aggravated. Litchfield v. White, 5 N. Y. Super. Ct. (3 Sandf.) 545, 552.

"Gross negligence," says the court, "is nothing more than negligence with the addition of a vituperative epithet." Mariner v. Smith, 52 Tenn. (5 Heisk.) 203, 208.

Negligence cannot be considered gross unless evidenced by an entire failure to exercise care, or by the exercise of such a slight degree of care as to justify a belief that the person on whom the care was incumbent was indifferent to the interest and welfare of the other. Missouri Pac. Ry. Co. v. Lawler, 3 Willson, Civ. Cas. Ct. App. § 19.

"Gross negligence" is a technical term. It is the omission of that care "which even inattentive and thoughtless men never fail to take of their own property. It is a violation of good faith." It implies malice and evil intention. Bannon v. Baltimore & O. R. Co., 24 Md. 108, 124 (quoting Ang. Carr. § 10).

No degree of mere carelessness or inadvertence constitutes gross negligence or willful misconduct. Decker v. McSorley, 93 N. W. 808, 809, 116 Wis. 643.

The word "gross," when used to qualify "negligence," is a relative one, and is supposed to emphasize merely a want of due care and negligence as gross or ordinary, according to the circumstances, relations, and conditions in which due care is omitted to be exercised. East Tennessee Telephone Co. v. Simms' Adm'r, 36 S. W. 171, 173, 99 Ky. 404.

The word "gross," when used to qualify the word "negligence," is a relative one, and is supposed to emphasize merely the want of due care and negligence as gross or ordinary. Louisville & N. R. Co. v. Kelly's Adm'r, 40 S. W. 452, 100 Ky. 421.

"Gross negligence" is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term "ordinary negligence," but after all it only means the absence of the care that was requisite under the circumstances. Albion Lumber Co. v. De Nobra (U. S.) 72 Fed. 739, 741, 19 C. C. A. 168 (citing Milwaukee & St. P. R. Co. v. Arms, 91 U. S. 489, 494, 23 L. Ed. 374).

#### As bad faith.

Gross negligence may be evidence of mala fides, but it is not the same thing. Atlas Nat. Bank v. Holm (U. S.) 71 Fed. 489, 491, 19 C. C. A. 94.

Gross negligence in the taking of negotiable paper is not itself the same as bad faith, though it may be evidence of it, inasmuch as the act of negligence may be so wanton as to afford ground for believing that it was intentional and fraudulent. Bad faith will not be imputed, unless there be something in the particular transaction which is equivalent to fraud, actual or constructive. But a deliberate and intentional avoidance of knowledge, or a willful closing of the eyes to a fact, will be construed to have the same effect as knowledge or actual notice. Morton v. New Orleans & S. Ry. Co. & Immigration Ass'n, 79 Ala. 590, 617 (citing 1 Pars. Notes & B. 257, 259; 1 Daniel, Neg. Inst. §§ 190-199; Jones, Securities, § 299).

"Gross neglect," as applied to the neglect of duty by railroad employes, means such an intentional or reckless disregard of security and right as to imply bad faith, and which therefore squints at fraud, and is tantamount to the "magna culpa" of the civil law, which in some respects is quasi criminal. Louisville & N. R. Co. v. Robinson, 67 Ky. (4 Bush) 507, 509.

Gross negligence may furnish evidence of fraud and of a violation of that good faith that the law presumes to exist in every contract of bailment, but that it amounts to actual or intentional fraud, or, in other words, is a quasi crime, as fraud is sometimes termed, is a doctrine clearly opposed to reason

and authority. Gross negligence, on the contrary, may be and often is consistent with good faith and honesty of intention, and, as said by Judge Story, in his work on Bailment, "to confound the terms 'gross negligence' and 'fraud' might be most mischievous error." *Tudor v. Lewis*, 60 Ky. (3 Metc.) 378, 385.

#### As ground for divorce.

The term "gross neglect of duty," which is a cause of divorce, is indefinite, and it is difficult to lay down any general rule by which every case can be determined to be within or without its limits. Each case must be examined by itself. It is not mere neglect of marital duty. The adjective "gross," whatever may be said of it as a mere term of vituperation in other relations, here has legal force as descriptive of the conduct of the party neglecting duty. There must not only be a default, but the default must be attended with circumstances of indignity or aggravation. *Smith v. Smith*, 22 Kan. 699, 700.

A cause of action for divorce on the ground of gross neglect is not established by proof of personal violence, agreement to separate, a division of furniture, and the husband's adulterous intercourse with others. *Thorpe v. Thorpe* (Ohio) *Wright*, 763.

The mere neglect of a husband, with no circumstances of aggravation, to provide maintenance for his wife and children for 15 years, during which time she has supported the children from her own earnings, is not such gross or wanton or cruel neglect as will sustain a libel for divorce in her behalf, under Gen. St. c. 107, § 9, making gross, wanton, or cruel neglect a ground for divorce. *Peabody v. Peabody*, 104 Mass. 195, 197.

#### Lesser degrees included.

The term "gross negligence" includes all lesser degrees of negligence, and a charge in a petition that an act was done through gross negligence would not limit the plaintiff's right of recovery, if otherwise entitled, to an injury inflicted by the willful or intentional act of another. *Hays v. Gainesville St. Ry. Co.*, 8 S. W. 491, 493, 70 Tex. 602, 8 Am. St. Rep. 624.

#### Ordinary negligence distinguished.

See "Ordinary Negligence."

#### As want of due or ordinary care.

The word "gross," when applied to negligence, per se has no legal significance which imports other than simple negligence or a want of due care. *Stringer v. Alabama Mineral R. Co.*, 13 South. 75, 80, 99 Ala. 397; *Alabama G. S. R. Co. v. Hall*, 17 South. 176, 179, 105 Ala. 599; *Louisville & N. R. Co. v. An-*

*chors*, 22 South. 279, 281, 114 Ala. 492, 62 Am. St. Rep. 116 (citing *Stringer v. Alabama Mineral R. Co.*, 99 Ala. 397, 13 South. 75).

Though the words "gross negligence" have been used frequently by judges in discussing the question of the negligence of a railroad which will authorize a recovery for an injury received at a crossing accident, the use of the word "gross" is probably wholly unnecessary. In England it is definitely decided that there is no difference between negligence and gross negligence; the latter being nothing more than the former with the addition of a vituperative epithet. *McPheeters v. Hannibal & St. J. R. Co.*, 45 Mo. 22, 26.

"Gross or willful negligence" is more than mere negligence, as these words are used in Pub. St. c. 112, § 213, requiring it to be shown, in order to recover, that, in addition to a mere want of ordinary care, a person was, at the time of a collision with a railroad train, guilty of gross or willful negligence, and that such gross or willful negligence contributed to the injury; but the distinction between them is one of degree. Where the question is whether a given condition of things amounts to negligence, the court has a right to say that negligence existed, and that therefore the plaintiff could not recover. The same must be true as to negligence in a higher degree, and was so decided in *Debbins v. Old Colony R. Co.*, 154 Mass. 402, 28 N. E. 274. See, also, *Sullivan v. New York, N. H. & H. R. Co.*, 154 Mass. 524, 28 N. E. 911; *Emery v. Boston & M. R. Co.*, 53 N. E. 278, 279, 173 Mass. 136.

It is said that the expression "gross negligence" is loosely used in many judicial decisions, and that it is sometimes used as a mere antithesis of a want of ordinary care. *Warren v. Robison*, 57 Pac. 287, 290, 19 Utah, 289, 75 Am. St. Rep. 734.

Where a landlord makes repairs on the demised premises without using ordinary skill in so doing, he is liable for a personal injury caused thereby to the tenant. In such a case there is no practical difference between gross negligence and the want of ordinary care and skill. The question of reasonable care must always depend on the special circumstances of each case, and is almost of necessity a question of fact, rather than of law. The degrees of negligence so often spoken of in the text-books do not admit of such precision and exactness of definition as to be of any practical advantage in the administration of justice, without a detail of the facts which they are intended to designate. *Gill v. Middleton*, 105 Mass. 477, 479, 7 Am. Rep. 548.

The term "gross negligence" means something more than a want of ordinary care, and the word "gross" has more effect

than the word "due" or "ordinary." *Galbraith v. West End St. Ry. Co.*, 43 N. E. 501, 502, 165 Mass. 572.

The use of the words "gross negligence," in Pub. St. c. 112, § 213, making a railroad corporation liable for death of any one killed at a crossing through the company's failure to give certain signals, unless deceased was guilty of gross or willful negligence, shows that the Legislature intended a materially greater degree of negligence than the mere one of ordinary care. *Phelps v. New England R. Co.*, 51 N. E. 522, 523, 172 Mass. 98.

A charge that, if the injuries for which an action was brought were due to the gross negligence of defendant, the jury should consider the question of exemplary damages, and that gross negligence was a total want of ordinary care, and that ordinary care is that degree of care which an ordinary person would use under like circumstances, is erroneous, since the exercise of care but slightly less than ordinary care does not constitute gross negligence. *Missouri Pac. Ry. Co. v. Mitchell*, 10 S. W. 411, 413, 72 Tex. 171.

In an action against a railroad to recover for the death of plaintiff's husband, where the court gave an instruction authorizing punitive damages for gross negligence, it was prejudicial error to instruct the jury that gross negligence is the absence of ordinary care. *Chesapeake & O. Ry. Co. v. Judd's Adm'rs*, 50 S. W. 539, 540, 20 Ky. Law Rep. 1978, 1979, 106 Ky. 364.

Gross negligence having been branded as an unmeaning, vituperative epithet, the modern tendency is to discard its use, and treat everything under the head of "ordinary care," and its correlative, "simple negligence." But it would be remarkable to find a few simple and useful gradations in almost all things, and yet none in negligence. It may not be generally useful in practice at the present day, but that is because of the multiplicity of the degrees of negligence, and the unevenness of the grades and subdivisions, and not because there is no such thing as gross negligence. To say that it is but the violation of the duty of ordinary care required in the case is but putting two things of different degrees in the one class by using "ordinary care" as a generic term. When one inflicts on a voluntary licensee a wanton, reckless, heedless injury, he is guilty of gross negligence, and is liable. *Poling v. Ohio River Co.*, 38 W. Va. 645, 661, 18 S. E. 782, 787, 24 L. R. A. 215.

#### As want of necessary care.

Gross negligence is the failure to exercise that degree of care, whether slight, ordinary, or great, which is required in the particular instance, although the party may have exercised some care, and it may be only

slightly less than the degree of care required. *Chicago, K. & N. Ry. Co. v. Brown*, 24 Pac. 497, 499, 44 Kan. 384.

Strictly speaking, the expressions "gross negligence" and "ordinary negligence" are indicative rather of the degree of care and diligence which is due from a party, and which he fails to perform, than the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to perform that little, it is called "gross negligence." If very great care is required, and he fails to come up to the mark, it is called "slight negligence." And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called "ordinary negligence." In each case the negligence, whatever epithet we give it, is failure to give and bestow the care which the situation demands, and hence it is more strictly accurate, perhaps, to call it simply "negligence," and this seems to be the tendency of modern authority. *Briggs v. Spaulding*, 11 Sup. Ct. 924, 930, 141 U. S. 132, 35 L. Ed. 662.

"Gross negligence" is a relative term. It is doubtless to be understood as meaning a greater amount of care than is employed by the term "ordinary negligence," but after all it only means an absence of the care that was requisite under the circumstances. *Campe v. Weir*, 58 N. Y. Supp. 1082, 1084, 28 Misc. Rep. 243 (citing *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374).

Within the rule that gratuitous bailees of another's property are not responsible for its loss, unless guilty of gross negligence in its keeping, gross negligence is nothing more than a failure to bestow the care which the property in its situation demands. The omission of the reasonable care required is the negligence which creates the liability. *Preston v. Prather*, 11 Sup. Ct. 162, 163, 137 U. S. 604, 34 L. Ed. 788. Whether this existed is a question of fact for the jury to determine. *Gray v. Merriam*, 35 N. E. 810, 812, 148 Ill. 179, 82 L. R. A. 769, 39 Am. St. Rep. 172.

"Gross negligence," on the part of a bailee, is a relative term, to be considered with reference to the nature of the goods. A bailee without hire is guilty of gross negligence if he omits that reasonable care of property committed to his charge which persons in the like situation exercise, or which the bailee is accustomed to exercise with respect to his own goods, in like cases. *Tracy v. Wood* (U. S.) 24 Fed. Cas. 117.

Gross negligence means the absence of the care that was necessary under the circumstances. When the danger is very great, and the care to prevent disaster is very

slight, or none at all, the negligence of the party becomes a willful act in law. An act characterized by a high degree of negligence, or, as it is familiarly called, "gross negligence," is the counterpart of a willful act. *Shumacher v. St. Louis & S. F. R. Co.* (U. S.) 39 Fed. 174, 177.

Where, under the circumstances, great care would be required, and the care demanded was not exercised, the case is one of gross negligence. "Gross negligence" is also a relative term. It is doubtless to be understood as meaning greater want of care than is implied by the term "ordinary negligence"; but after all it means the absence of the care required under the circumstances. It is also a want of slight care, an entire failure to exercise care, or the existence of so slight a degree of care as to justify the belief that there was an indifference to the interest or the welfare of others. *Galveston, H. & S. A. Ry. Co. v. Cook* (Tex.) 16 S. W. 1038, 1039.

#### As wanton or willful negligence.

Negligence, even when gross, is but an omission of duty. It is not designed and intentional mischief, though it may be cogent evidence of such fact; and a refusal to instruct that gross negligence is defined by the law to be willful and intentional neglect is correct. *Jacksonville S. E. Ry. Co. v. Southworth*, 25 N. E. 1093, 1094, 135 Ill. 250.

The expression "gross neglect" signifies a less degree of neglect than the expression "willful neglect," but as coupled in a petition, alleging that the deceased's death was caused by the gross and willful neglect of the defendant, it does not tend to change the degree of neglect expressed by the word "willful." *Hackett v. Louisville, St. L. & T. P. R. Co.*, 24 S. W. 871, 872, 95 Ky. 236.

In some of the cases, and especially the older ones, the term "gross negligence" is used as the equivalent of "willful negligence" as used by the later authorities, which imports acts or conduct that is willful or wanton, and to which the doctrine of contributory negligence has no application; for, when the injury done to plaintiff is occasioned by the willful and wanton act of the defendant, the negligence of the plaintiff is no defense. *Moses v. Southern Pac. R. Co.*, 23 Pac. 498, 501, 18 Or. 385, 8 L. R. A. 135.

The words "willful" and "gross," as applied to negligence, are not synonymous. As used in Ky. St. § 6, providing that punitive damages may be recovered when an act causing the death of a party is willful or the negligence gross, the word "willful" is descriptive of the act, while the word "gross" is descriptive of a degree of negligence. *Clark's Adm'r v. Louisville & N. R. Co.*, 89 S. W. 840, 841, 101 Ky. 84.

Gross negligence is not necessarily the same as willful neglect, and, in an action un-

der Act 1854, § 3, for the delivery by an apothecary's clerk of poison, instead of a harmless drug, is not the same as "willful neglect," which gives a right of action under such statute. *Hansford's Adm'r v. Payne*, 74 Ky. (11 Bush) 380, 382.

An allegation that deceased was killed by reason of defendant's "gross negligence" does not amount to a charge that the killing was willful or intentional. *Cleveland, C., C. & St. L. Ry. Co. v. Tartt* (U. S.) 64 Fed. 823, 825, 12 C. C. A. 618.

Willful neglect is a higher degree of neglect than gross neglect, and has never been used as a synonym by courts in discussing the facts of a particular case. *Louisville & N. R. Co. v. Coniff's Adm'r* (Ky.) 27 S. W. 865, 866.

The word "gross," as used in characterizing the degree or kind of negligence, does not imply the same thing as "willful" or "intentional," and implies nothing more than negligence. *Cleveland, C., C. & St. L. Ry. Co. v. Tartt* (U. S.) 64 Fed. 823, 825, 12 C. C. A. 618.

As contradistinguished from ordinary neglect, the term "gross neglect," when applied to acts of a bailee, means acts equivalent to willful acts upon the part of the bailee, for example, where he willfully refuses to take any precautions for the purpose of saving or caring for the property, the bailee is guilty of gross neglect. It is not where he simply fails to use the ordinary care which a prudent person would exercise under the circumstances. *Gurney v. Grand Trunk Ry. Co.*, 14 N. Y. Supp. 321, 322, 59 Hun, 625.

"Gross negligence," which evidences willfulness, is such a gross want of care for the rights of others as to justify the presumption of willfulness or wantonness. It is such gross negligence as to imply a disregard of consequences or a willingness to inflict injury. *Lake Shore & M. S. Ry. Co. v. Bode-mer*, 29 N. E. 692, 695, 139 Ill. 596, 32 Am. St. Rep. 218.

"Gross negligence" means an intentional failure to perform a manifest duty, in reckless disregard of the consequences as affecting the life or property of another. It also implies a thoughtless disregard of consequences, without exerting any effort to avoid them. *Denman v. Johnston*, 48 N. W. 565, 567, 85 Mich. 387; *Spokane Truck & Dray Co. v. Hoefer*, 25 Pac. 1072, 2 Wash. St. 45, 11 L. R. A. 689, 26 Am. St. Rep. 842; *Annas v. Milwaukee & N. R. Co.*, 80 N. W. 282, 290, 67 Wis. 46, 58 Am. Rep. 848.

The term "gross negligence" has been long and often employed in this state and in cases before this court as a synonym for wantonness or reckless indifference to probable consequences, and while it is inaccurate in that connection, which has been pointed

out, it has been recognized as implying more than negligence of any degree, and as being the equivalent of wantonness, or that recklessness which is beyond all negligence. In *Georgia Pac. Ry. Co. v. Lee*, 92 Ala. 262, 9 South. 230, it was held that the term "gross negligence" has been so frequently used as defining that recklessness or wantonness, or worse, which implies a willingness to inflict the impending injury, or a willfulness in pursuing a course of conduct which will naturally or probably result in disaster, or an intent to perpetrate wrong, that it is perhaps too late, if otherwise desirable, to eradicate what is said to be an insufficient definition, if not indeed, a misnomer. *Louisville & N. R. Co. v. Orr*, 26 South. 35, 41, 121 Ala. 489.

Though wanton and reckless conduct which amounts to willful negligence has sometimes been spoken of as gross negligence, the term does not define it; nor is gross negligence confined to only such an extreme degree of negligence. Where a court did not instruct that contributory negligence would not be a defense in a case for gross negligence, the term "gross negligence" will not be held to have been used in such extreme sense. *Florida Southern Ry. Co. v. Hirst*, 11 South. 506, 513, 30 Fla. 1, 16 L. R. A. 631, 32 Am. St. Rep. 17.

The expression "gross negligence," in a charge to a jury does not of itself define, nor does it include, only that extreme degree of negligence which is wanton or reckless of its injurious consequences, and to which the defense of contributory negligence does not obtain. *Florida Cent. & P. R. Co. v. Forsworth*, 25 South. 338, 341, 41 Fla. 1, 79 Am. St. Rep. 149.

The term "gross negligence," when referred to as authorizing recovery for a negligent injury, notwithstanding the contributory negligence of the plaintiff, means the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. It implies a thoughtless disregard of consequences, without the exertion of any effort to avoid them. *Schindler v. Milwaukee, L. S. & W. R. Co.*, 49 N. W. 670, 674, 87 Mich. 400.

The term "gross negligence," as defined in decisions of Wisconsin, means that no degree of mere carelessness or inadvertence, however remote from the care customarily used by either the ordinarily careful man or by the exceptionally careful one, constitutes gross negligence, unless accompanied by what is described as intent, either active or constructive, to cause injury, or unless the conduct evinces a total disregard for the safety of persons or property, and is but little less than intentional wrong. *Watermolen v. Fox River Electric Railway & Power Co.*, 85 N. W. 663, 665, 110 Wis. 153 (citing *Lockwood*

*v. Belle City St. Ry.*, 92 Wis. 97, 65 N. W. 866; *Schug v. Chicago, M. & St. Ry. Co.*, 102 Wis. 515, 78 N. W. 1090; *Bolin v. Chicago, St. P., M. & O. R. Co.* [Wis.] 84 N. W. 446, 108 Wis. 333).

The gross negligence of the defendant, which will authorize a recovery in a personal injury action notwithstanding plaintiff's contributory negligence, means such a negligence as evinces a reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or that entire want of care which would raise the presumption of a conscious indifference to the rights of others which is equivalent to an intentional violation of them. *McDonald v. International & G. N. R. Co. (Tex.)* 21 S. W. 774, 775 (citing *Missouri Pac. Ry. Co. v. Shuford*, 10 S. W. 408, 72 Tex. 165; *Southern Cotton Press & Mfg. Co. v. Bradley*, 52 Tex. 587, 600; *International & G. N. R. Co. v. Cocke*, 64 Tex. 151, 157; *Lake Shore & M. S. Ry. Co. v. Bodemer*, 29 N. E. 692, 695, 139 Ill. 596, 32 Am. St. Rep. 218; *Battisbill v. Humphreys*, 38 N. W. 581, 586, 64 Mich. 514; *Wall v. Cameron*, 6 Colo. 275, 277. Gross negligence is that entire want of care which would raise a presumption as to the conscious indifference as to consequences. *Redington v. Pacific Postal Telegraph Cable Co.*, 40 Pac. 432, 434, 107 Cal. 317, 48 Am. St. Rep. 132 (citing *Southern Cotton Press Mfg. Co. v. Bradley*, 52 Tex. 587).

Gross negligence is an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the rights and welfare of others. Gross negligence is that entire want of care which would raise a presumption of conscious indifference to consequences. Thus, where a telegraph message was transmitted by a company at a time when the wires were working, though immediately before they had been working badly, it cannot be said that the company was guilty of gross negligence. *Colt v. Western Union Tel. Co.*, 63 Pac. 83, 85, 130 Cal. 657, 53 L. R. A. 678, 80 Am. St. Rep. 153.

#### GROSS PROCEEDS.

"Gross proceeds," as the term is used in marine insurance in the statement of the rule that the measure of damages in case of a partial loss of a cargo of grain from water damage, is the difference between the respective gross proceeds of the same article when sound and when damaged, and not the net proceeds. It is said in 2 Arn. Ins. 969, to be the market price at which the merchant, after paying freight, duty, and landing charges, can sell the goods to the consumer or purchaser at the port of arrival, and that by the term "net proceeds" is meant the gross proceeds, deducting freight, duty, and landing charges. *Lamar Ins. Co. of New York*

v. McGlashen, 54 Ill. 513, 518, 5 Am. Rep. 162.

### GROSS RECEIPTS.

A "tax on gross receipts" is a tax on the money of the carrier after it has reached the treasurer of the corporation. The fact that it may have been derived from transportation of freight between states, or between the home port and a foreign port, matters not; and it is not the same as a tax on tonnage. *Philadelphia & S. M. S. S. Co. v. Commonwealth*, 104 Pa. 109, 115.

"Gross receipts," as used in Act June 7, 1879, providing that every railroad company shall pay a tax on its gross receipts for tolls or transportation, telegraph, and express business, is equivalent to "gross increase" or "gross earnings," and their origin and ownership, rather than the hands into which they come, must be considered in determining the question whether they are taxable or not. *Philadelphia & R. R. Co. v. Commonwealth*, 104 Pa. 80, 82.

Thus an express company cannot deduct from the amount on which it pays taxes the amounts paid various railroad companies for transporting express matter, even though the railroad companies have paid all the taxes accrued in respect to their gross earnings, including the amount received from such express company. *Commonwealth v. United States Exp. Co.*, 27 Atl. 396, 398, 157 Pa. 579.

The gross receipts received from passengers and freight, within the meaning of Act Pa. June 1, 1889, which provides that a railroad company owning, operating, or leasing any railroad shall pay a tax upon the gross receipts received from passengers and freight, do not include tolls received by one railroad company from another for the joint use of the track of the former, computed, not upon the amount of the gross receipts, but at a certain specified sum per ton or per passenger. *Commonwealth v. New York, L. E. & W. R. Co.*, 22 Atl. 808, 145 Pa. 200.

In Internal Revenue Act June 30, 1864, § 103 (13 Stat. 275), as amended by Act July 13, 1866, § 9 (14 Stat. 135), imposing a tax on the gross receipts of steamboat companies from passengers carried by it in its steamboats, "gross receipts" include not only the receipts for the carriage of the passengers, but also the money received for the use of berths and staterooms. *New Jersey Steamboat Co. v. Pleasonton* (U. S.) 18 Fed. Cas. 87.

### GROSS SALES.

"Gross sales," as used in a contract providing for the payment as royalties of a

certain per cent. of the amount of the gross sales, means actual sales, without deducting expenses. *Seven Southerland Sisters v. McInnerney*, 53 N. Y. Supp. 771, 24 Misc. Rep. 720.

### GROSS TON.

Where by local usage "gross ton" is used in place of "long ton," and means a ton of 2,240 pounds, a contract having reference to such local usage and using the words "gross ton" will not be held to mean a ton of 2,000 pounds, as provided by Pol. Code, § 3215. *Higgins v. California Petroleum & Asphalt Co.*, 52 Pac. 1087, 1089, 109 Cal. 304.

"Gross ton," as used in a contract providing for royalty of so much per gross ton of bituminous rock, will be held to mean the crude unrefined rock, in distinction from a product of a process of refinement by which it is reduced to pure asphalt, which is only one ton from about seven tons of the crude rock, and will not be held to mean a ton of 2,240 pounds. *Higgins v. California Petroleum & Asphalt Co.*, 41 Pac. 1087, 1089, 109 Cal. 304.

### GROSS TONNAGE.

The entire cubic contents of the interior space of a vessel, numbered in tons, is called the "gross tonnage." *The Thomas Melville* (U. S.) 62 Fed. 749, 751, 10 C. C. A. 619.

### GROSSLY.

A statute authorizing the granting of a divorce when the husband "grossly, wantonly, and cruelly" refuses or neglects for one year to provide a maintenance for the wife, being of sufficient ability, should be construed to mean more than a mere willful desertion and refusal of support. "The terms 'grossly, wantonly, and cruelly,' etc., although not very definite, must not be considered wholly insignificant. The Legislature did not intend a new cause of divorce, and the court could not regard it as synonymous with 'willful desertion,' where three years are required, and here only one year." *Mandigo v. Mandigo*, 15 Vt. 786.

### GROSSLY INADEQUATE CONSIDERATION.

"Grossly inadequate consideration" means a consideration so far short of the real value of the property as to shock a correct mind, or as to arouse a presumption in the mind that the person who takes that property takes it under some kind of secret trust. *McGhee v. Wells*, 35 S. E. 529, 531, 57 S. C. 280, 76 Am. St. Rep. 567.

**GROUND.**

See "Building Ground"; "Burying Grounds"; "Just Ground."

A covenant in a deed, reserving the right of arching over an alleyway at a height of not less than 10 feet from the ground, referred to the surface of the earth as it might be from time to time, and not to the surface as it was in its original state. An alleyway, with a cover not less than 10 feet above the surface of the alley, must be maintained under the covenant. *Wood v. Carter*, 70 Ill. App. 217, 218.

**Everything under surface.**

A reservation, in a lease of land for coal mining purposes, of the "ground east and south of a certain building," includes not only the surface, but everything thereunder. *Oskaloosa College v. Western Union Fuel Co.*, 54 N. W. 152, 153, 90 Iowa, 380.

**Land synonymous.**

"Ground," as used in Act April 9, 1867, § 1, authorizing school directors to enter upon and occupy ground for schoolhouses, is synonymous with "land," and is not confined to such only as is bare of buildings. *Ferree v. Sixth Ward School Dist. of Allegheny*, 76 Pa. (26 P. F. Smith) 376, 378.

**Land under water.**

Acts 1852, p. 426, § 17, provides that a water tax of a certain city may be assessed upon all grounds within the city limits liable to taxation, at a certain rate for each 100 square feet of surface. Held, that the word "grounds" does not include lots under water, whether owned by the state or by an individual. The very use of the word "grounds," to be taxed in proportion to their surface with regard to value, indicates a distinction, and hence that part of the tax for surface of ground below high-water mark must be set aside. *State v. Jersey City*, 25 N. J. Law (1 Dutch.) 525, 529.

Where certain lands have been granted for cultivation and settlement, the term "rest of the ground," as used in a grant, cannot be construed to mean land flowed by tide water, without some context or qualifying word of description indicating such an intention. *Commonwealth v. City of Roxbury*, 75 Mass. (9 Gray) 451, 491.

**Electric current.**

A statement that there was a "ground" on an electric circuit between two boxes means that the current escaped and was carried to the ground. *Bergen County Traction Co. v. Bliss*, 41 Atl. 337, 338, 62 N. J. Law, 410

**GROUND OF ACTION.**

The phrase "ground of action," as used in a statute authorizing the court to allow a declaration to be amended when amendment does not change the ground of action, "is not used in any technical or narrow sense, but was intended to refer rather to the real object of the plaintiff in bringing the suit, and such construction has always been given to it as would further that object. The face of the declaration merely, therefore, has never been held to determine whether it may be amended, the form of the action being preserved; but courts, in deciding on the admissibility and propriety of an amendment, have uniformly, and we think properly, looked also at the extrinsic circumstances of the case, with a view to ascertaining the real purpose for which the suit was brought." *Nash v. Adams*, 24 Conn. 33, 39.

The phrase "ground of action," within a statute allowing the amendment of a declaration, provided the ground of action is not changed, is not to be construed in its technical sense, but is held to refer rather to the real object of the plaintiff in bringing the suit, which is to be determined, not merely by the face of the declaration, but also by the extrinsic circumstances of the case. *Howland v. Couch*, 43 Conn. 47, 52; *Appeal of Huntington*, 48 Atl. 766, 767, 73 Conn. 582.

The ground of an action, as alleged in the original complaint, was a false affirmation or affirmations, amounting to a false warranty, in respect to the value of a river landing, by means of which the defendants induced the plaintiff to buy a lease of the landing to his injury; and the amendments introduced into that complainant enlarged the affirmation, so as to include in it the value of certain coal embraced in the same purchase. They do not otherwise change it. No other or different warranty, or other and different transaction or bargain, is set up; but the warranty is made by the amendment to extend to the value of the coal also. It is a case of purchase at the same time, of the same party, and by the same contract of two articles, under the inducement of a false warranty as to both; and the plaintiff, in declaring, omits to aver that the bargain embraced both articles, and that the false warranty extended to both. It is not changing his grounds of action to amend by averring that the purchase embraced both, and the false affirmation covered both. In fact, the amendment undoubtedly enlarges the issue, and lays the foundation for other and further evidence, and the recovery of greater damages; but that is immaterial. *Church v. Syracuse Coal & Salt Co.*, 32 Conn. 372, 376.

The term "ground of action," in Gen. St. § 1029, providing that, in hearings before the superior court on appeal from the doings of



commissioners, the claimant shall have liberty to amend any defect, mistake, or informality in the statement of the claim, not changing the ground of action, refers to what was the real object of the claimant in making his claim. *Donahue's Appeal from Com'rs*, 62 Conn. 370, 373, 26 Atl. 399, 400.

### GROUND OF RAILROAD.

The phrase "the ground of the railroad," used in describing a parcel of land in a mortgage as being "north of the ground of the railroad," evidently means its right of way. *Pence v. Armstrong*, 95 Ind. 191, 195.

### GROUND RENT.

See "Irredeemable Ground Rents."

As real property, see "Real Property."

Ground rent is a rent paid for the privilege of building on another's land. It implies that the buildings placed upon the land by the lessee shall be his property. *Russell v. City of New Haven*, 51 Conn. 259, 361.

Ground rent is a rent service. *Wallace v. Harmstad*, 44 Pa. (8 Wright) 492, 501.

"Ground rent" is an estate of inheritance in the rent, while the owner of the land has an estate of inheritance in the land out of which the rent issues. Each is the owner of a fee-simple estate. "The one is incorporeal; the other, corporeal." *Hart v. Anderson*, 48 Atl. 636, 637, 198 Pa. 558 (citing *Irwin v. Bank of United States*, 1 Pa. [1 Barr] 340).

The word "ground rent" is used to signify the "reditus," or "render," reserved in a perpetual lease. *Sturgeon v. Ely*, 6 Pa. (6 Barr) 406, 408.

A ground rent is an estate carved out of the land. The owner of the one has an estate in the rent; the other, an estate in the land. Both are real estate, and subject alike to be incumbered by mortgage and judgment. *Mitchell v. Steinmetz*, 97 Pa. 251, 255, 10 Wkly. Notes Cas. 43, 44.

Primarily the term "ground rent" means a rent payable to a lessor; but, as used in a will wherein the testatrix bequeathed her several ground rents for the payment of funeral expenses and the erection of monuments for her father, mother, husband, and herself, she having disposed of all her other property, and the rent amounting only to \$86 a year, should be construed so that the reversionary interest of the testatrix might be sold and the proceeds applied to the purposes mentioned in the will. *Ogle v. Reynolds*, 23 Atl. 137, 138, 75 Md. 145.

A grant of land from A. to B., his heirs and assigns, made under a certain annual rent, payable forever to the grantor, his heirs

and assigns, is called in this country a "ground rent," though in England, subsequent to the statute *quia emptores terrarum* of 18 Edw. I, a feoffment in fee by the owner, with a reservation by the same deed of a rent to be paid to himself and his heirs, with the right of distress, has been considered a rent charge. Nevertheless such ground rents differ from a rent charge, strictly speaking, which arises where one, being seised in fee of lands, grants a rent in fee or for life out of them, with a power to the grantee to distrain. In the latter case the payment is founded on a consideration actually paid to the grantor of the rent, and received by him at or before the time of granting it; and hence, if the title of the grantor to the land upon which the rent is charged proved defective, still the rent is not extinguished, but must be paid, while in the case of a ground rent, the continuance of which depends entirely upon the future enjoyment of the land under the title conveyed by the grantor, to whom the rent is to be paid, if the grantee and heirs be evicted by a title paramount, the rent ceases and becomes extinct. *Franciscus v. Reigart* (Pa.) 4 Watts, 98, 116.

### GROUNDLESS PROSECUTION.

"A groundless and malicious prosecution is caused by the act of commencing the action, not by the reasons given for commencing it. There is no relation of cause and effect between an illegal act, or the determination to do one, and the excuse alleged for doing it." *Rothschild v. Whitman*, 30 N. E. 858, 859, 132 N. Y. 472.

### GROUNDS.

Rev. St. c. 26, authorizing a proceeding at the instance of the public against corporations to have a forfeiture of the charter or a dissolution of the corporation judicially declared and a judgment of ouster thereon, and that such proceeding is to be effected by an information by the Attorney General in a superior court or the Supreme Court, "setting forth briefly and without technical terms the grounds on which such forfeiture or dissolution is alleged to have been incurred or to have taken place," means that the information, like an indictment or declaration, should state with certainty to a common intent those facts and circumstances which constitute the offense in its substance, whether of misfeasance or nonfeasance, so that on its face, if true, it may be seen that there is a specific ground in fact, and not by conjectural inference, on which a forfeiture ought to be adjudged. By requiring the grounds to be set forth, nothing less could be meant than that the facts and circumstances should be set forth. *Attorney General v. Petersburg & R. R. Co.*, 28 N. C. 456, 467.

# GROUNDS OF BELIEF.

The expression "grounds of belief" is practically synonymous and interchangeable with "ground of belief," so that a charge is not erroneous because using one expression instead of the other. *Lucas v. Johnson* (Tex.) 64 S. W. 823, 825.

# GROUTING.

"Grouting" is the same as being laid flush with mortar, as used in a contract for the construction of bridge piers, reciting that the foundation should rest on limestone rock and the filling in should be laid flush with mortar; the contract being construed to mean that the contractor should build the foundation on bed rock, and the filling in should be held to its place by grouting. *Sullivan County v. Ruth*, 59 S. W. 138, 140, 106 Tenn. 85.

# GROW.

See "Stock Grower."

Where a farmer mortgaged "all the hay and grain of every kind that grows on the farm on which I now live the present year," in January, it covered the hay and the winter rye, as being in esse at the time of the execution of the mortgage, but no part of the grain crop of the spring of such year *Cudworth v. Scott*, 41 N. H. 456.

# GROW DUE.

An assignment of property in trust for the benefit of creditors, directing the payment of debts and liabilities to grow due, should be construed to mean debts which will mature in the course of time, but which have then not matured, and cannot be held to mean debts or claims not then in existence, but afterwards to be created, either by the assignor or assignees, which, if secured, would render the assignment void. *Brainerd v. Dunning*, 30 N. Y. 211, 214; *Van Hook v. Walton*, 28 Tex. 59, 75. Thus it was held that a claim for rent accruing under a lease after an assignment was not a debt due or to grow due. *In re Havener*, 23 N. Y. Supp. 1092, 1093, 70 Hun. 56.

# GROWING CROPS.

"Growing," as used in Acts N. C. 1844, c. 35, which enacts that it shall not be lawful for any officer to levy an execution on any growing crop, "imports that the crop is not come to maturity, but is green or not made." *Shannon v. Jones*, 34 N. C. 206, 209.

A "growing crop" is one which exists in contemplation of law from the time the seed is deposited in the ground until after it

is harvested, since at the time the seed is sown it loses the qualities of a chattel, and becomes a part of the freehold, and will pass with it. *Wilkinson v. Ketler*, 69 Ala. 435.

A will giving a certain person a tract of land, with the crops thereon, whether "gathered or growing" at the time of testator's death, means the crops made the year the testator died, and those of the preceding year remaining on the land, and those brought thither from other plantations to be stored. *Carnagy v. Woodcock* (Va.) 2 Munf. 234, 239, 5 Am. Dec. 470.

In a mortgage conveying "all crops growing and to be grown" upon certain specified land, the mortgage covers all crops on such land which have been previously sown and are then growing; and although it is void as to the crops thereafter to be grown on the land, that fact does not affect its validity as to the crops then growing. *Luce v. Moorhead*, 73 Iowa, 498, 35 N. W. 598, 599, 5 Am. St. Rep. 695.

A mortgage describing the property mortgaged as "oats now growing" does not cover oats which have been cut and partially threshed. "Vegetable bodies are growing while their bulk is being enlarged by the natural addition of matter through ducts." *Ford v. Sutherland*, 2 Mont. 440, 442 (citing *Webst. Dict.*).

Alfalfa is not exempt from taxation as "growing crops," under Pol. Code, § 3607, exempting growing crops from taxation. *Miller v. Kern County*, 70 Pac. 549, 553, 137 Cal. 516.

## As part of realty.

The general rule of common law is that growing crops form a part of the real estate to which they are attached and from which they draw nourishment, and unless there has been a severance of them from the land they follow the title thereof. *Wootton v. White*, 44 Atl. 1026, 1027, 90 Md. 64, 73 Am. St. Rep. 425.

"Growing annual crops" for many purposes are and always have been considered chattels. At common law growing crops were universally held to be goods, and they were subject to all the leading consequences of being goods, as seizure on execution. *Kingsley v. Holbrook*, 45 N. H. 313, 319, 86 Am. Dec. 173.

It is well settled in this commonwealth that growing crops are personal property, subject, however, to pass with and as appurtenant to the realty unless severed by reservation or exception therefrom. *Bear v. Bitzer*, 16 Pa. (4 Harris) 175, 178, 55 Am. Dec. 490; *Wilkins v. Vashbinder* (Pa.) 7 Watts, 378, 379. Such was the rule of the common law, and uniformly held in Eng-

land not to have been altered by the statute against frauds and perjuries. *Backenstoss v. Stahler's Adm'rs*, 33 Pa. (9 Casey) 251, 254, 75 Am. Dec. 592.

A growing crop is an interest in land, and a part of the freehold, and passes by a deed conveying the land, without more. *Steele v. Farber*, 37 Mo. 71, 79.

"Growing crops" are not land, within the meaning of the clause of the statute of frauds requiring contracts affecting lands to be in writing. At common law growing crops are uniformly held to be goods. *Green v. Armstrong*, 1 Denio, 550, 554.

#### GROWING TIMBER.

It is elementary knowledge that "growing timber" forms a part of the realty, and like any other part of the estate may be separated from the rest by express reservation or grant; that, even when so separated, it retains its distinctive character as an incident of real property so long as it remains uncut, but, when cut and severed from the soil, it becomes personal property, to which title may be acquired, as in case of other chattels, by simple contracts, either oral or written. *Emerson v. Shores*, 49 Atl. 1051, 1052, 95 Me. 237, 85 Am. St. Rep. 404.

#### GROWING UP IN CRIME.

The term "growing up in crime," as used in Const. art. 8, § 12, providing that the Legislature may provide for the safe-keeping, education, and employment of all children who are growing up in mendicancy or crime, refers not only to a minor who is a criminal, who has been or is now committing a crime, but also to a status; that is, a tendency in the direction of crime. A youth who is incorrigible is "growing up in crime." Who is more likely to eventually become a criminal than a youth who is so far advanced in following his own will as to have become incorrigible, incapable of being corrected or amended, bad beyond correction, irreclaimable, by those upon whom society and the laws place the duty of training him in proper conduct as a member of society? *Scott v. Flowers*, 84 N. W. 81, 60 Neb. 675.

#### GROWN.

A complaint averring that defendant converted to its own use wheat "grown" by said D. upon the said premises is broad enough to allow proof of the several acts done and performed by D. in growing the grain. It imports that the grain was produced by agencies set in motion by D., and implies that he had possession of the land and was the owner of the crop. *Donovan*

*v. St. Anthony & D. Elevator Co.*, 75 N. W. 809, 810, 7 N. D. 513, 66 Am. St. Rep. 674.

#### GRUB STAKE.

This is a peculiar and novel character of contract, common in the early mining history of the state, where two parties enter into a common venture, one furnishing the grub and the other the labor, in prospecting for valuable mining properties. Such ventures were joint in their character, and all valuable discoveries would inure to the equal benefit of both. The courts declared such ventures to partake of the character of qualified partnerships. *Berry v. Woodburn*, 107 Cal. 504, 512, 40 Pac. 802, 804.

"Grub stake" is a term colloquially applied to a prospecting contract, and in its usual scope is simply a common venture, wherein one party, called the "outfitter," furnishes the supplies or grub, and the other, called the "prospector," performs the labor, and all discoveries inure to the benefit of the parties in the proportion fixed by the agreement. *Hartney v. Gosling*, 68 Pac. 1118, 1123, 10 Wyo. 346.

"Grub stake" is a contract by the terms of which one party is to furnish the necessary provisions, tools, powder, etc., and the other party agrees to prospect and locate mineral lands, and do the work necessary to the location of mining claims thereon, the interest thus acquired in the property to be held jointly by the parties. *Meylette v. Brennan*, 38 Pac. 75, 20 Colo. 242.

#### GUANO.

The term "guano," as used in a policy of insurance, though, strictly speaking, it does not embrace every kind of fertilizer used for agricultural purposes, where at the time the policy was issued the insurer knew that the insured had fertilizer on hand, but did not have any guano, was intended to embrace such fertilizer. *Planters' Mut. Ins. Co. of Washington County v. Engle*, 52 Md. 468, 481.

#### GUARANTEE.

He to whom a guaranty is made. This word is also used, as a noun, to denote the contract of guaranty or the obligation of a guarantor, and, as a verb, to denote the action of assuming the responsibility of a guarantor. But, on the general principle of legal orthography—that the title of the person to whom the action passes over should end in "ee," as "donee," "grantee," "payee," "bailee," "drawee," etc.—it seems better to use this word only as the correlative of "guarantor," and to spell the verb, and also

the name of the contract, "guaranty." Black, Law Dict.

# GUARANTIED.

See "Sales Guaranteed."

Generally the use of the word "guarantied," as applied to dividends upon preferred stock, whether in connection with the word "preferred," or alone, has not been held to import an absolute liability. *Field v. Lamson & Goodnow Mfg. Co.*, 38 N. E. 1128, 1128, 162 Mass. 388, 27 L. R. A. 136 (citing *Williston v. Michigan Southern & N. I. R. Co.*, 95 Mass. [13 Allen] 401; *Taft v. Hartford, P. & F. R. Co.*, 8 R. I. 810, 5 Am. Rep. 575; *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Boardman v. Lake Shore & M. S. R. Co.*, 84 N. Y. 178; *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496; *Stevens v. South Devon R. Co.*, 9 Hare, 315).

# GUARANTOR.

See, also, "Guaranty."

A "guarantor" is one who agrees to see the engagement of another performed. *Barnett v. Wing*, 16 N. Y. Supp. 567, 569, 62 Hun, 125.

Guarantors are sureties for others, who are the principals. *Read v. Cutts*, 7 Me. (7 Greenl.) 186, 189, 22 Am. Dec. 184.

A guarantor is a surety. *Conger v. Babbet*, 24 N. W. 569, 67 Iowa, 13.

A guarantor is one who writes his name on the back of a promissory note for the purpose of giving it security, and not for the purpose of transfer. *First Nat. Bank of San Diego v. Babcock*, 29 Pac. 415, 416, 94 Cal. 90, 28 Am. St. Rep. 94.

In a note signed by P., under which is the signature of C., with the words "Security for the fulfillment of the above," C. was not a "guarantor," but an immediate party. His name was signed at the foot, beneath that of P., the principal debtor, but, to exclude misconception of his character in the transaction, with the marginal annexation of the words "Security for the fulfillment of the above," which are not inconsistent with the direct engagement. They serve to note that he had signed, not as a "guarantor," but as a "surety." They are not technical words in a contract of guaranty, and the juxtaposition of the signatures as well as the absence of apt words to indicate a contingent responsibility, shows that the parties intended to be jointly bound. *Craddock v. Armor (Pa.)* 10 Watts, 258.

Where defendant wrote the words, "I guaranty the payment of the within note," he was a guarantor, and not a surety. Ox-

ford Bank v. Haynes, 25 Mass. (8 Pick.) 423, 19 Am. Dec. 334.

"The difference between a maker of a note and an indorser or guarantor is that the contract of the first by its terms imports an unconditional obligation to pay money, and that of the last by its terms imports a conditional obligation. The rules of law settle this species of contracts, as well as others, and prescribe how they may be created, their legal effect, and the mode of enforcement." *Aud v. Magruder*, 10 Cal. 282, 290.

# GUARANTY.

See "Absolute Guaranty"; "Collateral Guaranty"; "Conditional Guaranty"; "Continuing Guaranty"; "General Guaranty"; "Special Guaranty"; "Strict Guaranty."

A "guaranty" is defined to be a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person, who in the first instance is liable for such payment or performance. *Gallagher v. Nichols*, 60 N. Y. 438, 444; *Barnett v. Wing*, 62 Hun, 125, 128, 16 N. Y. Supp. 567; *Gallagher v. Nichols (N. Y.)* 16 Abb. Prac. (N. S.) 337, 338; *Manrow v. Durham (N. Y.)* 3 Hill, 584, 591 (citing 3 Kent, Comm. 121); *Andrews v. Pope*, 35 S. E. 817, 818, 126 N. C. 472; *Beeker v. Saunders*, 28 N. C. 380, 381; *Carter v. McGehee*, 61 N. C. 431, 432; *Spencer v. Carter*, 49 N. C. 287, 289; *Redfield v. Haight*, 27 Conn. 81, 87; *Middleton Bank v. Magill*, 5 Conn. 28, 70; *Deming v. Bull*, 10 Conn. 409; *Paine v. Stewart*, 33 Conn. 516; *Parker v. Culvertson (U. S.)* 18 Fed. Cas. 1122, 1126; *Tidoute Sav. Bank v. Libbey*, 77 N. W. 182, 183, 101 Wis. 193, 70 Am. St. Rep. 907; *Abbott v. Brown*, 22 N. E. 813, 814, 131 Ill. 108; *Gridley v. Capen*, 72 Ill. 11, 13; *Drake v. Markle*, 21 Ind. 433, 436, 83 Am. Dec. 358 (citing 1 Bouv. Law Dict.); *Wood v. Bevan & Bro.*, 8 Montg. Co. Law Rep'r, 189, 191 (citing *Johnston v. Chapman*, 3 Pen. & W. 18).

A guaranty is defined by Judge Story to be "an undertaking by one person to be answerable for the payment of some debt or the due performance of some contract or duty by another person, who himself remains liable to pay or perform the same." *Durham v. Manrow*, 2 N. Y. (2 Comst.) 533, 548; *Abbott v. Brown*, 22 N. E. 813, 814, 131 Ill. 108.

A guaranty is a promise to answer for the debt, default, or miscarriage of another person. *Rev. St. Okl.* 1903, § 3091; *Rev. Codes N. D.* 1899, § 4625; *Civ. Code S. D.* 1903, § 1969; *Civ. Code Mont.* 1895, § 3800; *Civ. Code Cal.* 1903, § 2787.

A guaranty is an agreement by one person to answer to another for a debt, default,

or miscarriage of a third person. *Buckingham v. Murray's Ex'r*, 30 Atl. 779, 780, 7 Houst. 176; *Wallace, Muller & Co. v. Leber*, 47 Atl. 430, 431, 65 N. J. Law, 195; *Lachman v. Block (La.)* 15 South. 649, 651; *Welsh v. Ebersole*, 75 Va. 651, 656; *Hall v. Farmer*, 5 Denio (N. Y.) 484, 487; *Bowen v. Needles Nat. Bank (U. S.)* 87 Fed. 430, 440.

"Guaranty" is an obligation for the ability or solvency of another. *Leonard v. Wood*, 2 Chest. Co. Rep. 329, 330 (citing *Reigart v. White*, 52 Pa. [2 P. F. Smith] 438).

"Guaranty is where one is bound to another, who hath the land, to warrant the same to him, which may be by two ways; that is, by act of the law, etc., or by deed of the party who grants by deed or fine to warrant it to him." *Roseman v. Hughey (S. C.)* Rice, 437, 438 (Quoting *Termes de la Ley*).

A contract of guaranty is that the principal is able and willing and that he will perform an engagement which he has undertaken or is about to undertake, and that in the event of failure the guarantor will answer for the consequences. It is a cumulative collateral engagement by which the guarantor agrees that his principal is able and will perform a contract which he has made or is about to make, and that if he fail he will, on being notified thereof, pay resulting damages. *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 335, 1 N. E. 805, 807 (citing *Reigart v. White*, 52 Pa. [2 P. F. Smith] 438).

A guaranty may be broad as, or broader or narrower than, the contract between the principal debtor and his creditor. The terms of the guaranty measure the liability of the guarantor, but do not constitute the contract between the debtor and creditor. The contract of guaranty is a contract between the guarantor and the person assured. The person whose conduct or acts are assured is not a necessary party to a contract of guaranty. The contract between the person thus assured and the person whose acts are assured is a separate matter. *Mt. Calvary Church v. Albers*, 73 S. W. 508, 512, 174 Mo. 331.

A guaranty is a contract of indemnity, which binds the party who gives it only in default of him for whose benefit it is given; and from the nature of such a contract it results that the debtor must be resorted to in the first instance. *Williams v. Collins*, 4 N. C. 382, 388.

A contract of guaranty or suretyship is said to be strictissimi juris, and one in which the guarantor has the right of prescribing the exact terms upon which he will enter into the obligation, and to insist on his discharge if those terms are not observed. It is not a question whether he is harmed by a deviation to which he has not assented.

*Schoonover v. Osborne*, 79 N. W. 263, 264, 108 Iowa, 453.

A contract of guaranty is like every other contract in this: that there must be two or more parties to the contract and the minds of the parties must assent. *Farmers' Loan & Trust Co. v. Stuttgart & A. R. R. Co. (U. S.)* 92 Fed. 246, 248.

#### Acceptance and notice thereof.

*De Colyar* states the essential requisites of a contract of guaranty to be (1) the mutual assent of the parties; (2) that the parties be capable of contracting; (3) that each be supported by a valuable consideration. With regard to the mutual assent of the parties he says: "Every contract includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise. Until, therefore, an acceptance be given (which must be an absolute and unconditional acceptance of the previous offer), the promisor is not liable. In accordance with this doctrine it has been decided that the mere offer of guaranty is not binding until acceptance by the person to whom the offer is made. Till then, it is revocable by the party making it." *Lachman v. Block (La.)* 15 South. 649, 651.

A letter, in which the writer thereof, after recommending a certain person as worthy of credit, adds, "If, in addition to the foregoing expressions, you should require any individual guaranty, I shall have no objection to give you that pledge," is not a guaranty, but is rather a proposition leading to a guaranty, and was not binding where for more than two years no notice was given the writer that it was meant to be accepted or that the party to whom it was written required any individual guaranty of him. *Stafford v. Low (N. Y.)* 16 Johns. 67, 68.

Where one exhibited a letter to himself containing the following words: "For the amount of such goods as you wish to purchase on six months' credit \* \* \* I will guaranty at 2½ per cent.," and on the faith of such letter obtained goods, the letter constituted a collateral guaranty, in which seasonable notice of acceptance was necessary in order to bind the guarantor. *Bradley v. Cary*, 8 Me. (8 Greenl.) 234, 238.

#### As an absolute agreement.

A guaranty may be absolute (that is, for the payment of the bill or note), or conditional (that is, a guaranty that it is collectible by due diligence). *Esberg-Bachman Leaf-Tobacco Co. v. Held (U. S.)* 62 Fed. 962, 963.

"Guaranty," as used in a contract whereby a party undertook to "pay and guaranty" the debt of a third person, is not used in its

technical sense, but will be construed as an absolute agreement to pay. *Packer v. Benton*, 35 Conn. 343, 348, 95 Am. Dec. 246.

**As agree or promise.**

The word "guaranty," in an indorsement on a note, "I hereby guaranty payment of the within, and waive demand, notice of protest, and protest," will not be construed in its technical sense, but as signifying "agree, promise, or undertake"; and hence the agreement was that of an indorser, as otherwise demand and notice of nonpayment would not be necessary. *Delsman v. Friedlander*, 66 Pac. 297, 298, 40 Or. 33.

"Guaranty," as used in a paper reciting that "for value received I guaranty" to a certain person "that I will pay" him a certain sum per month on certain conditions, is equivalent to "promise." *Thayer v. Wild*, 107 Mass. 449, 452.

In a contract for furnishing boilers for the construction of a building, one of the provisions contained the guaranty as to the boilers, and another one used the word "agreement"; and it was contended that a letter written in relation to such contract, which used the word "guaranty," referred to the portion of the contract alone where the guaranties were expressly used. It was argued that the word "guaranty" is not synonymous with the word "agreement," but ordinarily signifies such an undertaking as to some fact or performance as is enforceable as well after as before delivery and acceptance, and does not include matters of description or conditions which would be waived by acceptance of the goods. Technically a guaranty, where the word is used in the sense of "warranty," is an express or implied statement of something which a party undertakes shall be a part of the contract, and, though part of the contract, collateral to the express object of it, and that selling a particular thing by its proper description cannot with accuracy be said to create a warranty; but the word "guaranty" in such a contract is not to be taken in absolute literality. The question is, not what is the technical meaning of the word, but what did the parties intend it to refer to; and in this sense the provision of the contract constitutes a guaranty. *Heine Safety Boiler Co. v. Francis Bros. & Jellett* (U. S.), 105 Fed. 413, 417.

That the word "guaranty" is usually employed to signify a remote liability is admitted; but it does not thence follow that it is not frequently used to mean a direct or positive engagement. Its ordinary acceptation is "to secure," "to promise," "to bind," "to agree," "to warrant," and "to defend." It is often inserted in deeds of conveyance, and when it is used, unless its sense is limited or extended by the context of the writing or the legal consequence of the act, it is

synonymous with "promise," "agree," "warrant," or "defend." *Gaster v. Ashley*, 1 Ark. (1 Pike) 325, 333.

**As a collateral agreement.**

A guaranty is not a direct engagement to pay one's own debt, or perform an obligation resting primarily on the guarantor; for it assumes the liability of another as principal, for whom the guarantor becomes surety. The engagement is in aid of and collateral to the original liability of the principal debtor or party for whom the guaranty is given. *Hall v. Farmer* (N. Y.) 5 Denio, 484, 487; *Welsh v. Ebersole*, 75 Va. 651, 657; *Carpenter v. Thompson*, 34 Atl. 105, 106, 66 Conn. 457; *Cochran v. Dawson* (Pa.) 1 Miles, 276, 277.

A guaranty or warranty is not an independent agreement, but a mere incident and part of the principal contract of sale, and when the latter is formally reduced to writing whatever incidents exist are presumed by the rules of evidence to have been incorporated thereunder. *Jones v. Alley*, 17 Minn. 292, 295 (Gil. 269, 272).

The contract of an absolute guaranty is that, if the principal fails to pay, the guarantor will. If it were not so, it would not be a guaranty, but an independent undertaking. *Dickerson v. Derricksen*, 39 Ill. 574. Hence a guaranty to pay costs and expenses incurred in collecting a note does not include costs and expenses incurred in suing the guarantor himself upon the guaranty. *Abbott v. Brown*, 22 N. E. 813, 814, 131 Ill. 108.

To make a promise a contract of guaranty, there must be a primary liability of a third person to the promisee, which continues after the promise is made. An agreement by a stockholder in a corporation that if a party would invest in stock, and if such stock afterwards became worthless the stockholder would repay the sum invested, was not a guaranty. *Kilbride v. Moss*, 45 Pac. 812, 113 Cal. 432, 54 Am. St. Rep. 361.

A guaranty is a contract for and of itself, but it also has relation to some other contract or obligation, with reference to which it is collateral. A guaranty of a note is a special contract, and the guarantor is not in any sense a party to the note. *Coleman v. Fuller*, 11 S. E. 175, 176, 105 N. C. 328, 8 L. R. A. 380.

A guaranty is collateral, and refers to some contract in which some one else is principal. Where a railroad company received goods at Pittsburg, Pa., destined for Hudson, Wis., stipulating against responsibility as a carrier beyond its own line, but guarantying that the cost of transportation to Hudson should not exceed a certain sum, less than the aggregate of the charges on the several lines between Pittsburg and Hudson at the usual rates, the other connecting lines

on the route having no knowledge or notice of the guaranty, the word "guaranty" imported that the parties contemplated that the successive carriers on the route were at liberty to act each for itself and wholly independent of the others. *Schneider v. Evans*, 25 Wis. 241, 258, 8 Am. Rep. 56.

The contract contained in a writing in the following words: "Please send to W. goods to the amount of \$100, and I will guaranty the same in four months"—was a collateral undertaking to pay in case W. did not, and was, therefore, strictly a guaranty for the debt of another. This is the primary meaning of "guaranty," though it may be readily conceded that the word may be used in such a connection with other words as to constitute an original contract. *Dole v. Young*, 41 Mass. (24 Pick.) 250, 252.

**As a concurrent agreement.**

A guaranty of a contract implies *ex vi termini* that it was a concurrent act and a part of the original agreement. Therefore a writing under a promissory note, in the words "I guaranty the above," and signed by a stranger to the note, was *prima facie* a part of the original transaction, and, being so, the consideration for the note would operate, also, as a consideration for the guaranty. *Leonard v. Vredenburg* (N. Y.) 8 Johns. 29, 40, 5 Am. Dec. 317.

**Consideration.**

A guaranty, in its commercial sense, is an undertaking by one person to be answerable for the debt or obligation of another, and it is essential to its validity that it shall be based upon a sufficient consideration. *Clune v. Ford*, 8 N. Y. Supp. 719, 720, 55 Hun, 479.

A guaranty is a collateral engagement to answer for the debt, default, or miscarriage of another person, and must be made on a sufficient consideration. It is a contract in and of itself, but also has relation to some other contract, or some obligation that refers to it, which is collateral. Where the guaranty is executed at or before the time of the execution of the main contract, and both contracts form parts of the same transaction, one consideration may support both contracts. In all cases where the guaranty is executed after the execution of the original contract, or after a sale thereof, and not in pursuance of any understanding, had at the time of the execution of the original contract or at the time of the sale, that such guaranty should be executed, neither the consideration for the original contract nor the consideration for the sale can support a guaranty. *Briggs v. Latham*, 13 Pac. 129, 131, 36 Kan. 205.

**General or special.**

Guaranties are distinguished in the law as being either general or special; special

guaranties being those which are operated in favor of the particular persons only to whom they are addressed, while general guaranties are open for acceptance by the public generally. The true distinction between general and special guaranties, as contained in letters of credit, is that on the faith of a general guaranty any person is entitled to advance money or incur liability on complying with its terms, and can recover the same as though specially named therein. *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273, 276, 45 Am. Rep. 204.

**Indorsement distinguished.**

A guaranty is an engagement to pay in default of solvency in the debtor, provided due diligence be used to obtain payment from him. The contract of a guarantor differs from that of an indorser. In the latter case the acknowledgment is to pay if the maker does not, upon demand, after due notice. Something more than demand and notice of nonpayment is required to support an action on a guaranty. The contract for due diligence requires that a suit be brought within a reasonable time after the maturity of the claim, and be duly prosecuted to judgment and execution, before an action can be sustained against the guarantor. *Brown v. Brooks*, 25 Pa. (1 Casey) 210, 212.

In its broadest popular sense, "indorse" is sometimes synonymous with "guaranty." *Greer v. Featherstone* (Tex.) 68 S. W. 48, 50; *Tatum v. Bonner*, 27 Miss. (5 Oushm.) 760, 765.

**As indemnify or save harmless.**

"Guaranty" means "indemnify" or "save harmless." *Bausman v. Credit Guarantee Co.*, 47 Minn. 377, 379, 50 N. W. 496.

**Notice of default.**

A guaranty is a contract that some particular thing shall be done exactly as it is agreed to be done, whether it is to be done by one person or another, and whether there be a prior or a principal contractor or not. Generally notice of a breach, where a third person is to do the act guaranteed, need not be given before suit, because knowledge of the default is as open to the inquiry of the guarantor as it is to the one who is guaranteed. Consequently a contract whereby C. guaranteed to B. "the full and fair performance" of the contract of A. was a contract of guaranty, and B., upon the breach of A.'s contract, could immediately maintain an action against C. *Redfield v. Haight*, 27 Conn. 31, 37.

**Personal liability imported.**

A guaranty imports a personal liability exclusively. *Sather Banking Co. v. Arthur R. Briggs Co.*, 72 Pac. 352, 353, 138 Cal. 724.

**As security.**

In a lease of timber land, providing that it is agreed and understood by the parties thereto that the wood and timber on the above described premises shall be held by the lessor as guaranty for the payment of the sum named as rent, the term "guaranty" means "security" or "lien"—that the plaintiff should hold the wood and timber as security for the price thereof, and that he should have a lien upon the same. *Wilkie v. Day*, 6 N. E. 542, 544, 141 Mass. 68.

**Suretyship distinguished.**

In a strict collateral guaranty the guarantor undertakes, in the event the principal fails to do what he has promised, to pay damages for such failure. A guarantor undertakes to pay such damages as a result of the principal's default. A surety undertakes to do the particular thing if the principal fails. *Nading v. McGregor*, 121 Ind. 465, 470, 23 N. E. 283, 6 L. R. A. 686; *Newcomb Bros. Wall Paper Co. v. Emerson*, 17 Ind. App. 482, 46 N. E. 1018, 1020; *Conduitt v. Ryan*, 3 Ind. App. 1, 29 N. E. 160; *Wheeler v. Rohrer*, 21 Ind. App. 477, 52 N. E. 780; *Durand & Kasper Co. v. Rockwell*, 54 N. E. 771, 772, 23 Ind. App. 11; *G. F. Wittmer Lumber Co. v. Rice*, 55 N. E. 868, 23 Ind. App. 586.

A guaranty is an undertaking that the debtor shall pay; suretyship, an undertaking that the debt shall be paid. *Shearer v. R. S. Peale & Co.*, 9 Ind. App. 282, 36 N. E. 455.

The terms "surety" and "guarantor" are often confounded, from the fact that a guarantor is in common acceptance a surety for another. The true distinction seems to be this: that a surety is in the first instance answerable for the debt for which he makes himself responsible, while a guarantor is only liable where default is made by the party whose undertaking is guaranteed. *Courtis v. Dennis*, 48 Mass. (7 Metc.) 510, 518, 519.

The words "surety" and "guarantor" are often used as synonymous, but they are not so in fact. Both are bound for another person. A surety is, however, usually bound with his principal by the same instrument, executed at the same time, and upon the same consideration. *Treweek v. Howard*, 39 Pac. 20, 21, 105 Cal. 434.

While the undertaking of a guarantor technically differs from that of a surety, still the contract of guaranty is the obligation of a surety. Both are accessory contracts. That of a surety is in some sense conditional; that of a guarantor is strictly so. A guaranty is secondary, while a suretyship is a primary obligation. *Hooper v. Hooper*, 31 Atl. 508, 510, 81 Md. 155, 48 Am. St. Rep. 496.

The distinction between a surety and a guarantor is that the former enters into the contract primarily for the benefit of the debtor, while in the latter the benefit of the principal debtor is no part of the inducement to him to contract. In other words, a guarantor is one who enters into the contract mainly for his own benefit, and not for the benefit of the principal debtor. In a strict guaranty the guarantor does not undertake to do a thing which his principal is bound to do, but his obligation is that the principal shall perform such act as he is bound to perform, or, in the event he fails, that the guarantor will pay such damages as may result from the failure. *Cole Mfg. Co. v. Morton*, 60 Pac. 587, 589, 24 Mont. 58.

The terms "guarantor" and "surety" are frequently used interchangeably, and for this reason a great confusion has arisen in the books as to the proper distinction to be drawn between them. A guarantor is a surety, in the sense that he obligates himself to pay the debt of another. A surety binds himself to perform if the principal does not, without regard to his ability to do so. His contract is equally absolute with that of his principal. They may be sued in the same action, and judgment may be entered up against both. A guarantor, on the other hand, does not contract that the principal will pay, but simply that he is able to do so. In other words, the guarantor guarantees nothing but the solvency of the principal. *Manry v. Waxelbaum Co.*, 33 S. E. 701, 703, 108 Ga. 14.

**Understanding.**

See "Understanding."

**As warranty.**

"Warranty" and "guaranty," being derivatives from the same root, are identical in signification and effect; the one usually, but not always, denoting a covenant in a conveyance, and the other denoting a parole promise. *Ayres v. Findley*, 1 Pa. (1 Barr) 501.

In the strict sense of the word, "guaranty" or "guarantee" applies to an undertaking by another, though it is sometimes used in the sense of "warranty" or "warrant." *Field v. Lamson & Goodnow Mfg. Co.*, 38 N. E. 1126, 1128, 162 Mass. 388, 27 L. R. A. 136 (citing *Wiley v. Inhabitants of Athol*, 150 Mass. 434, 23 N. E. 811, 6 L. R. A. 342).

In an agreement in connection with the sale of electric storage batteries that, "In event the equipments are furnished under the proposals made, we will guaranty for a period of four years that the cost of renewal of batteries shall not exceed" a certain sum, the word "guaranty" was used in the sense



of "warranty"; it being evident that the intention was that the vendor would renew the batteries as required at such a sum. *Accumulator Co. v. Dubuque St. Ry. Co.* (U. S.) 64 Fed. 70, 76, 12 C. C. A. 37.

Where a contract for the sale of iron ore guaranteed that it would contain a yield of 50 per cent. of iron, the word "guaranteed" manifestly meant "warranted," and there was not a technical guaranty. *Martinez v. Earnshaw* (Pa.) 36 Wkly. Notes Cas. 498, 502.

A guaranty, in its strict legal and commercial sense, is said to be an undertaking by one person to be answerable for the payment of some debt or due performance of some contract or duty by another, who himself remains liable to pay or perform the same. Originally the words "warranty" and "guaranty" were the same; the letter "g" of the Norman French being convertible with the "w" of the German and English, as in the name of William or Guillaume. "Warranty" is applied to a contract as to title, quality, or quantity of something sold. A guaranty is held to be a contract by which one person is bound to another for the fulfillment of a promise or engagement of a third party. A guaranty is, perhaps, always understood, in its strict legal and commercial sense, as a collateral warranty against some default or event in futuro, while a warranty is generally understood as an absolute undertaking in presenti. Any form of words expressing an undertaking or consideration to insure another against delinquency against a third party may constitute a guaranty, and any words showing an undertaking as to quality or title of the thing sold may amount to a warranty. *Sturges v. Bank of Circleville*, 11 Ohio St. 153, 169, 78 Am. Dec. 296.

In legal contemplation there is a wide difference between "warranty" and "guaranty." The term "warranty" is an engagement or understanding forming a part of the transaction. It is an absolute understanding or liability on the part of the warrantor, and the contract is void unless it is strictly and literally performed. A guaranty, on the other hand, is a collateral promise to answer for the debt, default, or miscarriage of another. Consequently an instruction in a life insurance case: "Warranty means more than agreement. It means a guaranty"—is erroneous. *Masons' Union Life Ins. Ass'n v. Brockman*, 50 N. E. 493, 497, 20 Ind. App. 206.

#### Written contract not required.

Ordinarily, when one agrees to pay the debt of another which has already been contracted, the party is strictly a guarantor, and his guaranty must be in writing; but when the contract is originally made with the party sought to be charged, and the party

seeking to enforce the contract relied exclusively on the responsibility of such party, the contract is an original one, and need not be in writing. *Meldrum v. Kenefick*, 89 N. W. 863, 865, 15 S. D. 370.

#### GUARANTY AND SAVE HARMLESS.

The expression "guaranty and save harmless" is commonly, if not universally, used in covenants of indemnity. The phrase is tautological, and, taken as a whole, has the same meaning as the words "save harmless" would have, if used alone. *Traders' Nat. Bank v. Washington Water Power Co.*, 61 Pac. 152, 154, 22 Wash. 467.

#### GUARANTY COMPANY.

A guaranty or security company, within the meaning of St. 1899, § 273, is such a company as may become surety for another. An insurance company is not a guaranty or security company within the meaning of the term, and therefore is not within the provision of a statute imposing a tax on guaranty or security companies and "the like." *Ætna Life Ins. Co. v. Coulter*, 74 S. W. 1050, 1052, 25 Ky. Law Rep. 193.

#### GUARANTY FUND.

A statute of New York provides that, whenever any policy of life insurance issued by a domestic company shall lapse for the nonpayment of any premium, the "reserve on such policy" shall, on demand made, with surrender of the policy, within six months after the lapse, be applied, as shall have been agreed, to continue the policy in force at its full amount so long as such amount will purchase temporary insurance. The policy of a New York company stipulated to insure the assured for one year, accompanied by an agreement to renew the insurance from year to year, without examination, on the payment of a fixed annual premium, and provided that the excess of such premiums over operating expenses and the assured's share of death losses should constitute a "guaranty fund," to apply in reduction of later premiums, and after five years to extend the insurance in case of lapse. Held, that the fund classed in the policy as a "guaranty fund" was embraced within the meaning of the words "reserve on such policy," as used in the statute. *Nielson v. Provident Sav. Life Assur. Soc.*, 73 Pac. 168, 169, 139 Cal. 332, 96 Am. St. Rep. 146.

#### GUARANTY INSURANCE.

"Guaranty insurance" is a contract whereby one for a consideration agrees to indemnify another against loss arising from the want of integrity, fidelity, or insolvency

of employes and persons holding positions of trust, against insolvency of debtors, losses in trade, losses from nonpayment of notes, and other evidences of indebtedness, or against breach of contract. It includes other forms of insurance, which are specially classified as "fidelity guaranty," "credit guaranty," etc. *People v. Rose*, 51 N. E. 246, 247, 174 Ill. 310, 44 L. R. A. 124.

"Guaranty insurance" is defined by Mr. Frost in his work (section 2) as follows: "For purposes of classification and treatment, guaranty insurance contracts may be divided into three general classes: those of fidelity, commercial, and judicial insurance." *Cowles v. United States Fidelity & Guaranty Co.*, 72 Pac. 1032, 1033, 32 Wash. 120.

### GUARANTY OF COLLECTION.

A guaranty of collection requires the diligent prosecution of the original debtor by legal remedies, without effect as a condition precedent to liability on such guaranty. *Dyer v. Gibson*, 16 Wis. 557; *Schmitz v. Langhaar*, 88 N. Y. 503, 506; *Cumpston v. McNair* (N. Y.) 1 Wend. 457, 460; unless it is made to appear that the pursuit of such remedies would be fruitless. *Texas City Imp. Co. v. Griswold* (Tex.) 41 S. W. 513.

A "guaranty of collection" is sometimes defined as an undertaking to pay a debt on condition that the person to whom the guaranty is given shall diligently prosecute the principal debtor without avail, or that the debt will be paid if the person be prosecuted with reasonable diligence, or that the debt is collectible in due course of law. A guaranty of collection only guarantees the collectibility or goodness of the note, and does not amount to an absolute guaranty of payment. *New York Security & Trust Co. v. Lombard Inv. Co.* (U. S.) 73 Fed. 537, 552.

A guaranty indorsed on a promissory note, "that we guaranty the collection of the within note," is to be construed as equivalent to the phrase "that we guaranty the collection of the within note by due course of law." *Burt v. Horner* (N. Y.) 5 Barb. 501, 503.

When the words, "Collection guaranteed and notice of protest waived," are written on the back of a promissory note by the payee thereof, they mean that the transferee takes as an indorsee and not as an assignee of a note, for such words constitute an indorsement, with an enlarged liability. *State National Bank v. Haylen*, 16 N. W. 754, 755, 14 Neb. 480.

### Guaranty of payment distinguished.

A guaranty of collection of a note differs from one for payment, in this: that the guarantor undertakes only to pay the

debt upon the condition that the guarantee shall diligently prosecute the principal debtor without avail, and this means the prosecution of a suit against the principal debtor to judgment and execution. The legal remedies are only exhausted upon the proper return of an execution unsatisfied for want of goods whereon to levy. *Getty v. Schantz* (U. S.) 100 Fed. 577, 578, 40 C. C. A. 560.

There is a broad distinction between "guaranty of payment" and "guaranty of collection." The former is an absolute, unconditional undertaking on the part of the guarantor that the maker will pay the note, while the latter is an undertaking to pay if payment cannot, by reasonable diligence, be obtained from the principal debtor. *Cowles v. Peck*, 10 Atl. 569, 570, 55 Conn. 251, 3 Am. St. Rep. 44.

### GUARANTY OF DIVIDEND.

A guaranty of a dividend by a corporation is nothing more than a pledge of the funds, legally applicable to the purposes of a dividend. It is a dividend, and not a debt. *Taft v. Hartford, P. & F. R. Co.*, 8 R. I. 310, 333, 5 Am. Rep. 575.

### GUARANTY OF PAYMENT.

A guaranty of payment of a note is an absolute undertaking on the part of the guarantor that the maker will pay the note when due, or that the guarantor will pay the debt at maturity if the maker does not, and the contract of the guarantor is broken upon the failure of the maker to meet his obligation. *Hernley v. Brannum*, 55 N. E. 512, 514, 23 Ind. App. 388 (citing *Baylies*, Sur. p. 17; *Brown v. Curtiss*, 2 N. Y. [2 Comst.] 225; *Allen v. Rightmere* [N. Y.] 20 Johns. 365, 11 Am. Dec. 288); *New York Security & Trust Co. v. Lombard Inv. Co.* (U. S.) 73 Fed. 537, 552.

A guaranty of payment of a note is an absolute undertaking on the part of the guarantor, for a valuable consideration, to pay the debt at maturity in case the principal debtor does not; and the guarantee in such case may sue the guarantor at once for the debt, if not paid at maturity. *Getty v. Schantz* (U. S.) 100 Fed. 577, 578, 40 C. C. A. 560; *Day v. Elmore*, 4 Wis. 190, 193.

A guaranty of payment of a note may be absolute (that is, for the payment of a bill or note) or conditional (that is, a guaranty that it is collectible by due diligence). *Hanna v. Savage*, 35 Pac. 127, 129, 7 Wash. 414.

An indorsement on a note, that "I hereby guaranty the payment of the principal and interest of the within note," creates an absolute guaranty of the payment. *National*

Guaranty Loan & Trust Co. v. Fly, 69 S. W. 231, 232, 29 Tex. Civ. App. 533.

**Contract of indemnity distinguished.**

See, also, "Indemnity."

There is a well-understood difference between a guaranty of payment and a contract of indemnity against loss as the result of the nonpayment of a debt. In the first case the liability of the guarantor is fixed by the failure of the principal debtor to pay at maturity, or at the time when payment was guaranteed. In the second, the contract partakes of the nature of a guaranty of collection; no liability being incurred until after, by the use of due and reasonable diligence, the guarantee has become unable to collect the debt from the principal debtor. *Pierce v. Merrill*, 61 Pac. 64, 66, 128 Cal. 464, 79 Am. St. Rep. 56 (citing *Burton v. Dewey*, 46 Pac. 325, 4 Kan. App. 589).

**Guaranty of collection distinguished.**

See "Guaranty of Collection."

## GUARDIAN.

See "General Guardian"; "Natural Guardian"; "Special Guardian."

A guardian is a person appointed to take care of the person or property of another. Rev. Codes N. D. 1899, § 2807; Civ. Code S. D. 1903, § 139; Civ. Code Cal. 1903, § 236; Rev. St. Okl. 1903, § 3808; Civ. Code Mont. 1895, § 330.

A guardian is one that legally has the care and management of the person, or the estate, or both, of a child, during his minority, whose father has deceased. *Bass v. Cook* (Ala.) 4 Port. 390, 392 (citing *Reeves*, Dom. Rel. 311).

A guardian is a person upon whom the law imposes the duty of looking after the pecuniary interests of his ward. *Sparhawk v. Allen*, 21 N. H. (1 Fost.) 27.

"Guardian" is a general term, applicable to both guardians of the property and guardians of the person of a ward. The term "guardian," without words of limitation, describes one who is charged with the care and custody of the property and person of the ward. *Burger v. Frakes*, 23 N. W. 746, 747, 67 Iowa, 460.

A guardian is one who is entitled to the custody of the person of an infant. *Wilson v. Me-ne-chas*, 20 Pac. 468, 469, 40 Kan. 648.

Rev. Laws 1799, which provides that, if the personal estate and rents and profits of the real estate be not sufficient for the maintenance and education of the ward, the orphans' court of the proper county, on full investigation thereof, may from time to time

order the guardian to sell such parts of the ward's lands, tenements, hereditaments, real estate, etc., means such guardians as are named in the previous section of the act; that is, testamentary guardians, or guardians in socage. *Graham v. Houghtalin*, 30 N. J. Law (1 Vroom) 552, 560.

Code 1871, c. 45, § 2173, which provides that no action shall be brought to recover any property heretofore sold by any guardian by virtue of the order of any probate court in the state on the ground of the invalidity of such sale, unless, etc., will be construed to include persons appointed guardians of minors not fatherless. *Hall v. Wells*, 54 Miss. 289, 297.

The word "guardian," as used in the statute authorizing the courts of probate to appoint guardians to all minors under the age for choosing guardians, who have no father, guardian, or master, has reference to a guardian appointed by the court of probate; and the right of the mother, as natural guardian, to the custody of her minor child after the death of the father, is inferior to the right of a guardian appointed by the court of probate. *Macready v. Wilcox*, 33 Conn. 821, 827, 828.

**As agent.**

See "Agent."

**Guardian ad litem.**

Within the meaning of Sanb. & B. Ann. St. § 2447, providing that when any judge of a county court shall be an administrator, executor, or guardian of any ward, he shall be disqualified to act in relation to that estate, the word "guardian," being used in connection with the words "executors or administrators," will be construed to mean some trustee charged with the duty of caring for property or looking after some interest then pending, for which he must account to the court, and concerning which the court must make some decision, and will not include a guardian ad litem of an infant, who was such three years prior to election as county judge. *Richter v. Leiby's Estate*, 83 N. W. 694, 695, 107 Wis. 404.

**As legal representative.**

See "Legal Representative."

**Next friend.**

The term "guardian," as used in the citing part of a scire facias ad audiendum errores, in which a party is described as guardian of another, and the former party is described in the recital of such writ and in the writ of error as the next friend of the latter party, will be construed to mean next friend. *United States Mut. Acc. Ass'n of City of New York v. Weller*, 11 South. 786, 788, 30 Fla. 210.

**As occupant or trustee.**

See "Occupant—Occupier."

As trustee of an express trust, see "Express Trust."

**GUARDIAN AD LITEM.**

A guardian ad litem is an attorney appointed to conduct or care for a particular matter in court. He has charge neither of the person nor the property of the infant, and is not accountable to the court, save as an attorney is always accountable for the faithful discharge of his duty. So that a guardian ad litem is not included under a statute providing that a judge who shall be an administrator, executor, or guardian of any ward shall be disqualified to act in relation to the estate. A guardian ad litem is not a guardian, as used in the statute. *Richter v. Leiby's Estate*, 83 N. W. 694, 695, 107 Wis. 404.

**GUARDIAN BY NATURE.**

A guardian by nature is the father of the ward, and perhaps, on his death, the mother. On the part of the father, this guardianship extends to the age of 21 years of the child, but to the custody of his person only. Such guardian has neither possession nor control of the estate, whether real or personal. *Kline v. Beebe*, 6 Conn. 494, 500; *Mauro v. Ritchie* (U. S.) 16 Fed. 1171, 1175.

**GUARDIAN BY STATUTE.**

A "guardian by statute," in English law, means a guardian appointed by the father's will. As used in this country, it means a guardian appointed by the deed or will of the father or mother, and not guardians appointed by virtue of some statute. *Huson v. Green*, 16 S. E. 255, 256, 88 Ga. 722.

**GUARDIAN OF THE PERSON.**

A guardian of the person is one who has been lawfully invested with the care of the person of an infant whose father has died, and is considered as standing in the place of the father. *Nicholson v. Spencer*, 11 Ga. 607, 609.

**GUARDIANSHIP.**

See "Testamentary Guardianship."

A guardianship is a trust, and it peculiarly and exclusively belongs to the chancellor. A guardian must first be called to account, before the surety is liable. *Stilwell v. Mills* (N. Y.) 19 Johns. 804.

Guardianship is a trust coupled with an interest, and, when two guardians are appointed, and one of them dies, it follows

from the nature of the trust that it must survive. Guardians are in this respect analogous to administrators. *People v. Byrou* (N. Y.) 8 Johns. Cas. 53, 58.

**GUARDIANSHIP BY ELECTION.**

"Guardianship by election" is mentioned by some of the English writers, but never recognized in this country. Lord Coke, in Co. Litt. 87b, speaks of an heir under the age of 14 inheriting the rents charge, common of pasture, or such like thing, being able to choose his own guardian in certain cases; but it is remarked by Mr. Hargrave that it is not mentioned as to how or before whom such election should be made. *Mauro v. Ritchie* (U. S.) 16 Fed. Cas. 1171, 1175.

**GUARDIANSHIP FOR NURTURE.**

Guardianship for nurture extended only to the custody of the persons of those infants who were not heirs apparent, and continued only until their age of 14 years, and none could have it but the father or mother. It only occurs where the infant is without any other guardian. After 14 the infant is at liberty to choose his guardian. This form of guardianship cannot exist in this country, because it is applicable only to such children as are not heirs apparent. *Mauro v. Ritchie* (U. S.) 16 Fed. Cas. 1171, 1175.

At common law the guardian for nurture took charge of the person and personal estate, but if the ward held real estate by socage tenure, the guardian took the charge of his body and lands. *Appeal of Arthur* (Pa.) 1 Grant, Cas. 55, 56.

**GUARDIANSHIP IN CHIVALRY.**

Guardianship in chivalry existed only when the infant inherited land holden by knight's service. This guardian had the custody of the person and lands of the infant until his full age of 21, and took the profits to his own use, without account; and also the value of the marriage of his ward. The infant had no right to elect a guardian. This tenure was abolished by the statute 12 Car. II, c. 24, and with the tenure went the right of guardianship connected with that tenure. A guardian in chivalry never existed in the United States. *Mauro v. Ritchie* (U. S.) 16 Fed. Cas. 1171, 1175.

**GUARDIANSHIP IN SOCAGE.**

Guardianship in socage arises only when the infant has land by descent, which takes place when socage lands descend to the infant while under 14 years of age, and ceases when the infant arrives at the age of 14 years, unless no other guardian is appointed for him. *Tyler on Coverture & Infancy*. Under the common law, the right and duty of a guardian in socage were originally ex-

clusively confined to real estate, but by degrees they were extended so as to embrace personality. This extension at common law, though prevalent in England, was not followed in this state; and, in the absence of authority or decision, it cannot be said that in this state such guardian ever obtained title to or control over personal property of an infant. *Foley v. Mutual Life Ins. Co.*, 64 Hun, 63, 66, 18 N. Y. Supp. 615.

Guardianship in socage arose, like that in chivalry, wholly out of tenure. It was necessary that the ward should have inherited land holden in socage. It continued only until the heir attained the age of 14, although some have said that it continued until the age of 21, unless the ward, after the age of 14, should have elected another guardian. The guardian in socage had the custody of the person and of the lands, but wholly for the benefit of the ward. The guardian in socage must be the next of kin to whom the lands of the infant cannot by any possibility descend. This form of guardianship does not exist in this country. *Mauro v. Ritchie* (U. S.) 16 Fed. Cas. 1171, 1175.

A guardian in socage is a guardian who has custody of the land, and is entitled to the profits of the same for the benefit of the heirs. He has an interest in the estate, may avow in his own name, and may, of course, have trespass. *Byrne v. Van Hoesen* (N. Y.) 5 Johns. 66, 67.

A guardian in socage has not only the care of the land, but also an interest in it. He is said to be dominus pro tempore, and to have the seisin of the land, *una cum exitibus*. He may let it for years, and the lessee may have an *ejectione firmæ* thereupon. *Van Doren v. Everitt*, 5 N. J. Law (2 Southard) 460, 462, 8 Am. Dec. 615.

At common law, if lands held in socage came to an infant by descent, his nearest relative, who could not possibly inherit the lands, was his guardian in socage until the age of 14 years, and until the infant selected a guardian for himself. By the Act Concerning Tenures, all lands granted by the people of New York since July 4, 1776, are declared allodial and not feudal. Held, that since, by the statute of descent, land acquired by children through their maternal relations cannot go to the father, the father can be a guardian in socage as to his child's land so acquired, but that such guardianship shall only extend to lands granted by the state prior to the Revolution. *Combs v. Jackson* (N. Y.) 2 Wend. 153, 157, 19 Am. Dec. 568.

## GUARDS.

See "Cattle Guard."

Hay placed in the engine or deckroom of a passenger steamer, though the room be

inclosed by bulkheads, is upon the decks or guards of the steamer, within the meaning of Act July 25, 1866 (14 Stat. 227), prohibiting ignitable commodities from being carried on the decks or guards of passenger steamers unless protected, etc. *Union Ins. Co. v. Shaw* (U. S.) 24 Fed. Cas. 580, 582.

## GUEST.

A guest is a lodger at a hotel. *Comer v. State*, 26 Tex. App. 509, 513, 10 S. W. 106, 107 (citing *Webst. Dict.*).

A "guest" is defined as a visitor sojourning in the house or entertained at the table of another. *Odell v. New York Cent. & H. R. R. Co.*, 45 N. Y. Supp. 464, 465, 18 App. Div. 12 (citing *Cent. Dict.*).

A "guest" is defined as "a traveler who lodges at an inn or tavern with the consent of the keeper." *State v. Johnson*, 4 Wash. 593, 594, 30 Pac. 672, 673 (citing *Black's Law Dict.* tit. "Guest").

The term "guest" includes one who merely goes to an inn for the purpose of temporary refreshment, either food or drink. *McDaniels v. Robinson*, 20 Vt. 316, 330, 62 Am. Dec. 567.

A man who merely enters a restaurant to procure a meal or refreshments is not a guest. *Carpenter v. Taylor* (N. Y.) 1 Hill. 193.

The term "guest," as used when speaking of a guest of a hotel or inn, would include one who merely purchased liquor at the hotel or inn. *McDonald v. Edgerton* (N. Y.) 5 Barb. 560, 562.

### Duration of stay.

The term "guest" includes a person who took a room in a hotel, and took part of his meals there, although he only lodged and boarded there a part of the time. *McDaniels v. Robinson*, 26 Vt. 316, 330, 62 Am. Dec. 567.

A guest is a traveler or a wayfarer who comes to an inn and lodges there, and it makes no difference whether he stays a week, a month, or longer, providing he retains his character as a traveler. *Johnson v. Reynolds*, 3 Kan. 257, 261; *Jalie v. Cardinal*, 35 Wis. 118, 128.

The term "guest" includes a traveler who goes to a house held out to be an inn for the purpose of receiving such entertainment as he has occasion for. "A traveler who enters an inn as a guest does not cease to be a guest by purposing to remain a given number of days, or by ascertaining the price that will be charged for his entertainment, or by paying in advance for a part or the whole of the entertainment, or paying for what he has occasion for as his wants are supplied." *Pinkerton v. Woodward*, 33 Cal. 557, 597, 91 Am. Dec. 657.

The guest comes to the inn without any bargain for time, and remains without one, and may go when he pleases, paying only for the actual entertainment which he receives; and the fact that one stayed a long time at an inn is not sufficient to make him a boarder, and not a guest. *Shoecraft v. Bailey*, 25 Iowa, 553, 555; *Metzger v. Schnabel*, 52 N. Y. Supp. 105, 106, 23 Misc. Rep. 698.

#### Fixing price.

"Guest," as the term is used in speaking of a guest of an inn, would include one who resided at a hotel, paying \$6 a week for his room, which he had been informed was the regular price to a guest, although he stayed at the hotel for a period of a month. *Smith v. Keys* (N. Y.) 2 Thomp. & C. 650, 651.

Mere fixing of the price to be paid does not make the person a boarder, rather than a guest, so as to render the house a boarding house, rather than an inn. In re *Brewster*, 80 N. Y. Supp. 668, 670, 39 Misc. Rep. 689 (citing *Hancock v. Rand*, 94 N. Y. 1, 7, 48 Am. Rep. 112).

Where a person rented a room, which was cared for by the hotel keeper, but no particular time had been bargained for, though the price had been agreed upon in advance, he was a guest, as far as the liability of the hotel keeper for loss of his effects was concerned. *Metzger v. Schnabel*, 52 N. Y. Supp. 105, 106, 23 Misc. Rep. 698.

A guest is a traveler, that is, a mere transient or temporary visitor who takes board and lodging at an inn or hotel. The fact that such person contracted for board and lodging at a less price than the hotel or innkeeper usually charged does not change the fact that he was a mere traveler, or temporary, transient visitor. A guest for a single night might make a special contract as to the price to be paid for his lodging, and, whether it were more or less than the usual price, it would not affect his character as guest. The character of guest does not depend on the payment of any particular price, but on other facts. So long as the character of traveler or mere temporary and transient visitor exists, the relation of guest and innkeeper exists. *Beale v. Posey*, 72 Ala. 323, 331.

As the term is used in speaking of the guest of an inn, a guest is one who is temporarily at the inn for the purpose of obtaining shelter or refreshment, under an implied contract to pay for the same. Hence one who is there under a special contract for his board is not a guest, within the meaning of the law which makes the innkeeper liable for the loss of goods of his guests. *Jeffords v. Crump* (Pa.) 12 Phila. 500, 501; *Carter v. Hobbs*, 12 Mich. 52, 56, 83 Am. Dec. 762.

A guest of a hotel is one who is a mere temporary sojourner there, intending to rest a week or two, and then proceeding on her journey. The fact that on her arrival the person applied for entertainment, before being assigned to her room, ascertained what she would have to pay for the room and board, does not change her character from that of a guest to that of a boarder; there being no reduction in the price in consideration of an agreement to remain a definite time or as a boarder, and there being nothing upon which an understanding could be inferred between her and the proprietor that she was to be received as a boarder, and not as a guest. *Fay v. Pacific Imp. Co.*, 26 Pac. 1099, 1100, 98 Cal. 258, 16 L. R. A. 188, 27 Am. St. Rep. 198.

A guest is a person who goes to an inn as a wayfarer and traveler, and is received by the innkeeper into his inn. Neither the length of time that a person remains at an inn, nor any agreement he may make as to the price of board per day or per week, deprives him of his character as traveler and guest, provided he retains his status as a traveler in other respects. *Jalie v. Cardinal*, 35 Wis. 118, 128.

The prominent idea of the term "guest" is that he must be a traveler, wayfarer, or transient comer to an inn for lodging or entertainment. In *Russell v. Fagan* (Del.) 8 Atl. 258, 7 Houst. 389, it is said that "every one who is received into an inn, and has entertainment there, for which the innkeeper has remuneration or reward for his services, is a guest. The relation of host and guest exists. This general definition, however, only includes those who are in legal sense travelers or wayfarers, and boarders or persons who reside in the same place are not embraced by it." The distinction between a guest and boarder, which it is difficult to draw, and which is variously stated, is based mainly upon the fact that boarders contract for a definite stay at specific prices. One who had engaged rooms and board for himself and family at a hotel for two or three weeks at rates given to persons remaining longer than a week, and was assigned rooms on the floor occupied by boarders, is not a guest, but a mere boarder at the hotel. *Meacham v. Galloway*, 52 S. W. 859, 861, 102 Tenn. 415, 46 L. R. A. 319, 73 Am. St. Rep. 886.

#### Dependent on intent.

In order to constitute one a guest of an inn, so that the innkeeper will be responsible for his goods, it is necessary that one should visit the inn for the purpose which the common law recognizes as the purpose for which inns are kept; that is, for the purpose of shelter and refreshment. *Carter*

v. Hobbs, 12 Mich. 52, 56, 83 Am. Dec. 762; Arcade Hotel Co. v. Wyatt, 4 N. E. 398, 405, 44 Ohio St. 32, 58 Am. Rep. 785.

Where a visit is made to an inn by one who does not require the present entertainment or accommodations of such inn, but whose purpose is simply to deposit his money for safe-keeping, such person is not a guest of the inn. *Arcade Hotel Co. v. Wiatt*, 4 N. E. 398, 405, 44 Ohio St. 32, 58 Am. Rep. 785. So, also, one who went to a hotel merely for the purpose of attending a ball, but who neither roomed nor obtained his meals there. *Carter v. Hobbs*, 12 Mich. 52, 56, 83 Am. Dec. 762.

A guest is a traveler or transient comer who puts up at an inn for a lawful purpose—to receive its customary lodging and entertainment. One who takes a room solely to commit an offense against the laws of the state is not a guest at the hotel, within the legal sense of the term. The relation of landlord and guest was never established between them. It is essential that a person should have come from a distance, to constitute a guest. It does not include every one who goes to an inn for convenience to accomplish some purpose. *Curtis v. Murphy*, 22 N. W. 825, 826, 63 Wis. 4, 53 Am. Rep. 242.

#### **Boarder distinguished.**

See "Boarder."

#### **Keeping horse sufficient.**

"Guest," in the ordinary acceptance of its meaning, and according to Webster, is "a stranger; one who comes from a distance, and takes lodging at a place either for a night or for a longer time; a visitor, a stranger or friend, entertained in the house or at the table of another, whether by invitation or otherwise." To be a guest at an inn, something more than the mere stopping of another for convenience is necessary. It is one who relies on or adopts the inn as his home for the time being, though the length of time which the guest remains will not affect his right as such, provided he live there in the transitory character of a guest. There must be a person to be entertained, to constitute a guest. Where, therefore, there is no person to be entertained, there is no guest. Merely feeding his horse does not constitute its master a constructive guest of an innkeeper. *Ingalsbee v. Wood* (N. Y.) 36 Barb. 452, 460.

"Guests," as used in the law of innkeeper's liability, includes not only those who obtain food and lodging of an innkeeper, but also is properly applied to a traveler who obtains entertainment for his beasts, paying a fixed charge therefor; and under such circumstances the relation of innkeeper and

guest exists, so as to make the innkeeper liable as an insurer of the animals while in his possession. *Russell v. Fagan* (Del.) 8 Atl. 258, 7 Houst. 389.

A guest is a traveler who is received as such at an inn. "It is clearly settled that to constitute a guest, in legal contemplation, it is not essential that he should be a lodger or have any refreshment at the inn. If he leaves his horse there, the innkeeper is chargeable on account of the benefit he is to receive for the keeping of the horse," and hence he is liable for the theft of the harness of the horse. *Mason v. Thompson*, 26 Mass. (9 Pick.) 290, 285, 20 Am. Dec. 471.

If a man set his horse at an inn, though he lives in another place, that makes him a guest, and the innkeeper is obliged to receive him, for the innkeeper gains by the horse, and therefore that makes the owner a guest, though he was absent. *Holt, O. J.*, dissenting, said this was rather the business of a man that keeps a livery stable than of an innkeeper, and that it was the lodging of the man at the inn that makes him a guest. *Yorke v. Greenough*, 2 Ld. Raym. 866, 868; *McDaniels v. Robinson*, 26 Vt. 316, 330, 62 Am. Dec. 567.

Plaintiff, by leaving his horse at an inn, was a "guest" as much as if he had stayed himself, and the horse might be retained as security for the payment of the keeping. *York v. Grindstone*, 1 Salk. 388.

#### **Leaving goods sufficient.**

"In order to be a guest, within the meaning of rules relative to the liability of an innkeeper for the goods of his guest, and relative to giving liens thereon, it is not necessary that the person claimed to be a guest should be actually *infra hospitium* at the time the loss happened. For example, if a traveler leaves his horse at the inn, and then goes out to dine or lodge with a friend, he does not thereby cease to be a guest, and the rights and liabilities of the parties remain the same as though the traveler had not left the inn; and, if the owner leave the inn and goes to another town, intending to be absent two or three days, it seems that the whole rule holds good, so far as relates to property for the care and keeping of which the host is to receive a compensation; but it is otherwise in relation to inanimate property, from which the host receives no advantage, and, if that be stolen during such absence of the guest, the innkeeper will not be answerable." One who has neither been at an inn, nor intends going there, does not become a guest by merely sending his goods to be taken care of by the innkeeper. *Grinnell v. Cooke* (N. Y.) 3 Hill, 485-488, 38 Am. Dec. 663.

The term would include one who, after having become a guest and left goods with the proprietor of the inn, goes away for a brief period. *McDonald v. Edgerton* (N. Y.) 5 Barb. 560, 562.

#### **Lodger distinguished.**

See "Lodger."

#### **Roomer.**

In speaking of the duties and obligations of innkeepers, the term "guest" implies a traveler stopping at an inn. It does not include a railroad conductor making regular trips, and stopping over at each end of his route at hotels, where he rents a room by the month. *Horner v. Harvey*, 5 Pac. 329, 330, 3 N. M. 197.

#### **Traveler.**

Any one away from home, receiving the accommodation of an inn as a traveler, is a guest, and entitled to hold the innkeeper responsible as such. *Pullman Palace Car Co. v. Lowe*, 44 N. W. 226, 227, 28 Neb. 239, 6 L. R. A. 809, 26 Am. St. Rep. 325.

Any one away from home, receiving accommodations at an inn as a traveler, is a guest, though he be a townsman or neighbor. *Walling v. Potter*, 35 Conn. 183, 185.

The term "guest" is used to designate a traveler who stops at, and is received as a traveler at, a hotel. *Ross v. Mellin*, 32 N. W. 172, 173, 36 Minn. 421.

While a guest is a traveler, it is not necessary that he should come from another state or country, or from any distant place. Any person going from his own home, whatever the distance may be, and applying for and receiving accommodations at a hotel, is a traveler, and therefore a guest. One who has no other place of abode than a room in a hotel, for which he pays rent by the week, and in which he keeps his personal effects, is not a guest of the hotel. *State v. Johnson*, 30 Pac. 672, 673, 4 Wash. 593.

If a person goes to an inn as a wayfarer and a traveler, and the innkeeper receives him as such, he becomes the innkeeper's guest, and the relation of landlord and guest is instantly established between them. Neither the length of time that a man remains at an inn, nor any agreement he may make as to the price of board per day, deprives him of his character as a traveler and a guest, provided he retains his status of a traveler in other respects. *Norcross v. Norcross*, 53 Me. 163, 169.

#### **Visitor at inn.**

The term "guest" does not include a neighbor or friend who comes to an inn on the invitation of the innkeeper, nor does it include a person who comes on a special con-

tract to sojourn at an inn. *Manning v. Wells*, 28 Tenn. (9 Humph.) 746, 748, 51 Am. Dec. 688.

#### **GUEST (In Liquor Law).**

Under the definition of "guest" in Liquor Tax Law, § 31, as one who, during regular meal hours, and in good faith, comes to a hotel for a meal, and actually orders and receives such meal, a person is not a guest who only orders liquor, and to whom no food is served, except a sandwich, which is not eaten. In re *Kinzel*, 59 N. Y. Supp. 682, 684, 28 Misc. Rep. 622.

"Guests," as used in Pub. St. 1882, p. 100, § 9, cl. 2, restricting the sale of liquors by innkeepers on Sundays to their guests, means persons who had resorted to his inn or hotel for food or lodging. Persons who resort to an inn on the Lord's Day for the purpose of procuring and drinking liquor are not guests, within the meaning of the statute. *Commonwealth v. Moore*, 13 N. E. 893, 895, 145 Mass. 244.

The term "guest" is defined in Liquor Tax Law, § 31, as, first, a person who in good faith occupies a room in a hotel as a temporary home, and pays the regular and customary charges for such occupancy, but who does not occupy such room for the purpose of having liquor served therein; or, second, a person who, during the hours when meals are regularly served therein, resorts to the hotel for the purpose of obtaining, and actually orders and obtains, at such time, in good faith, a meal therein. The mere service of a sandwich with a glass of beer to the customer of a saloon does not render the customer a guest. In re *Schuyler*, 71 N. Y. Supp. 437, 438, 63 App. Div. 206.

According to the common usage of English speech, the word "guest" signifies a relation determined by outward circumstances, and not by inward intent. So that where a person resorts to an inn, expecting to make, and makes, a substantial purchase of food, though an undisclosed reason of his wanting the food is that he may enjoy the accompanying pleasure of a bottle of wine, he is a guest, within the protection of the statute permitting a hotel keeper to supply liquor on Sunday to guests who have resorted to his house for food or lodging. *Commonwealth v. Regan*, 64 N. E. 407, 182 Mass. 22.

Where a hotel keeper sells whisky at the hotel to casual callers, and only incidentally has sandwiches served with drinks, such persons are not guests, within the meaning of Liquor Tax Law (Laws 1897, p. 236, c. 312) § 31, subd. 2, in that they did not resort to the hotel for the purpose of obtaining, and did not order and actually obtain at such time, a meal therein in good faith. In



re Cullinan, 88 N. Y. Supp. 581, 41 Misc. Rep. 3.

## GUIDON.

A guidon is an old and well-known form of a small flag or streamer, used for a variety of purposes—amongst others, “as the flag of a guild or fraternity.” *Webst. Dict.* “It is broad at the end next the staff, and pointed, rounded, or notched at the other end.” *Caldwell v. Powell* (U. S.) 71 Fed. 970, 971 (citing *Cent. Dict.*).

## GUILTY.

See “Not Guilty”; “Plea of Guilty.” Guilty not criminally, but negligently, see “Negligently Guilty.”

The word “guilty” is defined by our best lexicographers to mean “having guilt; justly chargeable with a crime; not innocent; criminal.” Hence we say that a man is guilty of an offense when he has committed such offense. *Commonwealth v. Walter*, 83 Pa. 105, 108, 24 Am. Rep. 154.

The word “guilty” universally, in law, implies a violation of law—a commission of an act or omission of a duty under circumstances which render the commission or omission unlawful. When it is said that the law is made for the protection of the innocent by a due punishment of the guilty, and that it is better than ninety-nine guilty persons should escape than that one innocent should be punished, the term “guilty” is not asserted of persons who do or have done acts which may or may not be unlawful, according to circumstances, but all those who actually do or have done acts attended by such circumstances as render them illegal. *Jessie v. State*, 28 Miss. (6 Cushman) 100, 103.

A general finding of guilty will be interpreted as guilty of all that the indictment well alleges. It is sometimes stated that such finding, where different grades of the offense are charged, means guilty of the highest grade, but this is only another form of saying that it means guilty of all because a higher grade includes the lower. *Porter v. State*, 21 S. W. 467, 57 Ark. 267.

“Guilty,” as used in a verdict by a jury which finds the defendant guilty, signifies guilty in manner and form as charged in the indictment. It is a finding of the truth of all the material averments in the indictment constituting the offense charged. *State v. White*, 25 Wis. 359.

A verdict of a jury that the defendant is guilty, without more, would mean guilty of the whole matter charged; but where, in an action to recover a forfeiture provided by

law in case a property owner shall “intentionally make a false statement of his holdings,” the jury returned a verdict of “guilty, not criminally, but negligently,” the latter words explain the former, showing that they did not consider him guilty of intentional false statement, but of using too little care, and it was, in effect, a verdict of not guilty, since the statute makes no provision for negligent false statements. *State v. Wolfrum*, 60 N. W. 799, 800, 88 Wis. 481.

The phrase “guilty of conveying away such slave,” as contained in a statute providing that “if any person shall be found guilty of conveying away,” etc., he shall be punished, etc., implies a knowledge that the person conveyed away was a slave, coupled with an intention to carry him away. The phrase “wrongfully and illegally conveyed away a slave” is not of the same import, and lacks the essential ingredients of knowledge and intention. *Boice v. Gibbons*, 8 N. J. Law (3 Halst.) 324, 330.

A verdict in a criminal case stating that “we, the jury, find defendant guilty,” is not a sufficiently egregious blunder in spelling to vitiate the verdict, but the word written comes near enough to “guilty” to authorize judgment and sentence as on an accurate and regular verdict of guilty. *Higginbotham v. State*, 29 South. 410, 412, 42 Fla. 573, 89 Am. St. Rep. 237.

In holding that a verdict finding that the defendant was “guilty” of the offense as charged in an indictment was not invalid by reason of the misspelling of the word “guilty,” the court says that “formerly this character of verdict was held so uncertain in its terms as not to afford the basis of a judgment, and a number of cases were reversed on the imperfect spelling of the word ‘guilty.’ See *Taylor v. State*, 5 Tex. App. 569; *Harwell v. State*, 22 Tex. App. 251, 2 S. W. 606. But since the rendition of the last-mentioned case the rule has been different. This court has held a number of verdicts in which the word ‘guilty’ was misspelled—being written in some ‘guitty,’ ‘gully,’ ‘guitly’—sufficient; the rule being that, where the sense is clear, neither incorrect orthography nor ungrammatical language will render a verdict illegal or void, and that it is to be reasonably construed, and in such manner as to give it the meaning intended to be conveyed by the jury.” *McGee v. State*, 45 S. W. 709, 710, 39 Tex. Cr. R. 190 (citing *Birdwell v. State* [Tex.] 20 S. W. 556; *Shelton v. State*, 27 Tex. App. 443, 11 S. W. 457, 11 Am. St. Rep. 200; *Stepp v. State*, 31 Tex. Cr. R. 349, 20 S. W. 753; *Attaway v. State*, 31 Tex. Cr. R. 475, 20 S. W. 925; *Roberts v. State*, 33 Tex. Cr. R. 83, 84, 24 S. W. 895; *Harris v. State* [Tex.] 34 S. W. 922; *Price v. State*, 36 Tex. Cr. R. 403, 37 S. W. 743).

**As negligent.**

In a finding that defendant was guilty of not providing an additional conductor for the management of the car, and was guilty of putting on cars in the management of a young and inefficient conductor, and was guilty of not coming to a full stop at a certain place, etc., "guilty" should be construed to mean negligent. *Sirk v. Marion St. Ry. Co.*, 39 N. E. 421, 422, 11 Ind. App. 680.

**GUILTY AS CHARGED.**

As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty, as charged, is that the jury believes from all the evidence, beyond a reasonable doubt, that the accused was guilty, and was therefore responsible criminally for his acts. *Davis v. United States*, 16 Sup. Ct. 353, 358, 160 U. S. 469, 40 L. Ed. 499.

**GUILTY CONNECTION.**

The words "guilty connection," in common parlance, when applied to a man and woman, mean a carnal connection. *State v. George*, 29 N. C. 321, 324.

**GULF.**

In Co. Litt. 5, it is said that a gulf is water and land, and therefore by grant thereof the soil doth pass. *Goodrich v. Eastern R. R.*, 37 N. H. 149-164.

"A gulf is usually an arm of the sea which seems to have encroached on the land, such as the Gulf of Mexico." See Mitch. Mod. Geog. "Gulf: An arm of the ocean." Ency. Brit. "All the gulfs and all the inland seas form only portions detached, but not entirely separated, from that universal sea denominated the ocean." First Encyclopædia of Geography. The Orient (U. S.) 16 Fed. 915, 920.

**GULF OF MEXICO.**

"The Gulf of Mexico is a basin of the Atlantic Ocean inclosed by the United States, the West Indies, and Mexico." The Orient (U. S.) 16 Fed. 915, 920.

**GUM SUBSTITUTE.**

The ordinary meaning of the words "gum substitute" is a substitute for gum, but the use of the words in a tariff act imposing a duty on gum substitute is to be determined by the jury, where there is evidence of trade usage. The term is to receive the same meaning given in ordinary commercial operations, unless a different trade meaning is shown by a preponderance of the evidence.

It was determined by the jury in the case at bar that glucose and grape sugar were not dutiable as gum substitute. *Weilbacher v. Meritt* (U. S.) 37 Fed. 85.

**GUN.**

See "Shotgun Barrels."

A gun, in the usual sense, is a weapon which throws a projectile or missile to a distance; a firearm for throwing a projectile with gunpowder. An air gun is not a gun or weapon, in the ordinary signification of the words, but is imitative only of a real gun, to give it dignity to a boy to play soldier with. *Harris v. Cameron*, 51 N. W. 437, 438, 81 Wis. 239, 29 Am. St. Rep. 891.

**GUN COTTON.**

Gun cotton is an explosive obtained by immersing vegetable fiber in nitric and sulphuric acids, and subsequent drying. *Celluloid Mfg. Co. v. Zylonite Co.* (U. S.) 26 Fed. 692.

**GUNPOWDER.**

Gunpowder is a mixture of saltpeter, sulphur, and charcoal, separately pulverized, then granulated and dried. It is held, however, that all articles containing these constituents, even if highly inflammable, and in a measure explosive, are not necessarily gunpowder, so that a stipulation in a policy of fire insurance that, if gunpowder is kept on the premises insured without the written consent of the insurer, the policy will be void, will not invalidate the policy for the keeping of fireworks, though they are largely composed of the same ingredients as gunpowder. *Tischler v. California Farmers' Mut. Fire Ins. Co.*, 4 Pac. 1169, 1170, 68 Cal. 178.

**GURGES.**

"In Co. Litt. 5, it is laid down that stagnum (in English, a pool) consists of water and land, and therefore by the name of stagnum or a pool the water and land shall pass also. In the same manner, gurgues (a deep pit of water) consisteth of water and land, and therefore by the grant thereof by that name the soil doth pass." *Johnson v. Rayner*, 72 Mass. (8 Gray) 107-110.

**GUTTER.**

A gutter is a part of the street designed to drain and carry off water. *Warren v. Henly*, 31 Iowa, 31, 38.

As used in a municipal ordinance making it criminal to obstruct a gutter, a gutter "is a ditch or a conduit calculated to allow the

passage of water from one point to another in a certain direction. A mere excavation, without an outlet, would not be a gutter." *Willis v. State*, 42 N. W. 920, 921, 27 Neb. 98.

A city ordinance provided that, when any sidewalks should be established, the commissioner of highways should grade the same, set the curbstones and pave the gutters, and construct the sidewalk, and the abutting owners should be assessed therefor

their just and proportionate part of the expense of paving the walk, but that no part of the expense of grading the street, setting the curbstones, or paving the gutters should be so assessed, but should be paid for by the city. Held, that the word "gutters" meant the gutters between the sidewalk and that part of the street devoted to carriage travel. *Dickinson v. City of Worcester*, 188 Mass. 555, 562.

## H

## H.

Where an assessor making an assessment used the abbreviations "h, l, and stable," such abbreviations were intelligible, and properly used to mean "house, lot, and stable." *Alden v. City of Newark*, 36 N. J. Law (7 Vroom) 288.

A description in an assessment, "Samuel Barber, h., 60 feet, Linden St.," could only be construed as "house, 60 feet, Linden St."; and, as such words cannot be held to mean that it is a house 60 feet on Linden street, which is the significance of the description, and the mere location of the lot upon the street without the number is insufficient, the abbreviated description did not identify the lot, and was therefore not sufficient. *Parker v. City of Elizabeth*, 89 N. J. Law (10 Vroom) 689, 693.

## HABANA.

The word "Habana" must be taken as a part of the mark which the plaintiff wants protected. Like the other words, it is Spanish, and commonly used in this country where that sort of tobacco is grown. The use of the word "Habana" on a label, when in fact the cigars on which the label appeared were merely Havana filler, is such a deceit on the public that equity will furnish no relief against an infringement. *Solis Cigar Co. v. Pozo*, 26 Pac. 556, 558, 16 Colo. 388, 25 Am. St. Rep. 279.

## HABEAS CORPUS.

For the meaning of the term "habeas corpus," resort must unquestionably be had to the common law, but the power to award the writ by any of the courts of the United States must be given by written law. *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 94, 2 L. Ed. 554.

The common-law writ of habeas corpus was a writ in behalf of liberty, and its purpose was to deliver a prisoner from unjust imprisonment and illegal and improper restraint. *People v. Walts*, 25 N. E. 266, 267, 122 N. Y. 238; *People v. Ciarcia*, 63 N. Y. Supp. 497, 49 App. Div. 90. See, also, *Ex parte Watkins*, 28 U. S. (3 Pet.) 193, 201, 7 L. Ed. 650.

The writ of habeas corpus is a highly privileged writ, and has for its object the release by judicial decree of persons who are restrained of their liberty, or detained from the control of those who are entitled to the custody of them. Code Prac. art. 787, de-

fining the scope and province of this writ, provides that habeas corpus is an order in writing issued in the name of the state, by a judge of competent jurisdiction, and directed to the person who has another in his custody, and detains him in confinement, commanding him to bring before the judge the person thus detained, at the time and place appointed, and state the reason for which he thus keeps him imprisoned and deprived of his liberty. *Prieto v. St. Alphonsus Convent of Mercy*, 27 South. 153, 170, 52 La. Ann. 631, 47 L. R. A. 656.

"The writ of habeas corpus is a writ of right. 2 Kent, Comm. 228. It is designed to give the person in confinement, or who is restrained of his liberty, an immediate opportunity to test the question of law involved in his imprisonment, or, as it is put in some of the state Constitutions, the citizen is entitled to the privilege of this writ in the most free, easy, cheap, expeditious, and ample manner." *In re Leggat*, 62 N. Y. Supp. 208, 210, 47 App. Div. 881.

The writ of habeas corpus is a writ of right, guaranteed by Const. art. 1, § 13, which issues in behalf of any one who is illegally restrained of his liberty, and may be allowed by the supreme, district, or circuit court, or any judge thereof. *Shaw v. McHenry*, 2 N. W. 1096, 1098, 52 Iowa, 182.

The writ of habeas corpus is undoubtedly an immediate remedy for every illegal imprisonment. *Commonwealth v. Brower* (Pa.) 9 Kulp, 317-319; *Ex parte Hays*, 47 Pac. 612, 613, 15 Utah, 77.

The writ of habeas corpus was well known to the common law, and has been regarded by English jurists as one of the greatest safeguards to the liberty of the subject. Its great object is the liberation of those who may be imprisoned without just cause, and it has been so favorably regarded in this country that the provisions of the English act, 31 Car. II, c. 2, have been substantially adopted by the several states. We have even gone further, and, by the twenty-seventh section of the Bill of Rights in our Constitution, provided that the privilege of the writ of habeas corpus shall not be suspended, except in case of rebellion or invasion, and then only if the public safety demand it. *Wright v. State*, 5 Ind. 290, 294, 61 Am. Dec. 90.

The history of the writ of habeas corpus is lost in antiquity. It was in use before Magna Charta, and came to us as a part of our inheritance from the mother country, and exists as a part of the common law of the

state. It is intended and well adapted to effect the great object secured in England by Magna Charta, and made a part of the Constitution, that no person shall be deprived of his liberty without due process of law. This writ cannot be abrogated or its efficiency curtailed by legislative action. Cases within the relief afforded by it cannot, until the people voluntarily surrender the right to this greatest of all writs by an amendment of the organic law, be placed beyond its reach and remedial action. The privilege of the writ cannot even be temporarily suspended, except for the safety of the state. In cases of rebellion or invasion. In *re Dill*, 32 Kan. 668, 685, 5 Pac. 39, 45, 49 Am. Rep. 505; *People v. Liscomb*, 60 N. Y. 559, 568, 19 Am. Rep. 211.

The object of the habeas corpus act was to protect the liberty of individual citizens, and the danger of oppression is not so great in civil matters as in the case of crimes or supposed crimes. Governments often magnify real crimes, and sometimes impute offenses falsely to innocent persons, for the purpose of oppression. From this quarter has generally arisen the danger to liberty, and it may be for those reasons that the Legislature failed to impose the same penalty upon officers for a refusal to issue or return a habeas corpus in civil cases that is imposed in criminal cases. *Hecker v. Jarrett* (Pa.) 1 Bin. 373, 376, 377.

Habeas corpus is well termed the greatest writ of the common law, because it assures and secures personal liberty by simple and direct process available to every citizen. Its place is above debate and dissension. *People v. Wells*, 68 N. Y. Supp. 58, 60, 57 App. Div. 140.

#### **As action, controversy, or suit.**

See "Action"; "Controversy"; "Suit—Suietd."

#### **As appellate in nature.**

Habeas corpus is in the nature of a writ of error to examine the legality of the commitment. *Ex parte Watkins*, 28 U. S. (3 Pet.) 193, 201, 7 L. Ed. 650.

The question brought forward on a habeas corpus is always distinct from that which is involved in the case itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore those questions are separated, and may be decided in different courts. The decision that the individual shall be imprisoned must always precede the application for a writ of habeas corpus, and this writ must always be for the purpose of revising this decision, and therefore appellate in its nature. *Ex parte Bollman*, 8

U. S. (4 Cranch) 75, 94, 97, 98, 101, 2 L. Ed. 554. See, also, *Ex parte Mooney*, 26 W. Va. 36, 39, 53 Am. Rep. 59.

✓ The writ of habeas corpus is not a writ of error, and cannot be used to authorize the exercise of appellate jurisdiction. *Ex parte Clawson* (Utah) 5 Pac. 74, 76. Nor can it be used to perform the functions of an appeal. *Price v. McCarty* (U. S.) 89 Fed. 84, 85, 32 C. C. A. 162; *Holman v. City of Austin*, 34 Tex. 668, 670.

The writ of habeas corpus cannot be used as a writ of error, nor will one court review the proceedings of another court of concurrent jurisdiction in that manner; and especially so if it is by some fact dehors the record that the judgment complained of is to be determined to have been improperly rendered. *People v. District Court*, 45 Pac. 402, 403, 22 Colo. 422.

Habeas corpus is not a writ of error. It cannot bring a case before the court in such a manner that it can exercise any kind of appellate jurisdiction. On habeas corpus, the judgment, even of the subordinate court, cannot be disregarded, reversed, or set aside, however clearly it may appear to be erroneous, and however plain it may be that it ought to be reversed, if it was before the court on appeal or writ of error. The court can only look to the record to see whether a judgment exists, and has no power to say whether it is right or wrong. It is conclusively presumed to be right until it is regularly brought up for revision. *Ex parte Hardy*, 68 Ala. 303, 330.

#### **As civil or criminal proceeding.**

A habeas corpus proceeding cannot be said to be a criminal action, for, while it is frequently invoked by criminals or other persons charged with crime, it is not a criminal action, so far as the parties to the cause are concerned. Its office is to inquire into the legality of the custody of the applicant, and sometimes the applicant is charged with crime; but it is frequently sued out for the purpose of determining the proper care and legal custody of children, and is in no sense criminal in its application. The following cases are to the effect that habeas corpus proceedings are in their nature civil proceedings: *State v. Superior Court of King County*, 72 Pac. 1040, 1041, 32 Wash. 143 (citing *Ex parte Tom Tong*, 108 U. S. 556, 2 Sup. Ct. 871, 27 L. Ed. 828; *In re Van Sciever*, 42 Neb. 772, 60 N. W. 1037, 47 Am. St. Rep. 730; *Henderson v. James*, 52 Ohio St. 242, 39 N. E. 805, 27 L. R. A. 290; *Kurtz v. Moffitt*, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458; *Cross v. Burke*, 146 U. S. 82, 13 Sup. Ct. 22, 36 L. Ed. 896; *People v. Dewey*, 50 N. Y. Supp. 1013, 23 Misc. Rep. 267; *In re Reynolds* (U. S.) 20 Fed. Cas. 592; *In re Borrego*, 8 N. M. 655, 46 Pac. 211).

An appeal from a judgment in habeas corpus proceedings, adjudging defendant lawfully detained under a certain information, did not suspend prosecution of the information; nor does Ballinger's Codes & St. §§ 6506, 6529, providing for a stay of proceedings by appeal in criminal cases, contemplate such a stay. *State v. Fenton*, 70 Pac. 741, 742, 30 Wash. 325.

Habeas corpus is not a criminal action, within the definition given in Comp. Laws 1879, c. 80, § 7. It is, indeed, not an action at all, but a special proceeding, and in many cases it is a purely civil remedy, as where it is sought in behalf of the parents to obtain custody of a child or for the relief of imprisoned debtors; but it is a criminal case when it is sought for the relief of a party charged with crime, who, upon examination before a magistrate, has been committed for trial, it being, in effect, an appeal from such examination, and therefore is a criminal case, within the scope of Laws 1881, c. 103, § 1. *Gleason v. McPherson County Com'rs*, 1 Pac. 384, 30 Kan. 53.

Many are accustomed to regard the writ as almost obsolete and of little practical value, but the writ is as much a palladium of liberty to-day as it was during the abuses existing in the days of the ancient English sovereigns. It is to the credit of an advanced civilization that the necessity for the issuance of the writ rarely ever arises. The common-law writ became so little respected in England that it no longer afforded real or substantial benefits to English subjects, and it was not until after the passage of St. 31 Car. II, known as the "Habeas Corpus Act," that the writ came to be thoroughly recognized in its fullest scope. The writ with which we are now dealing under our Codes was the one known to the common law as the "habeas corpus ad subjiciendum," and was issued in cases of illegal detention. It was not, strictly speaking, either a civil or a criminal action. It was not a proceeding in a suit, but was a summary application by the person detained. It was, as Lord Coke described it, *festinum remedium*. The proceeding is sometimes characterized as a cause or action, but erroneously so; and it has been called a civil or criminal proceeding according to whether the person is held in custody on a criminal charge, or by private restraint. *Simmons v. Georgia Iron & Coal Co.*, 43 S. E. 780, 782, 117 Ga. 305, 61 L. R. A. 739.

The purpose of the writ of habeas corpus is to inquire into and remove any unlawful restraint upon the liberty of a person. If in this proceeding it appears that such person is restrained by reason of his supposed violation of some criminal law, or quasi criminal law, as offense against a person or contempt of court, then the proceeding must

be classed as a criminal case, although the court should be of the opinion that the act does not constitute a violation of such law, or that the evidence is insufficient to establish the act, or that the supposed law does not exist or is void; but, if such person is not restrained by reason of such violation of law, then the proceeding must be classed as a civil case. It is the cause of restraint which determines whether the proceeding to remove the restraint be a civil or criminal case. A proceeding by habeas corpus to determine a parent's right to the custody of her minor child is a civil action. *Legate v. Legate*, 28 S. W. 281, 282, 87 Tex. 248.

A procedure by habeas corpus can in no legal sense be regarded as a suit or controversy between private parties, and, even when not used to relieve against illegal restraint under a criminal charge, cannot, in the proper sense of the term, be regarded as a civil suit. It should rather be held the exercise of a special jurisdiction conferred by the Constitution and laws upon either the courts or judges for the prompt relief of the citizen against any improper interference with his personal liberty. Consequently it does not come under the provisions of the Code allowing an appeal to the Supreme Court in civil suits. *McFarland v. Johnson*, 27 Tex. 105, 109.

#### Determination as to custody of children.

The common-law writ of habeas corpus was a writ in behalf of liberty, and its purpose was to deliver a prisoner from unjust imprisonment and illegal and improper restraint. It was not a proceeding calculated to try the rights of parents and guardians to the custody of infant children. It was of frequent use, however, when children were detained from their parents or guardians, on the ground that absence from legal custody was equivalent to illegal restraint and imprisonment. In the case of children of the age of discretion, the object of the writ was usually accomplished by allowing the party restrained the exercise of his volition; but, in the case of an infant of an age to be incapable of determining what was best for itself, the court or officer made the determination for it, and in so doing the child's welfare was the chief end in view. *People v. Buffett*, 78 N. Y. Supp. 175, 177, 75 App. Div. 365 (quoting from *People v. Walts*, 25 N. E. 266, 267, 122 N. Y. 238); *People v. Garcia*, 63 N. Y. Supp. 497, 498, 49 App. Div. 90.

#### As directed to individuals.

The writ of habeas corpus never goes to courts, but to individuals only, to inquire into the legality of the imprisonment complained of. *State v. First Judicial Dist. Ct.*, 63 Pac. 395, 399, 24 Mont. 539.

### Examination of jurisdictional questions.

Habeas corpus is an appropriate and legal remedy for the release of a prisoner who is restrained of his liberty by virtue of process issuing under the order or judgment of a court only in cases where there is a total want or else an excess of jurisdiction; and hence, where the court had jurisdiction both of the subject-matter and of the prisoner's person, he cannot be discharged on habeas corpus. *Ex parte State*, 71 Ala. 371, 375.

Habeas corpus is a common-law writ, and it is not available to inquire into the mere legality or justice of a judgment or mandate; but the term "legality or justice," as used in the rule, is not deemed to include questions of jurisdiction or power, and the want of jurisdiction of the tribunal to pronounce the judgment or mandate by which the person is placed and detained in custody furnishes to him the right to resort to the writ for relief. *People v. Stout*, 30 N. Y. Supp. 898, 902, 81 Hun. 336. See, also, *People v. Liscomb*, 60 N. Y. 559, 568, 569, 19 Am. Rep. 211.

The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right of liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crime are criminal proceedings, so that habeas corpus is a civil proceeding. The writ of habeas corpus never takes the place of the writ of error, and is confined to jurisdictional defects when it is resorted to merely for the purpose of liberating a prisoner detained in custody to await his trial on the charge of being guilty of a criminal offense. Yet the questions whether there was any evidence for the magistrate to act upon, and whether the complaint charges any offense known to the law, are jurisdictional matters, and, in determining them, it can examine the evidence only sufficiently to discover whether there was any substantial ground for the exercise of judgment by the committing magistrate, it cannot go beyond that, and weigh the evidence. *State v. Huegin*, 85 N. W. 1046, 1052, 1057, 110 Wis. 189. See, also, *Ex parte Lucas*, 61 S. W. 218, 219, 226, 160 Mo. 218.

### Production of the body of the prisoner.

An essential element of the remedy by habeas corpus is the power to compel the production of the body of the prisoner before the judge. It is this very feature which is embodied in the distinctive words which

give the name to the writ. *Nebraska Children's Home Soc. v. State*, 78 N. W. 267, 269, 57 Neb. 765.

### Injustice of arrest.

The office and object of the writ are to ascertain whether the prisoner can legally be detained in custody, and, if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment. *Price v. McCarty* (U. S.) 89 Fed. 84, 85, 32 C. C. A. 162.

Innocent parties are daily arrested by due process of law, and, if that gave the courts of the United States power to issue writs of habeas corpus to inquire into the justice or injustice of their arrest, every criminal case in the state would be tried first on habeas corpus. The courts of the United States, while they have carefully maintained their own powers, have been scrupulously careful not to encroach upon the powers of the state courts. *In re Bergen* (U. S.) 3 Fed. Cas. 261, 263.

### As a prerogative writ.

The writ of habeas corpus was from its inception a prerogative writ. At common law it stood upon the same footing as other writs of that character—such as a quo warranto, mandamus, certiorari, prohibition, etc.—and was dealt with on the like general grounds and principles. The proceedings under it, as in all prerogative writs, were regarded as appellate in their character. *In re Miller* (N. Y.) 1 Daly, 562, 574; *Ex parte Watkins*, 28 U. S. (3 Pet.) 193, 201, 7 L. Ed. 650.

### Punishment for detention.

The one object of the writ of habeas corpus is to relieve the party detained from an illegal restraint. If this is accomplished before the jurisdiction of the court attaches by the service of the writ, there is nothing upon which it can attach. It is not the object or intention of the writ to punish the respondent or afford the party redress for his illegal detention; but the question occupies a different attitude after the jurisdiction of the court has attached. It cannot then be defeated by the wrongful act of either of the parties. *Ex parte Coupland*, 28 Tex. 386, 390.

### As writ of inquiry.

The writ of habeas corpus is essentially a writ of inquiry, and upon matters of which the state itself is concerned, in aid of right and liberty. Thus a habeas corpus proceeding by the husband, as relator, against a wife, cannot be said to be a proceeding between husband and wife. *State v. Michel*, 30 South. 122, 125, 105 La. 741, 54 L. R. A. 927.

**HABEAS CORPUS AD DELIBERANDUM ET RECIPIENDUM.**

The writ of habeas corpus ad deliberandum et recipiendum issues when it is necessary to remove a prisoner to be tried by the proper jurisdiction wherein the fact was committed. *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 97, 2 L. Ed. 554 (citing 3 Bl. Comm. 129).

**HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM.**

The common writ ad faciendum et recipiendum issues out of any of the courts of Westminster Hall when a person is sued in some inferior jurisdiction, and it is desirable to remove the action into the superior court, commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer, to do and receive whatever the King's court shall consider in that behalf. This writ is grantable of common right, without any motion in court, and instantly supersedes all proceedings in the court below. *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 97, 2 L. Ed. 554 (citing 3 Bl. Comm. 129).

**HABEAS CORPUS AD PROSEQUENDUM.**

The writ of habeas corpus ad prosequendum issues when it is necessary to remove a prisoner in order to prosecute in the proper jurisdiction wherein the fact was committed. *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 97, 2 L. Ed. 554 (citing 3 Bl. Comm. 129).

**HABEAS CORPUS AD RESPONDENDUM.**

The writ of habeas corpus ad respondendum lies when a man hath a cause of action against one who is confined by the process of some inferior court, in order to remove the prisoner and charge him with this new action in the court above. *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 94, 2 L. Ed. 554 (citing 3 Bl. Comm. 129).

**HABEAS CORPUS AD SATISFACIENDUM.**

The writ of habeas corpus ad satisfaciendum lies when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution. *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 95, 2 L. Ed. 554 (citing 3 Bl. Comm. 129).

**HABEAS CORPUS AD TESTIFICANDUM.**

The writ of habeas corpus ad testificandum issues to bring a witness into court to

bear testimony in the cause. *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 97, 2 L. Ed. 554 (citing 3 Bl. Comm. 129).

The writ of habeas corpus ad testificandum, under any practice, either in this country or England, never issued except to bring a witness competent and qualified to testify when brought, and never to bring a person who could not testify when brought, by reason of his being disqualified as a witness. *Ex parte Marmaduke*, 91 Mo. 228, 250, 4 S. W. 91, 92, 60 Am. Rep. 250.

**HABENDUM.**

In ancient conveyancing lore, the office of an habendum was "to determine the interest granted, or to lessen, enlarge, explain, or qualify the premises." Modern use has changed its signification. It is now the office of the premises "rightly to name the grantor and grantee, and to comprehend the certainty of the thing granted," and an habendum has become in most cases a mere form where the estate is mentioned in the premises. 2 Burrill, Law Dict. 555, 821. If the habendum cannot be reconciled with the premises, so that full effect may be given to both, it must give way, and the latter will stand. *Clapp v. Byrnes*, 3 App. Div. 284, 286, 287, 38 N. Y. Supp. 1063, 1067.

The office of an habendum is to name the grantee, and limit the certainty of the estate in the subject of the grant. *Sumner v. Williams*, 8 Mass. 162, 175, 5 Am. Dec. 83; *Horn v. Broyles* (Tenn.) 62 S. W. 297, 306.

The object of the habendum clause is said to be to set down against the name of the grantee the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use. *New York Indians v. United States*, 18 Sup. Ct. 531, 535, 170 U. S. 1, 42 L. Ed. 927 (citing *Shep. Touch.* 74).

The office of the habendum in a deed is to properly determine what interest or estate is granted by the deed. *Miller v. Graham*, 25 S. E. 165, 168, 47 S. C. 288 (citing 2 Bl. Comm. 241; *McLeod v. Tarrant*, 39 S. C. 271, 17 S. E. 773, 20 L. R. A. 846).

It is the office of the habendum to qualify and explain the general words of the premises. *Redstrake v. Townsend*, 39 N. J. Law (10 Vroom) 372, 377, 378.

The habendum of a deed is that part which declares and limits the use of the thing conveyed. *Stockton v. Martin* (S. C.) 2 Bay, 471, 473.

The office of the habendum in a deed is to limit and define the estate which the grantee is to have in the property granted. It is not an essential part of a deed. *Hart v. Gardner*, 20 South. 877, 878, 74 Miss. 153.



Chancellor Kent remarks that in modern conveyancing the habendum clause in deeds has degenerated into a mere useless form, for the premises contain the names of the parties and the specification of the thing granted, and the deed becomes effectual without any habendum. *Hafner v. Irwin*, 20 N. C. 570, 571, 34 Am. Dec. 390.

**As contradicting or defeating estate granted.**

The habendum may explain and enlarge or qualify, but cannot contradict or defeat, the estate granted by the premises. *New York Indians v. United States*, 18 Sup. Ct. 531, 535, 170 U. S. 1, 42 L. Ed. 927.

The habendum part of a deed was usually used to determine the interest granted, or to lessen, enlarge, explain, or qualify the premises. But it cannot perform the office of divesting an estate already vested by the deed, for it is void if it be repugnant to the estate granted in the premises. *Hafner v. Irwin*, 20 N. C. 570, 571, 34 Am. Dec. 390.

An estate granted may be designated and made certain in the habendum clause, where it enlarges and explains, but is not inconsistent with, the previous parts of the instrument. *Jackson v. Ireland* (N. Y.) 3 Wend. 99, 102.

**As enlarging subject-matter of grant.**

The habendum of a deed does not grant the estate, but only limits its certainty, and cannot enlarge the premises. Nothing can be limited in the habendum of a deed which has not been given in the premises, because, the premises being that part of a deed in which the thing is granted, it follows that the habendum, which is only used for the purpose of limiting the certainty of the estate, cannot increase the gift, for in that case the grantee would in fact take a fee, which was never given to him. *Brown v. Manter*, 21 N. H. (1 Fost.) 528, 533, 53 Am. Dec. 223.

It is the office of the habendum sometimes to enlarge the estate granted, but never to extend the subject-matter of the grant, and accordingly, where a deed describing the land granted by metes, and the habendum read, "to have and to hold the premises with all their appurtenances," the phrase "with all their appurtenances" did not operate to convey an easement consisting of the right to the use of water conducted artificially onto the premises from other land of the grantor. *Manning v. Smith*, 6 Conn. 289, 292.

## HABIT.

See "Good Habits"; "Intemperate Habits"; "Temperate Habits."

See "Confirmed Habits of Intoxication"; "Continuing Habits of Intoxication."

The word "habit" is defined to be a fixed or established custom; ordinary course of conduct. *Conner v. Citizens' St. R. Co.*, 45 N. E. 862, 866, 146 Ind. 430; *Tatum v. State*, 63 Ala. 147, 152.

Habit is the customary conduct of a person, to pursue which he has acquired a tendency from frequent repetitions of the same act. *State v. Skillicorn*, 73 N. W. 503, 504, 104 Iowa, 97.

Habit is a customary state; a disposition acquired by frequent repetition; aptitude by doing frequently the same thing; usage; established manner. When a person has repeatedly acted in a particular way at intervals, whether regular or irregular, for such length of time that we can predicate with reasonable assurance that he will continue to act so, we may affirm that this is his habit. *State v. Robinson*, 20 South. 30, 31, 111 Ala. 482 (citing *State v. Savage*, 89 Ala. 1, 7 South. 183, 7 L. R. A. 426).

"Habit is the disposition of a person toward a certain thing." *Seigler v. Commonwealth* (Pa.) 14 Atl. 237, 238.

It need not be the uniform or unvarying rule, but, to be a habit, it must be the ordinary course of conduct—the general rule or custom. *Tatum v. State*, 63 Ala. 147, 152.

**Single or occasional acts.**

The word "habit" has a clear, well-understood meaning, being nearly the same as "custom," and cannot be applied to a single act. *Lynch v. Bates*, 38 N. E. 806, 808, 139 Ind. 206.

A habit of using intoxicating liquors means more than an occasional or incidental use. *Supreme Lodge K. P. v. Foster*, 59 N. E. 877, 880, 26 Ind. App. 333.

"When we speak of the habits of a person, we refer to his customary conduct, to pursue which he has acquired a tendency from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. A habit of early rising, for example, could not be affirmed of one because he was once seen on the streets in the morning before the sun had risen; nor could intemperate habits be imputed to him because his appearance and actions on that occasion might indicate a night of indulgence. Hence a representation in an insurance policy that the insured was of temperate habits was not made untrue by the fact that he may have had an attack of delirium tremens from an exceptional overindulgence. *Knickerbocker Life Ins. Co. v. Foley*, 105 U. S. 350, 354, 26 L. Ed. 1055.

On the sale of a negro, the vendor warranted that the negro was not addicted to the habit of running away. The negro was kept in jail for five months preceding the day

of the sale for running away, and soon after the sale he ran away again. Held, that the two cases should be considered sufficient to constitute his acts a habit, within the meaning of that word as used in a warranty of sale. *Macarty v. Bagnieres* (La.) 1 Mart. (O. S.) 149, 150.

Where a statute prohibits the sale of liquor to a person in the habit of getting intoxicated, the word "habit" should be construed to mean the involuntary tendency of becoming intoxicated, which is acquired by frequent repetition, and therefore might include a case where a person was proved to have been drunk for three to five times within two years prior to the alleged infringement of the statute. *Murphy v. People*, 90 Ill. 59, 60.

## HABITABLE.

Where one lets a house for people to live in, and agrees to keep it in good repair, he is bound by the dictates of common reason, as well as by those of common law, to both make and keep it habitable—that is, reasonably fit for the occupation of a tenant of the class which occupies it. *Miller v. McCardell*, 33 Atl. 445, 446, 19 R. I. 304, 30 L. R. A. 682.

## HABITANCY.

The term "habitancy" "expresses the fact of residence at a place with the intent to regard and make it a home. The act and intent must concur, and the intent may be inferred from declarations and conduct. In general terms, one may be designated as an inhabitant of that place which constitutes the principal seat of his residence, of his business pursuits, connections, attachments, and of his political and municipal relations." *Lyman v. Fiske*, 34 Mass. (17 Pick.) 231, 234, 28 Am. Dec. 293; *Inhabitants of Abington v. Inhabitants of North Bridgewater*, 40 Mass. (23 Pick.) 170, 177, 178; *Hairston v. Hairston*, 27 Miss. (5 Cushm.) 704, 711, 61 Am. Dec. 500.

The word "habitancy" is more comprehensive than "domicile." In some respects, "habitancy" includes "domicile," and embraces citizenship and municipal relations. *Hairston v. Hairston*, 27 Miss. (5 Cushm.) 704, 711, 61 Am. Dec. 500.

## HABITATION.

See "Right of Habitation"; "Separation of Habitation."

"Habitation" is defined to be a place of abode; a place to dwell in. *Holmes v. Oregon & C. R. Co.* (U. S.) 5 Fed. 523, 527.

The word "habitation," in 1 Rev. Code, c. 104, § 7, p. 37, requiring nuncupative wills to be made at the habitation of the testator, means dwelling house or home. Its meaning is the same as in the original statute, 29 Car. II, c. 8, § 19, which uses the term "house, or his or her habitation or dwelling." *Nowlin's Adm'r v. Scott* (Va.) 10 Grat. 64, 65.

"The constitutional definition of 'habitation' is the place where a man dwells or has his home; in other words, his domicile." *Harvard College v. Gore*, 22 Mass. (5 Pick.) 370, 372.

Where one stops for a long time in a place for the management of his business affairs, while he resided with his family at another place, he had simply a habitation at the former place, and not a domicile. *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 463, 35 Am. Rep. 536.

## HABITUAL.

The word "habitual" is defined by Webster as constant; customary; accustomed; usual; common; ordinary; regular; familiar; and this is certainly the common understanding of the meaning of the word. *Peltz v. Printz*, 40 Atl. 486, 186 Pa. 347.

"Habitual" means formed or acquired by or resulting from habit; frequent use or custom; formed by repeated impressions. *Hilton v. State*, 53 S. W. 113, 115, 41 Tex. Cr. R. 190.

## HABITUAL CARNAL INTERCOURSE.

The expression "habitual carnal intercourse," as used in Pen. Code, art. 833, defining adultery as habitual carnal intercourse with each other, without living together, of a man and woman, when either is lawfully married to some other person, is not such an expression as needs explanation, for the jury is competent to understand what is meant by the language in common use, and what is meant by "habitual carnal intercourse"; the word "habitual" not being one of technical signification, but should be understood in its common acceptance. *Collum v. State*, 10 Tex. App. 708, 710.

## HABITUAL CRIMINAL.

When a person is hereafter convicted of a felony, who has been, before that conviction, convicted in this state of any other crime, he may be adjudged by the court, in addition to other punishment inflicted upon him, to be an habitual criminal. A person convicted of a misdemeanor, who has been already five times convicted in this state of a misdemeanor, may be adjudged by the court, in addition to or instead of other pun-

ishment, to be an habitual criminal. Cr. Code N. Y. 1903, § 510.

Whoever has been previously twice convicted of crime, sentenced, and committed to prison, in this or any other state, or once in this or once at least in any other state, for terms of not less than three years each, shall, upon conviction of a felony committed in this state, other than murder in the first or second degree, be deemed to be an habitual criminal. Rev. St. Utah 1898, § 4067.

#### HABITUAL CRUEL AND INHUMAN TREATMENT.

"Habitual cruel and inhuman treatment," as used in Rev. St. p. 147, § 51, entitling a wife to a divorce for habitual cruel and inhuman treatment, means actual violence, or a reasonable apprehension of bodily harm. Injured susceptibilities do not suffice for so grave a judgment as one of divorce. "Occasional outbursts of passion will not do it, nor mere abuse, however gross. Words of menace, however, are sufficient, if they be of such a character and are accompanied by such circumstances as would justify a belief in their seriousness; that is, they must impress the person to whom they are addressed, not as idle words, not as a form of intemperate expression, but as importing action, and in that sense conveying the reality of the threat of bodily harm. The authorities in support of the rule are numerous. *Ruckman v. Ruckman* (N. Y.) 58 How. Prac. 278, 279 (citing *Perry v. Perry* [N. Y.] 2 Paige, 501; *Burr v. Burr* [N. Y.] 10 Paige, 20, 31, 32, 33; *Mason v. Mason* [N. Y.] 1 Edw. Ch. 278).

Under a statute providing that "habitual cruel and inhuman treatment," marked by personal violence, shall be cause for divorce, it is held that the treatment must be habitual; the court remarking that a single act of violence ordinarily would not suffice. It might never be repeated. The violence, however, need not be frequent. It is not necessary for personal violence to attend the daily intercourse of the parties. If the treatment is persistently cruel and inhuman, and is occasionally characterized by personal violence, so as to beget the apprehension that it is liable to occur again at any time, it is sufficient. *Johns v. Johns*, 57 Miss. 530, 531, 532.

Under a statute authorizing divorce for "habitual cruel and inhuman treatment," it is held that where a husband struck his wife, attempted to kick her, called her by abusive epithets, at times refused to speak to her for months, supplied her scantily with clothing, and told her to leave and get a divorce, there was "habitual cruel and inhuman treatment," within the meaning of the statute. *Pillar v. Pillar*, 22 Wis. 658, 659.

#### HABITUAL DRUNKARD.

See, also, "Habitual Drunkenness or Intoxication"; "Habitual Intemperance."

An habitual drunkard is one who has formed the habit, and indulged in it, of drinking to excess and becoming intoxicated, whether daily or continuously or periodically, with sober intervals of a greater or less extent.—*Miller v. Gleason*, 18 Ohio Cir. Ct. R. 374, 10 O. C. D. 20, 21.

An habitual drunkard is one who makes it a habit, or who habitually becomes intoxicated by the voluntary use of intoxicating liquors. Rev. St. Tex. 1895, art. 5060h.

An habitual drunkard is one who has the habit of indulging in intoxicating drink so firmly fixed that he becomes drunk whenever the temptation is presented by his being near where liquor is sold. *Magahay v. Magahay*, 35 Mich. 210.

An habitual drunkard is one who has acquired a fixed habit of drunkenness. An instruction properly declares the law which tells the jury that an habitual drunkard is a person given to inebriety or excessive use of intoxicating drink, who has lost the power or will, by frequent indulgence, to control his appetite for it. *Sitton v. Grand Lodge A. O. U. W.*, 84 Mo. App. 208, 212.

"Bouvier defines an habitual drunkard to be a person given to inebriety or the excessive use of intoxicating drinks, who has lost the power or will, by frequent indulgence, to control his appetite for it. 'Habitual drunkenness,' said Harrison, J., 'or the degree or the course of intemperance that amounts to it, cannot be exactly defined. We may, however, say, in general terms, that one is addicted to habitual drunkenness who has a fixed habit of frequently getting drunk, and he may be so addicted though he may not oftener be drunk than sober, and he may be sober for weeks.' *Brown v. Brown*, 38 Ark. 324, 328. 'Occasional acts of drunkenness do not make one an habitual drunkard, nor is it necessary that he should be continually in an intoxicated state. A man may be an habitual drunkard, and yet be sober for days and weeks together. The rule is, has he a fixed habit of drunkenness?' *Ludwick v. Commonwealth*, 18 Pa. (6 Harris) 172, 174. 'He is an habitual drunkard,' says the court in *Commonwealth v. Whitney*, 71 Mass. (5 Gray) 85, 'whose habit is to get drunk; whose inebriety has become habitual.' *Poland, P. J.*, says: 'The fair definition of "habitual drunkard" we suppose to be one who is in the habit of getting drunk, or who commonly or frequently is drunk; and we do not suppose it necessary, to satisfy those terms, that a man be shown to be constantly or universally drunk.'" *McBee v. McBee*, 29 Pac. 887, 888, 22 Or. 329, 29 Am. St. Rep. 613 (citing *State v. Pratt*, 34

Vt. 323, 384). See, also, *Magahay v. Magahay*, 35 Mich. 210; *Murphy v. People*, 90 Ill. 59, 60; *Mack v. Handy*, 2 South. 181, 183, 39 La. Ann. 497.

An habitual drunkard is a person whose habits of drunkenness are confirmed and continual. *Gourlay v. Gourlay*, 19 Atl. 142, 143, 16 R. I. 705.

"Neither does a single nor an occasional excess make a man an habitual drunkard, but if the habit and rule of a man's life is to indulge periodically, and with increasing frequency and violence, in excessive fits of intemperance, such a use of liquor may properly cause the finding of habitual drunkenness." *Northwestern Mut. Life Ins. Co. v. Muskegon Nat. Bank*, 7 Sup. Ct. 1221, 1225, 122 U. S. 501, 30 L. Ed. 1100.

One who has a fixed habit of drunkenness, and who is habituated to intemperance whenever the opportunity offers—he himself making the opportunity—filling his flask, silently drinking by himself, and getting continually drunk, is an habitual drunkard. *Appeal of Miskey*, 107 Pa. 611, 626.

In construing a statute authorizing the imprisonment in any inebriate or insane asylum of any person convicted of being an inebriate, habitual, or common drunkard, it was said that "just what would make a person such is not very clearly defined. Manifestly, it was intended that the drunkenness should be repeated to the extent of becoming habitual; but just how frequently it should occur, or the extent of the delirium or stupefaction, is left, as a matter of fact, to be determined by those who might differ widely in regard to it. Such conviction is not made dependent upon his inability to attend to business, nor to any want of physical self-control, nor upon his being dangerous to himself or others." Such a statute is in violation of Const. U. S. Amend. 14, § 1, which declares that no state shall deprive any person of liberty without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. *State v. Ryan*, 36 N. W. 823, 827, 70 Wis. 676.

#### **Delirium tremens.**

One who has so indulged in intoxicating liquors as to become subject to delirium tremens may properly be regarded as an habitual drunkard. *Menkins v. Lightner*, 18 Ill. (8 Peck) 282, 284, 285.

#### **Inability to control appetite.**

An habitual drunkard is a person given to inebriety or the excessive use of intoxicating drink, and who has lost the power of will, by frequent indulgence, to control his appetite for it; and therefore where, in a suit for divorce, it was proved that de-

fendant for a period of two years prior to the beginning of the suit was frequently and customarily or habitually given to the excessive use of intoxicating drink, and had during such two years or more lost the power of his will to control his appetite, he was an habitual drunkard, within the statute authorizing a divorce on that ground. *Richards v. Richards*, 19 Ill. App. (19 Bradw.) 465, 467.

In *McBee v. McBee*, 22 Or. 329, 29 Pac. 887, 29 Am. St. Rep. 613, the court, after a review of all the authorities, concludes that there must be frequent and regular recurrence of excessive indulgence in intoxicating drinks, to constitute an habitual drunkard. It is not necessary that he should drink liquors to excess, and become intoxicated every day, or even every week, but there must be such frequent repetition of excessive indulgence as to engender a fixed habit of drunkenness. Occasional acts of intoxication are not sufficient to make one an habitual drunkard. There must be the involuntary tendency to become intoxicated as often as the temptation is presented, which comes from a fixed habit, acquired from frequent and excessive indulgence. The man is reduced to that pitiable condition in which he either makes no vigorous effort to resist and overcome the habit, or his will has become so enfeebled by the indulgence that resistance is impossible. There is generated in him, by frequent and excessive indulgence, a fixed habit of drunkenness, which he is liable to exhibit at any time when the opportunity is afforded. This is what is meant by "habitual drunkenness," as a ground for divorce. *Bizer v. Bizer*, 81 N. W. 465, 466, 110 Iowa, 248; *Walton v. Walton*, 8 Pac. 110, 111, 84 Kan. 185.

#### **Loss of reason or capacity for business.**

"Habitual drunkards," as used in *Sayles' Ann. St. art. 3226, § 4*, providing for the execution of a bond by retail liquor dealers, conditioned that they will not sell to habitual drunkards, is used in its common acceptance. It does not refer to an habitual drunkard, as defined in the statutes under the title "Guardian and Ward." The capacity of a person to take care of himself or property is immaterial, within the meaning of the statute quoted. *Campbell v. Jones*, 21 S. W. 723, 724, 2 Tex. Civ. App. 263.

The fact that a person is for any considerable part of his time intoxicated to such a degree as to deprive him of his ordinary reasoning faculties is *prima facie* evidence, at least, that he is incapacitated, as an habitual drunkard, to have the control and management of his property, within the meaning of the statute giving the care of habitual drunkards to the court. In *re Tracy* (N. Y.) 1 Paige, 580, 582.

**As question for jury.**

"An habitual drunkard" is defined by act relating to liability of liquor sellers for selling intoxicating liquors to habitual drunkards as one who makes it a habit, or who habitually becomes intoxicated by the voluntary use of intoxicating liquors, and it is a question for the jury to determine whether or not a person is an habitual drunkard. *Willson v. White*, 69 S. W. 989, 29 Tex. Civ. App. 588.

In an action for libel, for charging that plaintiff was an habitual drunkard, an instruction stating: "I think 'an habitual drunkard' means more than being drunk on two or three occasions within a given time, or two or three times within a given number of months; that it means the use of intoxicating liquors to such an extent as to in some manner disqualify a man from pursuing his avocation; but the jury can, perhaps, define it as well as the court"—was held not to be erroneous by reason of the latter clause. *Rude v. Nass*, 48 N. W. 555, 558, 79 Wis. 321, 24 Am. St. Rep. 717.

**Senile dementia.**

A person who indulges in alcoholic intoxicants to such an extent as to impair the mind and produce senile dementia is an habitual drunkard. *Robertson v. Lyon*, 24 S. C. 286, 272, 278.

**HABITUAL DRUNKENNESS OR INTOXICATION.**

See, also, "Confirmed Drunkenness."

"Habitual drunkenness," as the term is used to designate habitual drunkenness, as the cause of divorce, has reference to the existence of drunkenness as a habit. A frequent and regular recurrence or excess of indulgence in intoxicating drinks constitutes such a habit. *Golding v. Golding*, 6 Mo. App. 602.

The term "habitual," when applied to drunkenness, as a ground for divorce, implies growth through various and increasing stages until drunkenness becomes a fixed or established habit. *McClanahan v. McClanahan*, 56 S. W. 858, 861, 104 Tenn. 217.

Habitual drunkenness is drunkenness repeated at intervals, whether regular or irregular, for such a length of time that it can be said with reasonable assurance that such actions will be continued. It need not be the uniform or unvarying rule, but, to be habitual, must be the ordinary course of conduct—the general rule or custom. Occasional exceptions do not destroy the rule, but unless, when occasion offers, there is a disposition or probable inclination to drink to excess, intemperate habits cannot be predicated. If the rule or habit is to drink to in-

toxication when occasion offers, and sobriety or abstinence is the exception, the condition of habitual drunkenness exists. *State v. Robinson*, 20 South. 30, 31, 111 Ala. 482 (citing *Tatum v. State*, 63 Ala. 147, 152; *Stanley v. State*, 26 Ala. 26; *Smith v. State*, 55 Ala. 1, 10; *Ludwick v. Commonwealth*, 18 Pa. [6 Harris] 172; *State v. Pratt*, 34 Vt. 323; *Northwestern Life Ins. Co. v. Muskegon Bank*, 122 U. S. 501, 507, 7 Sup. Ct. 1221, 30 L. Ed. 1100).

The terms "habitual drunkenness," "habitual intemperance," "habitual intoxication," and "continued habits of intoxication" are equivalent and capable of the same definition, and are defined as the fixed and irresistible habit of getting drunk. *Ring v. Ring*, 38 S. E. 330, 332, 112 Ga. 854.

The question of habitual intoxication is a question for the jury. To prove such intoxication, evidence is admissible that the person in question was in the habit of getting intoxicated. The general rule, it is true, forbids the opinions or conclusions of witnesses from being given in evidence. Whether or not a person possesses a certain habit is rather a question of fact than of opinion or conclusion. *Gallagher v. People*, 11 N. E. 335, 336, 120 Ill. 179.

"Habitual drunkenness" is a distinct act within itself; a condition of body and mind produced by the excessive use of intoxicating liquors—spirituous, vinous, or malt—confirmed by habit. It is usually produced by oft-repeated indulgence in drinking to excess, which is liable to have different effects on different persons, and therefore cannot be described or measured or defined by the causes that produce it in any one instance, any more than insanity or any other condition of body or mind produced by extraneous causes. *Trigg v. State*, 49 Tex. 645, 663.

**Inability to resist temptation.**

"Habitual drunkenness," as used in Civ. Code La. art. 128, making habitual drunkenness cause of divorce, means repeated acts of drunkenness, followed by occasional spells of sobriety and moderate drunkenness, with the habit of drinking so fixed that temptation to drink cannot be resisted. *De Lesdernier v. De Lesdernier*, 14 South. 191, 45 La. Ann. 1364.

**Incapacity for business.**

"Habitual drunkenness," as used in a statute making habitual drunkenness a ground of divorce, includes fixed habits of drinking to excess, to such a degree as to disqualify the person from attending to his business during the principal portion of the time usually devoted to business. *Wheeler v. Wheeler*, 5 N. W. 689, 53 Iowa, 511, 38 Am. Rep. 240; *Mahone v. Mahone*, 19 Cal. 626, 627, 81 Am. Dec. 91.

By "habitual drunkenness," as used in the statute relating to the removal of county officers, is meant the frequent and customary use to excess of intoxicating drinks, resulting in that condition of the body and mind produced by the excessive use of intoxicating liquors, spirituous, vinous, or malt, confirmed by habit. In order to constitute habitual drunkenness, it shall not be necessary to show that the officer is incapable of discharging the duties of his office or taking care of himself; but proof of the fact of habitual drunkenness, to the satisfaction of the judge and jury, shall be sufficient cause of removal, without reference to his capacity or incapacity to discharge the duties of his office. Rev. St. Tex. 1895, arts. 3536, 3537.

#### Occasional intoxication.

Habitual drunkenness, within the meaning of a statute authorizing a divorce for habitual drunkenness, is not shown by proof of occasional intoxication. *Meathe v. Meathe*, 47 N. W. 109, 83 Mich. 150.

Proof that defendant drank at times to excess, and that when under the influence of liquor he was boisterous, quarrelsome, and offensive, is not alone sufficient to fill the legal requirement as to habitual drunkenness. *Powers v. Powers*, 81 N. W. 1, 5, 20 Neb. 529.

#### Use of opiates.

Habitual drunkenness, as a ground for divorce, includes only alcoholic intoxication, and not that resulting from the habitual use of opiates. *Dawson v. Dawson*, 23 Mo. App. 169, 170; *Burt v. Burt*, 46 N. E. 622, 623, 168 Mass. 204; *Ring v. Ring*, 38 S. E. 380, 332, 112 Ga. 854.

#### Quarrelsomeness.

Habitual drunkenness, such as is ground for divorce, was not shown by evidence that defendant drank, at times, to excess, and that, when under the influence of liquor, he was boisterous, quarrelsome, and offensive, and at least disgustingly unpleasant. *Powers v. Powers*, 20 Neb. 529, 536, 81 N. W. 1, 5.

Where the evidence showed that a man had always been in the habit of taking a drink whenever he had a mind to and felt like it, and the habit had grown upon him, until during the last six or seven years he had been in the habit of getting more or less intoxicated when he went to the village, which happened once or twice a week, though he never was so drunk that he could not drive his team home, or put it out after he got there, but was morose and ugly, and sometimes brutal, when filled with liquor, a divorce for habitual drunkenness was properly granted. *Berryman v. Berryman*, 26 N. W. 789, 59 Mich. 605.

#### Sober periods.

"Habitual drunkenness" is not exactly definable, but it may be said that one is addicted to habitual drunkenness who has a fixed habit of frequently getting drunk; and he may be so addicted, though not oftener drunk than sober, and though sober for two weeks. *Brown v. Brown*, 38 Ark. 324, 328.

"Habitual drunkenness," within a statute providing for an action for damages against a dramshop keeper for sales to an habitual drinker, is sufficiently established by evidence that the man in question has a fixed habit of frequently getting drunk, though he is oftener sober than drunk, and is sometimes sober for weeks at a time. *Cook v. Newton*, 14 Ky. Law Rep. 860.

A charge that "habitual," as applied to intoxication, means continuous; an acquired habit; constant intoxication—was too strong, as it is not necessary, in order to show that a man has been guilty of habitual intoxication, within Civ. Code, § 2427, authorizing a divorce for such cause, to prove that he was continuously and constantly drunk. *Fuller v. Fuller*, 108 Ga. 256, 257, 33 S. E. 865.

#### HABITUAL INSANITY.

Habitual insanity is such insanity as is, in its nature, continuous and chronic. *Wright v. Market Bank* (Tenn.) 60 S. W. 623, 624.

#### HABITUAL INTEMPERANCE.

"Habitual intemperance," as used in a statute making it a ground for divorce, can only refer to the persistent habit of becoming intoxicated from the use of strong drinks. *Burns v. Burns*, 13 Fla. 369, 370; *McGill v. McGill*, 19 Fla. 341, 348.

"The phrase 'habitual intemperance' means the custom or habit of getting drunk; the constant indulgence in such stimulants as wine, brandy, and whisky, whereby intoxication is produced; not the ordinary use, but the habitual use, of them. The habit should be actual or confirmed. It may be intermittent. It need not be continuous, or even of daily occurrence." *Mack v. Handy*, 2 South. 181, 183, 39 La. Ann. 491; *Williams v. Goss*, 9 South. 750, 751, 43 La. Ann. 868.

Habitual intemperance is a condition, and when any person gets into that condition he is said to be habitually intemperate. Where a person about once in three weeks becomes intoxicated during the evening to such an extent that the next morning he could not go as usual to his work, and which had continued for a period of two years, he was not affected with habitual intemperance, so as to afford cause to his wife for a divorce on that ground. *Dennis v. Dennis*, 36

Atl. 84, 36, 68 Conn. 186, 84 L. R. A. 449, 57 Am. St. Rep. 95.

The terms "habitual drunkenness," "habitual intemperance," "habitual intoxication," and "continued habits of intoxication" are equivalent and capable of the same definition, and are defined as the fixed and irresistible habit of getting drunk. Ring v. Ring, 38 S. E. 830, 832, 112 Ga. 854.

The term "habitually intemperate" characterizes one who uses liquors excessively, often or daily. *Ætna Life Ins. Co. v. Davey*, 8 Sup. Ct. 331, 832, 123 U. S. 739, 81 L. Ed. 315.

#### **Incapacity for business.**

Habitual intemperance is that degree of intemperance from the use of intoxicating drinks which disqualifies the person a great portion of the time from properly attending to business, Civ. Code Mont. 1895, § 144; or which would reasonably inflict a course of great mental anguish upon the innocent party, Civ. Code Cal. 1903, § 106; Civ. Code Idaho 1901, § 2026; Rev. Codes N. D. 1899, § 2742; Civ. Code S. D. 1903, § 72. The habit need not be of such a character as to render the party at all times incapable of attending to business. *Mahone v. Mahone*, 19 Cal. 626, 628, 81 Am. Dec. 91.

#### **Use of opiates.**

The term "habitual intemperance" means the habit of using intoxicating liquors to excess, and does not include the excessive use of opiates and drugs. *Barber v. Barber* (Conn.) 14 Law Rep. 375, 376; *Burt v. Burt*, 46 N. E. 622, 623, 168 Mass. 204; Ring v. Ring, 38 S. E. 830, 832, 112 Ga. 854.

#### **HABITUALLY.**

An application for a life insurance policy stating that the applicant did not habitually use intoxicating drinks as a beverage cannot be construed to mean any use of intoxicating drinks which did not make his habits those of a man not uniformly and strictly temperate, and which did not amount to habitual use of such beverage. *Swick v. Home Ins. Co.* (U. S.) 23 Fed. Cas. 550, 551.

"Habitual use," within the meaning of the rule that a person entitled to the exemption of a team habitually used for certain purposes, does not require that such property has been so used in the past; but, if it has been procured for such habitual use, and the owner has started in the character of the work demanding such use, the property will be held exempt. *Bevan v. Hayden*, 18 Iowa, 122, 125.

#### **As exclusively.**

"Habitually," as used in Code Civ. Proc. § 690, subd. 6, exempting from execution the

two horses, wagons, and harness by which a peddler habitually earns his living, means customarily or by frequent practice or use. It does not mean exclusively or entirely. And hence the fact that a peddler occasionally used the team and wagon in other ways would not deprive him of the benefit of exemption provided for in the statute. *Stanton v. French*, 27 Pac. 657, 91 Cal. 274, 25 Am. St. Rep. 191.

The term "habitually earns his living by the use of such property," in a statute exempting horses, etc., so used, from execution, does not apply to horses owned by a coal dealer, and used a part of the time to deliver coal and wood sold by him, and the rest of the time in hauling for others. *Dove v. Nunan*, 62 Cal. 399, 400.

#### **HABITUALLY CARRYING CONCEALED WEAPONS.**

To constitute the offense of habitually carrying concealed weapons, the accused need not have been seen carrying such weapons on any prescribed or particular number of times or occasions, but a jury would be justified in convicting upon evidence that he had been seen once wearing concealed weapons, if the circumstances tended to support the evidence and the charge. *Hicks v. Commonwealth* (Va.) 7 Grat. 597, 598.

#### **HACKMEN.**

See "Public Hackmen."

As common carrier, see "Common Carrier."

#### **HACKNEY COACH.**

Under a city charter providing that the common council shall have power to establish ordinances which to them shall seem both useful or necessary for the good rule and government of all residents of said city, and for the further public good, trade, and better government and rule of the city, the council may establish hackney coach stands. Hackney coaches standing in the streets have existed so universally in England, and for so long a period (certainly since 1700, and perhaps further back), that the term "hackney coach" conveys the idea to the mind of a coach standing in the street for hire. Webster defines a hackney coach to be a coach let for hire, commonly that stands in the streets. When, therefore, the Legislature uses the term "hackney coach," it must be deemed to use it in such sense as to cover coaches for hire standing in the streets, as well as those kept in stables for hire. *Masterson v. Short* (N. Y.) 33 How. Prac. 481, 486.

A vehicle described as a certain wagon drawn by four horses, and used in the transportation of property, and for transferring goods of grocers and merchants, cannot be considered as a hackney coach, within the ordinance requiring a license to keep, hire out, or cause to be run any hackney coach. *Snyder v. City of North Lawrence*, 8 Kan. 82, 83.

## HAD.

See "Have."

## HAIR.

"Hair," as used in Revenue Act June 6, 1872, 17 Stat. 231, which reduces the tariff on certain articles 10 per cent., enumerating among those on which the tariff should be reduced all wools, hair of the alpaca, goat, and other animals, and all mantles and other articles wholly or in part of wool and hair of the alpaca, goat, and other animals, does not include bristles of a hog. *Von Stade v. Arthur* (U. S.) 28 Fed. Cas. 1274.

## HAIR CLIPPERS.

Hair clippers are instruments operated on the same principle as shears or scissors, having fingers which run close to the skin and gather and hold the hair, where it can be cut off by the reciprocating action of the cutting blades upon the fingers, and are intended to take the place of shears and scissors in the work of cutting and trimming the hair and whiskers. *Koch v. Steeberger* (U. S.) 80 Fed. 424, 425.

## HAIR SEATING.

Hair seating is a cloth composed of cotton and hair, similar in nature to crinoline cloth; the only difference being that it is more closely woven, and is used mainly for upholstering purposes. *Arthur's Ex'rs v. Butterfield*, 8 Sup. Ct. 714, 715, 125 U. S. 70, 31 L. Ed. 643.

## HALF.

See "North Half"; "West Half."

The terms "north half" and "south half" were used by the owner of a triangular tract of land in making separate conveyances of different portions of the land; the first conveyance describing the north half as beginning in the middle of one of the sides, and running back parallel to another side, of the triangle. After such conveyances the lots were conveyed by the description of "north half" and "south half," and were so assessed for taxes; and, upon failure of the owner of the south half to pay the taxes,

it was sold at tax collector's sale and conveyed under the description of "south half." Held, in an action of ejectment, that the common grantor had fixed upon the words "north and south half" a conventional meaning, and that they must be considered to have been so used in the muniment of title under which both parties claimed, and the defendant could claim no greater portion than was designated to him. *Grandey v. Casey*, 6 S. W. 376, 93 Mo. 595.

### As government subdivision.

"Half," as used in a description of premises, in which they are described as the south half of a certain section of land, is a fit and strictly accurate and proper expression to describe the south half in quantity. It may also mean the south half according to the government survey. The intention of the parties is the controlling element as to its meaning. *Prentiss v. Brewer*, 17 Wis. 635, 644, 86 Am. Dec. 730.

In deeds calling for 30 acres of land off of the south end of the east half of the northwest quarter, etc., of a certain section, the words "east half" have reference to the government subdivision of the quarter section, and not to a subdivision of the quarter section by a line dividing it into two equal parts as to area. *Turner v. Union Pac. Ry. Co.*, 20 S. W. 673, 674, 112 Mo. 542. See, also, *Brown v. Hardin*, 21 Ark. 324, 327.

"Half," as used in deeds of land according to government survey, ordinarily is used not with reference to the quantity, but with reference to a line which is equidistant from the boundary line of the parcel subdivided; but, where the government has divided a quarter of a section into what it calls "fractional 40's," the government division will govern. *Edinger v. Woodke*, 86 N. W. 397, 398, 127 Mich. 41.

The general and proper acceptance of the terms "section" and "half section," as well as their construction by the general land department, denotes the land in the sections and subdivisional lines, and not the exact quantity which a perfect admeasurement of an unobstructed surface would declare. *Brown v. Hardin*, 21 Ark. 324, 337.

### As half in quantity.

"Half," as used in a deed conveying the half of a certain tract of land, will be held to mean the half in quantity, and not the part lying on one side of a line drawn midway between, and parallel to, the side lines of the lot. *Owen v. Henderson*, 47 Pac. 215, 216, 16 Wash. 39, 58 Am. St. Rep. 17; *Dart v. Barbour*, 32 Mich. 267, 272 (citing *Au Gres Boom Co. v. Whitney*, 26 Mich. 42).



A deed conveying the east half of certain irregularly shaped lots is presumed to mean the east half in quantity. There is no presumption that the parties intend that the tract conveyed shall be ascertained by the rule of subdivision adopted in government surveys; that is, by running a line equidistant from the opposite sides of the lot. *Cogan v. Cook*, 22 Minn. 137, 142.

The use of the word "half" in a description of premises to be conveyed as being the south half of a certain farm held not to bind the grantor to convey an exact half of such farm. *Heyer v. Lee*, 40 Mich. 353, 356, 29 Am. Rep. 537.

Plaintiff and defendant were lessees, the one of the east half, the other of the west half, of a certain lot, which, according to government survey, is bounded on the south by an east and west line, and on the east and west line by north and south lines, and on the north by a meandered lake. Held, that the word "half" should be construed to mean half in quantity, and that the boundary line between the lessee's half was a north and south line dividing the land within the government boundaries into equal acreage, and not one equally distant from the east and west boundaries, though the land was leased to parties for mining purposes only, and the land under the lake might be useful for that purpose. "The literal significance of the word 'half' is one of two equal parts into which anything may be divided." *Hartford Iron Min. Co. v. Cambridge Min. Co.*, 45 N. W. 351, 80 Mich. 491.

A deed contained a description of certain land as follows: "The east half of the east half of the northwest quarter, and the east half of the east half of the southwest fractional quarter, all in section 36, containing 50 acres, being the east half of 100 acres." Held, that the "east half" referred to one-half the quantity of the land, and not to the land lying east of a line drawn through the middle of the tract. *Jones v. Pashby*, 29 N. W. 374, 378, 62 Mich. 614.

#### **As undivided half.**

"Half," when used in a conveyance which conveys the half of any particular piece of property, means an undivided half. *Baldwin v. Winslow*, 2 Minn. 213, 216 (Gil. 174, 178).

#### **HALF AND HALF.**

"Half and half between the parties," as used in a declaration that the capital stock of a corporation should be divided into a certain number of shares, and divided half and half between the parties, should be construed to mean equally divided between the parties; there being three parties. *Bates v. Wilson*, 24 Pac. 99, 105, 14 Colo. 140.

#### **HALF BLOOD.**

As of the blood, see "Blood."

Acts 1796, c. 14, provides that all real estates of inheritance, as well as personal, shall descend to, and be divided between, brothers and sisters as well of the half blood as of the whole blood, in the same proportions as they have heretofore been divided between brothers of the whole and half blood only. Held, that the term "brothers of the whole and half blood only," as used in this paragraph, without any uncertainty or doubt, means brothers of the half blood on the side of the father, exclusive of maternal brothers. Therefore "brothers and sisters of the half blood," in the preceding part of the paragraph, means half blood on the side of the father; otherwise "half blood," in the same sentence, will mean half blood generally, or half blood on the father's side, without any sign or token to indicate that the Legislature intended different meanings to each. *Butler v. King*, 10 Tenn. (2 Yerg.) 115, 118.

"Kindred of the half blood," as used in Gen. St. c. 91, § 5, providing that kindred of the half blood shall inherit equally with those of the whole blood in the same degree, should be construed to include kindred of the half blood in any degree. *Larrabee v. Tucker*, 116 Mass. 562.

The statute, providing that there shall be no distinction between the kindred of the whole and of the half blood in regard to inheriting property, is not confined in its application to cases where the ancestor from whom the estate is derived leaves children by different mothers. The children of the same mother, but who have different fathers, are no less brothers and sisters of the half blood than are the children of a common father, but who have different mothers. *Oglesby Coal Co. v. Pasco*, 79 Ill. 164, 166.

#### **HALF-BLOODED MERINO WOOL.**

A promissory note payable in "half-blooded merino wool" is not complied with by the delivery of wool of which a portion is of a less degree of fineness than half-blooded merino, and an equal portion is of a greater degree of fineness than the standard, so that the whole quantity, taken together, would be of the average degree of fineness required. *Perry v. Smith*, 22 Vt. 301, 309.

#### **HALF BROTHER OR SISTER.**

Half-brothers and half-sisters partake of a dual character, being by virtue of their common parent blood half-brothers, and by virtue of the marriage of their several parents half stepbrothers, falling equally within the designation of brother or stepbrother.

In re Weiss' Estate (Pa.) 1 Montg. Co. Law Rep'r, 209, 210.

### HALF BUSHEL.

In the sale of fruit, vegetables, and all other articles sold by weight measure, 1,282 cubic inches shall constitute a half bushel. Pol. Code Idaho 1901, § 616.

### HALF PILOTAGE.

Half pilotage is compensation for services which a pilot has put himself in readiness to perform by labor, risk, and cost, and had offered to perform. Gloucester Ferry Co. v. Pennsylvania, 5 Sup. Ct. 826, 832, 114 U. S. 196, 29 L. Ed. 158 (citing Southern S. S. Co. of New Orleans v. Port Wardens, 73 U. S. [6 Wall.] 81, 18 L. Ed. 749).

### HALF-SISTER.

A half-sister is a woman who has the same father or the same mother with another. Wood v. Mitcham, 92 N. Y. 375, 379.

### HALF YEAR.

A half year is 182 days. Pol. Code Cal. 1903, § 3257.

### HALL.

A. executed a deed to B., conveying to him a lot of land adjoining another lot owned by Mrs. Pope, on which was situated a large building. The deed contained the following reservation: "And the parties of the first part do hereby reserve out of the above-described property a space three feet wide, running from the rear of Pope's Hall, or where the water is taken from the said hall, across the said lot to P. street, for the purpose of carrying off the water and sewage from the said hall, and also nothing shall be built or erected on the said lot to obstruct the light from the said Pope's Hall." Held, that the term "Pope's Hall" included not only the single room used as an audience room, but the entire building. Pope v. Bell, 87 N. J. Eq. (10 Stew.) 495, 500.

### HALLUCINATION.

The medicinal definition of "hallucination" adopted by Worcester is: "Morbid error in one or more of the senses; a presumption of objects which do not in fact make any impression upon the external senses; delirium; delusion." Staples v. Wellington, 58 Me. 453, 459.

"The word 'hallucination' is defined, according to lexicographers, as an error; a blunder; a mistake; a fallacy; and, when

used in describing the condition of a person, does not necessarily carry an imputation of insanity." Foster's Ex'rs v. Dickerson, 24 Atl. 253, 257, 64 Vt. 233.

"Hallucination" is defined to be a morbid error in one or more sense. It is not per se insanity, and a party claiming to avoid a contract by reason of temporary hallucination or delusion must show its existence at the time of the contract sought to be avoided, and that it was of a character affecting his capacity to make the contract. McNett v. Cooper (U. S.) 13 Fed. 586, 590.

Hallucinations are errors of eyesight, hearing, and the like, as where the patient imagines that he sees an object when there is none, or hears a voice when no sound strikes his ear. People v. Krist, 90 N. E. 1057, 1060, 168 N. Y. 19.

### HAMLET.

"Hamlet" and "vill" are in common acceptance used as synonymous terms; and, where an order is made concerning the overseers of the poor of a hamlet, where each order should be strictly made concerning a vill, the hamlet will be presumed to be a vill, to support the order. Rex v. Morris, 4 Term R. 550, 552.

### HAMMER.

"A hammer is a tool or instrument ordinarily used by one man in the performance of manual labor. It may be made an essential part of machinery, when intended to be and is operated by means thereof; but, when disconnected from any other mechanical appliances, and operated singly by muscular strength directly applied, such tool or instrument is not machinery in its most comprehensive signification, or in the meaning of Code 1886, § 2590, subd. 1, providing that an employer is liable for injuries to an employé when the injury is caused by any defect in the machinery used in the business of the master or employer." Georgia Pac. Ry. Co. v. Brooks, 4 South. 289, 291, 84 Ala. 138; Georgia R. & Banking Co. v. Nelms, 83 Ga. 70, 74, 9 S. E. 1049, 20 Am. St. Rep. 308.

### HANAPER OFFICE.

In the ordinary or legal court the officina justitiæ is kept, out of which issue all original writs that pass under the great seal. Those writs that related to the subject were originally kept in a hamper, and those that related to the interests of the crown were kept in a little bag. Hence arose the distinction between the hanaper office and the petty bag office. Those offices are at all times open to the subject, who may at any

time demand and have, *ex debito justitiæ*, any writ that he may call for. The denomination "*officina justitiæ*" was adopted to signify that all justice between man and man proceeded from that source; it being, as it is styled in the books, the shop, mint, or manufactory of justice. *Yates v. People* (N. Y.) 6 Johns. 337, 363.

## HAND.

See "Cash on Hand"; "Die by His Own Hand or Act"; "Die by the Hand of Justice"; "In Hand"; "In Hand Paid"; "In the Hands Of"; "On Hand"; "Under His Hand"; "With Strong Hand"; "Wrought by Hand."

A measure of length equal to four inches, used in measuring the height of horses. A person's signature. In old English law, an oath. *Black, Law Dict.*

## HAND CAR.

Under a statute rendering railroad companies liable for injuries to persons by cars run on their tracks, hand cars are included. *Thomas v. Georgia R. & Banking Co.*, 38 Ga. 222, 224; *Kansas City, M. & B. R. Co. v. Crocker*, 11 South. 262, 264, 95 Ala. 412; *Perez v. San Antonio & A. P. Ry. Co.*, 67 S. W. 137, 139, 28 Tex. Civ. App. 255.

## HAND LABORERS.

Within the statute giving hand laborers a lien, laborers employed in peeling bark and squaring timber are included. *Weed v. Robinson*, 14 Pa. Co. Ct. R. 7, 9.

## HANDBILL.

The word "handbill," in its usual acceptance in common language, is synonymous with the words "printed circular"; and therefore an indictment for libel, charging in one count that the alleged libelous statements were contained in a printed circular and handbill, is not bad for duplicity, on the ground that a circular is one thing, and a handbill another. *People v. McLaughlin*, 68 N. Y. Supp. 1108, 1109, 83 Misc. Rep. 691.

## HANDKERCHIEF.

"Handkerchiefs," as used in *Tariff Act Oct. 1, 1890*, par. 349, includes hemstitched handkerchiefs composed of cotton or other vegetable fiber, and embroidered with only an initial letter. *United States v. Harden* (U. S.) 68 Fed. 182, 183, 15 C. C. A. 358.

The phrase "handkerchiefs or mufflers composed wholly or in part of silk," in *Tariff Act July 24, 1897*, c. 11, § 1, Schedule A, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1670], par.

388, fixing a duty thereon, includes mufflers composed of cotton and silk, though the cotton is the component material of chief value. *Guiterman v. United States* (U. S.) 113 Fed. 994.

## HANDLE.

In a finding of a referee in an action against a common carrier for the loss of goods that the freight was handled from the propellers to the warehouse, and from the warehouse to the cars, by one J. M. C., "handled" means only the moving of the goods from the propellers into the warehouse, and from thence into the cars. It does not imply any control over the goods by J. M. C. while in the warehouse, any more than would belong to a machine if one had been used to move the goods. *Ætna Ins. Co. v. Wheeler* (N. Y.) 5 Lans. 480, 484.

### Hauling distinguished.

The words "handling" and "hauling" are not synonymous words. Hauling is a transportation, while handling involves touching, holding, moving, or managing with the hand. And an indictment charging the hauling of liquors is not within *Dispensary Act 1896*, § 37, prohibiting the handling of liquors. *State v. Adams*, 27 S. E. 523, 525, 49 S. C. 518.

### Transport distinguished.

Within the meaning of the *dispensary act of 1895*, forbidding the transportation of alcoholic liquors, and providing a penalty for handling and transporting liquors in the nighttime, the terms "transporting" and "handling" are not equivalent words, and do not mean the same thing. "Transporting" means to carry, bear, or convey from one place or country to another, while handling is the act of touching, moving, or managing with the hand. It is clear that there may be a handling of alcoholic liquors, which could not with any appropriateness be described as the transportation thereof. For example, pouring liquor from a blind tiger jug at night might be punished, under section 37, as a handling of contraband liquors in the nighttime, but that could hardly be called a transportation of liquor, however transporting the effect might be. *State v. Pickett*, 47 S. C. 101, 25 S. E. 46, 47.

### As used.

"To handle a commodity" means to buy and sell such commodity; and the power to handle a fund implies the power to use it in making purchases and to sell the thing, etc., for the purpose of changing the investment. So, where a wife's conveyance of her separate property to her husband recited that she appointed him trustee thereof for her children, and that the money was to be used

by him in his discretion, and that he agreed to use and handle said money according to his best ability, the husband had power to invest the money in property, and to sell such property and reinvest such money. *Scottish-American Mortg. Co. v. Massie*, 60 S. W. 544, 545, 94 Tex. 339.

#### Handling firearms.

The phrase "handling firearms," in an insurance policy exempting the insurer from accidental injuries or death happening while the insured is employed in the manufacture, sale, or transportation of any explosive compound, or handling of firearms, does not apply to the incidental handling of a gun for pleasure or recreation, but only when the employment of the assured calls upon him to handle firearms; and therefore the company is liable for the death of insured, resulting from the accidental discharge of a gun on a pleasure hunting tour. *Thomas v. Masons' Fraternal Acc. Ass'n*, 71 N. Y. Supp. 692, 693, 64 App. Div. 22.

Whether a person was handling firearms, within the meaning of the qualifying clause of the by-laws of an accident insurance company, depends upon the meaning to be given the word "handling," and, as used in connection with the phrase "in any way," has no different meaning than that to be found in the standard lexicons of the language. "To handle" is defined by the *Standard Dictionary* as to use the hands upon; to turn, adjust, examine, or feel with the hands; to manage, contrive, or direct with the hands; to use; to ply; to wield; to manipulate, as to handle a musket or oar. By the *Century Dictionary* (1889) it is defined as "to touch or feel with the hand, or to use the hand or hands upon; to manage by hand; use or wield with manual skill; ply; manipulate; act upon or control by the hand; in general, to manage, direct, control." By *Webster's Dictionary* (1894) it is defined as "to touch; to manage in using, as a spade or a musket; to wield; often to manage skillfully." From the foregoing definitions, it will be seen that, while the word may be synonymous with such words as "ply," "wield," and "manipulate," none of such words, nor all of them, are its verbal equivalent. It is a more comprehensive term, and includes not only the act of plying, wielding, and manipulating, but touching, using the hands upon, acting upon or controlling by the hands, and other acts. Had the parties used the equivalent of the word, as shown by the foregoing definitions, instead of the word itself, there could be no question that the act in which the plaintiff was engaged at the time of the injury was within the meaning of the qualifying clause of the by-laws. We are unable to see how the legal effect of the language is in any manner changed by the use of a word which com-

prehends all such acts. *Doody v. National Masonic Acc. Ass'n* (Neb.) 92 N. W. 613, 614.

#### HANDSOME.

"Handsome gratuity," as used in a will, is void for uncertainty. *Jubber v. Jubber*, 9 Sim. 503, 508.

Defendant had a house opposite to plaintiff's house, and, being desirous to let it, told plaintiff that if he would open the windows, and take care of the house and air it, and show it to persons applying to take it, he would make the plaintiff a handsome present, and subsequently gave him £2. In an action to recover as on a contract, *Mansfield, C. J.*, directed the jury that "this was no evidence of any contract, but that it must be inferred that the plaintiff, in undertaking the employment, intended to trust entirely to the generosity of the defendant, and must therefore be content with what the defendant had chosen to give him." The jury, however, thought otherwise, and returned a verdict for plaintiff for £17 15s. damages. On a motion for new trial, *Heath and Chambers, JJ.*, were of opinion that there was sufficient evidence of a contract to do the work and labor for a reasonable compensation, the amount of which the jury, whose province it was, had determined. *Jewry v. Busk*, 5 Taunt. 302.

#### HANDWRITING.

"Handwriting" is the cast or form of writing peculiar to each hand or person. In *re Hyland's Will*, 27 N. Y. Supp. 961, 963.

The term "handwriting" includes generally whatever a party has written with his hand, and not merely his common and usual style of chirography. *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 301, 52 Am. Dec. 711.

#### HAPPEN.

The word "happen" is defined by the words "to come by chance; to fall out, to befall, to come unexpectedly." *Sager v. Portsmouth, S. & P. & E. R. Co.*, 31 Me. 228, 239, 1 Am. Rep. 659.

The phrase "if it shall so happen," when used in a will conveying real estate, will be construed as being a covenant, rather than a condition, if such a construction can be reasonably given to such language. *Hartung v. Witte*, 18 N. W. 175, 177, 59 Wis. 285.

#### Casualty implied.

"Happen," as used in Const. art. 7, § 9, providing that, when a vacancy shall "happen" in the office of judge of the supreme or circuit court, such vacancy shall be filled

by appointment by the Governor, "has reference to some casualty not provided for by law, which could not be remedied by the usual means of an election. The primary principle established by the Constitution is that judges shall be elected, and the power of temporary appointment seems only to have been conferred from necessity, to cure certain defects which are inseparable from the system adopted." *State v. Messmore*, 14 Wis. 177, 193.

In the clause of the Constitution, providing that the Governor shall have power to fill up vacancies that may happen during the recess of the Legislature, "happen" does not necessarily imply a casualty, and hence it is not necessary that such vacancy should have occurred since the last session of the Legislature. "That the word 'happen' does not necessarily imply this idea is clear from the dictionary of Crabb, the most accurate philologist of our language: 'To happen, chance.' To happen, that is, to fall out by a hap, is to chance. 'Happen,' respects all events, without including any collateral idea; 'chance' comprehends likewise the idea of the cause, and order of events: whatever comes to pass happens, whether regularly in the course of things, or particularly and out of the order; whatever chances, happens altogether without concert, intention, and often without relation to any other thing. Accidents happen daily which no human foresight could prevent. The newspapers contain an account of all that happened in the course of a day or week. Listeners and busybodies are ready to catch every word that falls in their hearing. See Crabb's Synonyms. The inference is that, whenever or from whatever cause a vacancy exists, it is the duty and power of the executor to fill it. It is enough that the vacancy exists, to confer this power and right to appoint during recess." *Bry v. Woodrooff*, 13 La. 556, 558.

#### As happen to exist.

"Happen" as used in Const. § 5, par. 12, providing that, when a vacancy happens during the recess of the Legislature, it is to be filled by the Governor by appointment, does not mean "happen to take place," that is "originate," but means "happen to exist." *State v. Kuhl*, 17 Atl. 102, 103, 51 N. J. Law (22 Vroom) 191.

Const. U. S. art. 2, § 2, declaring that the President shall have the power to fill all "vacancies that may happen during the recess of the Senate," means vacancies that may happen to exist during the recess of the Senate. In *re Farrow* (U. S.) 3 Fed. 112, 113.

The word "happen" may have many significations or meanings, depending much upon its connection with other words, and the circumstances under which it is used. In

the proviso to an act approved July 16, 1864, the expression is, "If such vacancy shall happen during the recess of the Legislature," such successors may be appointed, etc.; the word "such" referring to the vacancy just mentioned, which might exist in consequence of death, resignation, or otherwise; that is, in any way or from any cause whatever. "If any such vacancy shall happen," that is, shall occur, shall chance to exist, shall happen to be, during the recess of the Legislature, etc. The substance of both of these sentences might be expressed in this way, without doing any violence to the language: "If there shall happen to be, during the recess of the Legislature, any vacancy in such office, which may exist in consequence of death, resignation, or in any other way, or for any other cause, such successor may be appointed," etc. Opinion of Justices, 45 N. H. 590, 592.

## HAPPINESS.

See "Pursuit of Happiness."

"Happiness," as used in determining the question whether the happiness and welfare of certain children are more liable to be promoted in the custody of the mother or the father, does not mean the pleasure of remaining with the parent they love, as compared with the temporary pain of separation, but means that more permanent enjoyment of life which attends upon, and is almost identical with, welfare. *English v. English*, 32 N. J. Eq. (5 Stew.) 738, 750.

## HARASS.

"The word 'harass,' as defined in the standard dictionaries, is synonymous with 'to vex,' and at least as comprehensive as that term, so that an affidavit for a distress warrant stating that it is not issued to injure or harass defendant is sufficient, under a statute requiring the affidavit to state that the warrant is not issued to vex and harass." *Blesenbach v. Key*, 63 Tex. 79, 81.

The attachment law (Rev. St. art. 153), providing that the affidavit shall further state that the attachment is not used for the purpose of injuring or harassing the defendant, embodies two distinct requirements in suing out a writ of attachment. It contemplates that the plaintiff shall make affidavit that his purpose is not to injure the defendant, in the sense of inducing a damage, loss, or detriment to him, and also that he shall swear that his purpose is not to harass the defendant in the sense in which that word is properly understood. "Injure" and "injury" are words having numerous and comprehensive popular meanings, as well as having a legal import. The varieties of their signification are not important in

this connection, further than as may be required to draw a line between these words and the word "harass," and to exclude the latter from being comprehended within the word "injure" or "injury." The synonyms of "harass" are: To weary, jade, tire, perplex, distress, tease, vex, molest, trouble, disturb. They all have relation to mental annoyance, and a troubling of the spirit. An affidavit that the attachment "is not sued out for the purpose of injuring and harassing the said defendants" is insufficient, since such affidavit might be true, while it was affiant's intention to either injure or harass, but not to do both. *Moody v. Levy*, 58 Tex. 582, 583.

## HARBOR.

In construing a statute making the harboring or concealing of an escaped slave a crime, it was said that the word "harbor" is defined by Worcester: "To entertain; to shelter; to rescue; to receive clandestinely and without lawful authority." By Webster: "To shelter; to rescue; to secrete, as to harbor a thief." Worcester defines the word "conceal": "To hide; to keep secret; to secrete; to cover; to disguise;" and Webster: "To hide; to withdraw from observation; to cover or keep from sight." The words in a statute only apply when the person is harbored or concealed with knowledge that he is an escaped slave. *Driskill v. Parrish* (U. S.) 7 Fed. Cas. 1100, 1103; *Ray v. Donnell* (U. S.) 20 Fed. Cas. 325, 326.

The term "harbor a dog," within the meaning of the rule that one who harbors a vicious dog is liable for injuries inflicted by him, cannot be applied to the owner of a farm, who rents a house thereon to one who keeps a vicious dog, but the term can only be applied to the tenant. *Simpson v. Griggs*, 12 N. Y. Supp. 162, 163, 58 Hun, 393.

"Harboring" means protecting. A defendant does not harbor a stray dog, so as to be liable for injuries inflicted by it, by merely permitting it to live under a building in his coalyard. *Fitzgerald v. Brophy*, 1 Pa. Co. Ct. R. 142.

### Assisting escape.

Act Cong. Feb. 12, 1793, § 4, providing that any person who shall harbor or conceal a fugitive from labor, after notice that the person so harbored or concealed was a fugitive from labor, shall forfeit and pay a certain amount, should be construed to mean assistance to escape and reach speedily some distant place, where the master cannot find or reclaim the fugitive, rather than detaining him long in the neighborhood, or secreting him about one's premises. The general definition of the word "harbor" is, according

to 1 Bouvier, 460: "To receive, clandestinely and without lawful authority, a person, for the purpose of concealing him, so that another, having the right to the lawful custody of such person, shall be deprived of the same." "To harbor" means to secrete, and hence one who took fugitive slaves into a covered wagon in the night, and drove with speed 12 or 14 miles, so that one was never retaken, the person so doing was guilty of harboring and concealing such fugitives, for there was a clandestine reception of the slaves, without lawful authority, and a concealment of them in a covered wagon, and carrying them onward and away, so as to deprive their owner of their custody. *Jones v. Van Zandt*, 46 U. S. (5 How.) 221, 224, 12 L. Ed. 122.

### As conceal.

The idea of hiding and harboring a negro, within the meaning of an indictment charging that defendant did conceal, harbor, hide, and employ a negro, is included within the meaning of the word "conceal," and therefore a verdict that defendant concealed a negro is sufficient to show that he did hide and harbor him. *Cook v. State*, 26 Ga. 593, 603.

In Act Cong. 1793, prohibiting any citizen from harboring or concealing fugitive slaves, etc., "harboring" is not synonymous with "concealing." Harboring, within the meaning of the act, consists in any entertainment or shelter for an unlawful purpose. Receiving and entertaining a person clandestinely and for the purpose of concealment may well be called "harboring," as the word is sometimes used; yet one may harbor without concealing; he may afford the entertainment, lodging, and shelter without the purpose or attempt at concealment; and it may be correctly affirmed of him that he has harbored, within the meaning of the statute. *Oliver v. Kauffman*, 1 Am. Law Reg. 142, 150.

Under a statute imposing a penalty on every person who shall harbor or conceal any runaway slave or slaves, knowing that they are such, to constitute the act of harboring it is sufficient if defendant, knowing the slave to be a runaway, supported and entertained her, or provided her with a home or place of residence, although she went about in the streets, and was seen by the natives; concealment not being a necessary ingredient of the offense of harboring. *McElhaney v. State*, 24 Ala. 71, 73.

"Harboring" means a fraudulent concealment, and hence, where slaves ran away, and were found in the possession of defendant, who openly maintained them, and gave notice to plaintiff that he would do so until they were recovered by law, there was no harboring. *Dark v. Marsh*, 4 N. C. 228, 229.

Rev. St. U. S. § 4601, providing that whoever harbors or secretes any deserted seaman shall be liable to a certain penalty, etc., should be construed to mean the furnishing of shelter, food, or lodging clandestinely or with concealment. The reasonable interpretation of its terms would be to hold that the penalty therein provided is denounced not only against all persons who conceal and secrete deserting seamen, but against all persons who knowingly furnish them food, shelter, or other aid, with intent thereby to encourage them to continue in their violation of law, and to defeat the rights of the master and owners of the vessel. *United States v. Grant* (U. S.) 55 Fed. 414, 415.

#### Intent implied.

The term "harbor and secrete," applied to the crime, created by statute, of harboring and secreting slaves, was construed not only to include the act of harboring and secreting the slaves, but also to include the intent to defraud the owner of his property. *Bells v. People*, 5 Ill. (4 Scam.) 498, 509.

In 1 St. 302, § 4, providing for the punishment of any person who shall harbor or conceal any fugitive from labor, after notice that he or she was a fugitive from labor, the word "harbor" means an act evincing an intention to elude the vigilance of the master or his agents, and must be calculated to attain that object. To relieve the hunger of a fugitive would not be within the statute, unless accompanied by acts showing a determination to disregard the law. *Jones v. Vanzandt* (U. S.) 13 Fed. Cas. 1040, 1043, 1049; *Van Metre v. Mitchell* (U. S.) 28 Fed. 1036, 1040.

Act Cong. Feb. 12, 1793, § 4, providing that any person who shall harbor or conceal a fugitive from labor, after notice that he or she is a fugitive, shall incur a certain forfeiture, does not mean affording shelter to the fugitive for an hour, a day, or a week, when there is no design to conceal him from the pursuit of the master or his agent, or in any way to defeat the legal right of the master to his services. The acts done must be with a view to elude the claim of the master, after notice or knowledge that the person is a fugitive from labor. If, from motives of humanity, a person permit fugitives to remain with him for a short time after notice of their real character, without any design thereby to elude the claim of the owner, he does not harbor or conceal them, within the contemplation of the statute. *Driskill v. Parrish* (U. S.) 7 Fed. Cas. 1100, 1103.

#### HARBOR (Noun).

See "New York Harbor."

A harbor is defined to be a bay or inlet of the sea, in which ships can moor and be

sheltered from the fury of the winds and heavy seas. "Any navigable water where ships can ride in safety." *Webst. Dict.* So a finding that a harbor extends to a line, inside of which large numbers of vessels seek and find protection from certain storms, is correct. *Rowe v. Smith*, 51 Conn. 266, 271, 50 Am. Rep. 16.

"Harbor," in its most strict and proper sense, means a safe station for a ship; a place of refuge, shelter, rest. *Worcest. Dict.* Where a collision took place inside of the bar, and on pilotage ground, it was in a general sense within the harbor of New York; but, being in the lower bay, and not in a part where vessels could either moor or safely lie at anchor, it was not in the harbor in its strict sense. *The Aurania and The Republic* (U. S.) 29 Fed. 98, 103.

"Harbors," as used in the colonial patents of 1666, 1688, and 1694, granting to the town of Huntington title to all lands south of Long Island Sound, between certain points, including all havens, harbors, etc., includes a body of water lying between projecting necks, and capable of being used as a haven or harbor, though it is not landlocked, and is not a perfectly safe harbor or haven. *Board of Trustees of the Town of Huntington v. Lowdnes* (U. S.) 40 Fed. 625, 629.

#### As a boundary.

"Harbor," as used in a grant of land described as bounded by a harbor, will be construed to mean low-water mark of the harbor. *Paine v. Woods*, 108 Mass. 160, 169.

Any boundary at tide water, by whatever name—whether sea, harbor, or bay—includes the land below the high-water mark, as far as the grantor owns; but a boundary of that land, whether described as shore, beach, or flats, excludes it. *City of Boston v. Richardson*, 95 Mass. (13 Allen) 146, 155.

A will devising a parcel of land from a larger tract lying on the west side of a harbor, describing such parcel as bounded east on the harbor, at the foot of the bank, should be construed to mean the lands about a bay, as well as the bay itself. *Nichols v. Lewis*, 15 Conn. 137, 142.

#### River.

"A harbor, in its usual and ordinary sense, means an indentation in the coast of a lake, sea, or ocean, extending into the country in such a manner as to form an inlet or bay, and sufficiently narrow between the headlands to afford protection to vessels against the wind and storm upon the waters." *Gould, Wat. 10*; 4 Co. Inst. 140. The word as used in statutes relating to fisheries would not include Grand river at a point three miles upstream from its mouth. *People v. Kirsch*, 85 N. W. 157, 158, 67 Mich. 539.

As used in Rev. St. c. 32, providing that the pilotage district which includes the harbor of Boston shall extend between certain fixed points, the harbor includes all the ports which use the several channels leading to the city of Boston, and the mouths of the rivers which enter into that harbor; the words "port" and "harbor" being synonymous terms, and clearly including all those ports which use the several channels leading to the city of Boston itself. *Martin v. Hilton*, 50 Mass. (9 Metc.) 371, 377.

### HARBOR FEES.

An ordinance of the city of Washington requiring payment of harbor fees by all vessels, fixed in proportion to the tonnage of such vessels, is in conflict with the provision of the Constitution of the United States that no state shall, without the consent of Congress, levy any duty on tonnage. Such fees, though called "harbor fees," are in fact duties on tonnage. *Mayor of Washington v. Barnes*, 6 D. C. 230, 231, 234.

### HARBOR LINE.

"A harbor line is in fact what it purports to be—the line of a harbor. It marks the boundary of a certain part of the public waters which is reserved for a harbor. The port so reserved is to be protected from encroachment. The rest is to be left to be filled and occupied by the riparian proprietors. Its establishment is equivalent to a legislative declaration that navigation will not be straitened or obstructed by any such filling out." *Engs v. Peckham*, 11 R. I. 210, 224. See, also, *Dawson v. Broome*, 53 Atl. 151, 156, 24 R. I. 359.

### HARD CIDER.

See "Cider."

### HARD-FED HOGS.

The term "hard-fed hogs" is used to designate hogs fed on corn. They are of superior value to other hogs, and thus an assertion that certain hogs are hard or corn fed may constitute a warranty. *Bartlett v. Hoppock*, 34 N. Y. 118, 119, 88 Am. Dec. 428.

### HARD LABOR.

There is a material distinction in the public thought between a sentence to confinement at hard labor, and a sentence to confinement in a designated State Prison, where hard labor would be required of persons sentenced, as a part of the discipline of the prison; and embodying the words "at hard labor" in a sentence which need not be

at hard labor gives the stigma an emphasis which the statute does not require, and the sentence should be modified by striking out the words. *Gardes v. United States* (U. S.) 87 Fed. 172, 184, 80 C. C. A. 596.

A sentence condemning a defendant to hard labor in the penitentiary does not signify that the labor shall be of unusual severity, but means no more than that it is compulsory and continuous during the term of imprisonment. It does not subject the defendant to any other than legal punishment, or to labor of any other kind or degree than must have been endured if the words "hard labor" had been omitted; the penitentiary, under the statutes, being not a mere place for the imprisonment of convicts, but imprisonment in it involving subjection to involuntary or compulsory labor during its continuance. *Brown v. State*, 74 Ala. 478, 483.

A verdict finding the defendant guilty of manslaughter, and assessing his punishment at 30 months' hard labor, does not necessarily mean hard labor for the county. It may mean hard labor for the state, and be embraced in the punishment usually known as imprisonment in the penitentiary, and does not render the verdict invalid, because the statute provides that, if the period of imprisonment or hard labor is more than 2 years, the sentence must be punishment in the penitentiary. *Gunter v. State*, 83 Ala. 96, 3 South. 600, 603.

A person was indicted and convicted for permitting three prisoners, respectively charged with arson, counterfeiting, and larceny, to go at large, and was sentenced to five months' imprisonment at hard labor in the county jail, and to pay a fine and costs of prosecution. The act of March 24, 1806, uses the word "hard" in connection with "labor," in reference to the punishment of criminals, but later acts exclude the word. It was held that the use of the word "hard" in connection with labor in the sentence was not a fatal defect, for it should be treated simply as surplusage. *Weaver v. Commonwealth*, 29 Pa. (5 Casey) 445, 448.

### HARD MONEY.

Hard money is a coin of the precious metals, of a certain weight and fineness, with the government's stamp thereon, denoting its value as a medium of exchange or currency. *Henry v. Bank of Salina* (N. Y.) 5 Hill, 523, 536.

### HARDPAN.

Webster defines "hardpan" as a hard stratum of earth, and it is, in a general sense, earth, although more or less compressed and cemented, and is of the same material as



earth, namely, clay, gravel, loam, etc.; and it is included in the term "earth," as used in a contract for the excavation of earth at a certain price per yard. *Dickinson v. City of Poughkeepsie*, 75 N. Y. 65, 76.

"Hardpan" is a name which has long been popularly used among farmers and well diggers to denote a hard, earthy substance, composed of gravel, sand, and clay, very compact, nearly impervious to water, and too hard to be excavated by the spade. *Mansfield & S. City R. Co. v. Veeder*, 17 Ohio, 885, 389, 397.

"Hardpan" seems to be a term well understood among railroad men. It is not an uncommon word among geologists, and it is sufficiently understood in common speech to designate something different either from common earth or rock, and not to be included in either of them; and it cannot well mean anything else, in a contract for grading, than some intermediate kind of hard material, such as compact, indurated, or cemented earth, sand, gravel, or conglomerate, which could not be dug with a spade or shovel. In short, "hardpan" and "indurated earth or gravel" mean the same thing. *Blair v. Corby*, 37 Mo. 313, 317.

## HARM.

See "Bodily Harm."

## HARMLESS.

See "Save Harmless."

## HARMONIZE.

The difference between the words "harmonize" and "reconcile" is not sufficiently substantial to render it error for the trial court to instruct the jury that, if they found the evidence apparently conflicting, it is their duty to "harmonize" it. *Holdridge v. Lee*, 52 N. W. 265, 266, 3 S. D. 134.

## HARMONY.

"Harmony," as used in Const. art. 9, § 20, providing that the charter of the city of St. Louis, to be formed by a board of freeholders, should be in harmony with and subject to the Constitution and laws of Missouri, means that no regulation established by the charter, nor any made by its authority, shall do violence either to the declared laws or to the policy or manifest governmental purposes of the state, as shown in her Constitution and statutory enactments. By the word "harmony," in this connection, is not to be understood an exact coincidence in all possible points of comparison. In *re Dunn*, 9 Mo. App. 255, 260.

## HARROW.

A harrow is an implement as important and as generally used by farmers as a plow, and is quite as necessary for the proper cultivation of land as any other agricultural implement, and is in use on every properly cultivated farm. Float spring-tooth harrows have come into general use, and have largely superseded the old-fashioned square and three-cornered harrows or drags, having peg teeth; and I think it needs no argument to show that the combination formed for the purpose of controlling the prices, limiting the production, preventing competition from manufacturers, and also preventing further improvement in them, is contrary to public policy, as declared by the statutes of this state, and by the long line of decisions in this and in other jurisdictions. *National Harrow Co. v. El Bement & Sons*, 21 App. Div. 290, 296, 47 N. Y. Supp. 462, 467.

## HARRY.

An act of the Legislature was passed, attainting certain persons of treason—among them, Henry Gordon. It appeared that he had been baptized and had always been called and known by the name of Harry. Harry Gordon failed to appear in compliance with the proclamation, and the Legislature then passed a law entitled "An act for the attainder of Harry Gordon." Held, that the names Harry and Henry were not the same names; the court saying: "The use of names is to describe the individual so as to distinguish him from some other person, and therefore, where two names have the same original derivation, or where one is an abbreviation or corruption of the other, but both are taken, promiscuously and according to common use, to be the same, though differing in sound, the use of one for the other is not a material misnomer; but if the name be wholly mistaken—if it be repugnant to truth—the misnomer is fatal." *Gordon v. Holliday* (U. S.) 10 Fed. Cas. 798, 799 (citing *Rex v. Roberts*, 2 Strange, 1214).

## HARVEST.

The word designates the time when crops of grain and grass are gathered, and does not apply to second crops cut out of the harvest season. *Wendall v. Osborne*, 18 N. W. 709, 710, 63 Iowa, 99.

## HARVESTING.

A policy of fire insurance was issued on a harvesting machine against loss by fire while operating in grain fields, and "in transit from place to place in connection with harvesting"; and the machine was moved the day after the policy was issued from the

place where it had been stored since the previous harvesting season to a blacksmith shop, to be repaired, in order to fill contracts for cutting and threshing grain, and while near such shop, eight days after being taken there, and about the day the harvesting season commenced, was burned. Held, that it was not "in transit from place to place in connection with harvesting" at the time it was destroyed. *Mawhinerey v. Southern Ins. Co.*, 32 Pac. 945, 946, 98 Cal. 184, 20 L. R. A. 87.

## HAS BEEN.

See "Have Been."

## HAT BRAIDS.

"Hat braids," as used in Revenue Acts U. S. 1861-62, means those cotton braids which are used exclusively for enameling hats and bonnets. *Arthur v. Zimmerman*, 96 U. S. 124, 125, 24 L. Ed. 770.

## HAT TRIMMINGS.

Ribbons made of silk, or of which silk is a contained material of chief value, and commonly and principally used in trimming hats, are hat trimmings, within the meaning of the tariff act of March 3, 1883 (22 Stat. 488), placing a duty thereon. *Cadwaller v. Wanamaker*, 13 Sup. Ct. 979, 980, 149 U. S. 532, 37 L. Ed. 837.

## HATH.

See "Have."

## HAULING.

The words "handling" and "hauling" are not synonymous words. Hauling is a transportation, while handling involves touching, holding, moving, or managing with the hand; and an indictment charging the hauling of liquors is not within Dispensary Act 1896, § 37, prohibiting the handling of liquors. *State v. Adams*, 27 S. E. 523, 525, 49 S. C. 518.

The expression "take and haul away," in an indictment charging that the defendant did feloniously steal, take, and haul away certain personal property, was equivalent to "take and carry away," and sufficient to meet the requirements of Code, § 1934, providing that whoever shall feloniously steal, take, and carry away personal goods of another shall be guilty of larceny. *Spittorff v. State*, 8 N. E. 911, 912, 108 Ind. 171.

## HAVANA.

The term "Havana," in a marine policy insuring a vessel and cargo to Havana, was

construed to mean the inner harbor, and not the outer harbor or quarantine ground; the latter not being a safe anchorage. *Dickey v. United Ins. Co. (N. Y.)* 11 Johns. 358, 363.

## HAVE.

See "May Have."

All I have, see "All."

An entry that it is "adjudged by the court that the plaintiff in this action have judgment" is equivalent to "hereby have judgment," or "recover judgment," as found in the same connection in ordinary entries of judgment, and is a judgment, and not an order for judgment. *Potter v. Eaton*, 26 Wis. 382, 383.

A will providing that, on the death of either of "my said daughters, I bequeath to such child or children as my said daughters so dying shall have or leave," etc., the remainder in the lands in which the daughters were given a life estate should be construed to mean that, on the death of each of his daughters, the remainder should go to the children she might have or leave living, and their heirs and assigns; that is to say, to the living children, and to the heirs or assigns of those who might have died, as tenants in common. The clause, therefore, should read (as applied to the singular number), "to such child as my daughter so dying shall have or leave living at her decease, and to the heirs and assigns of such child." *Griswold v. Onondaga County Sav. Bank*, 93 N. Y. 301, 305.

A devise of certain lots to a granddaughter, "to have and to hold to her, my said granddaughter, her heirs and assigns, forever," vests in the granddaughter a fee simple. *Lloyd v. Mitchell*, 18 Atl. 599, 130 Pa. 205.

A deed conveying certain property, "to have and to hold said interest and estate of the said D. unto the said M. and his assigns forever," clearly indicates an intention to transfer all the grantor's interest in the property. *Hayward v. Ormsbee*, 11 Wis. 3, 8.

### Continuance or permanency implied.

In a fire policy providing that it should be void if insured should have certain enumerated combustible articles on the premises, the use of "have" was intended only to prevent the permanent and habitual storage of the prohibited articles; and taking them on the premises to clean machinery was not embraced within the meaning of the words, and did not constitute a breach of the condition of the policy. *American Cent. Ins. Co. v. Green*, 41 S. W. 74, 77, 16 Tex. Civ. App. 531; *Krug v. German Fire Ins. Co.*, 23 Atl. 572, 573, 147 Pa. 272, 30 Am. St. Rep. 729 (citing *Mears v. Humboldt Ins. Co.*, 92 Pa. 15, 37 Am. Rep. 647; *Fraim v. National*

Fire Ins. Co., 32 Atl. 613, 170 Pa. 151, 50 Am. St. Rep. 753; Hall v. Insurance Co. of North America, 58 N. Y. 292, 17 Am. Rep. 255).

The use of the words "hath absconded," in an affidavit for attachment against an absconding debtor, though in the past tense, is a sufficient compliance with a statute requiring the creditor in such case to make complaint on oath that the debtor hath removed or is removing out of the state, or so absconds. If the debtor hath absconded, it may be assumed that he still absconds. Wallis v. Wallace, 7 Miss. (6 How.) 254, 255.

#### Ownership implied.

A will giving property to a wife, to have during her widowhood, implies custody and right to use. Gee v. Hasbrouck, 87 N. W. 621, 622, 128 Mich. 509.

In Pub. St. c. 184, § 7, providing that the husband shall be entitled to administration of the personal estate of his wife in case of her intestacy, and shall not be compelled to distribute the same among the next of kin, but shall have and retain the surplus thereof, after payment of her debts, for his own use, "have" is of broader significance than "retain," and implies an intention to cover his right to such property in case of administration by another. Kenyon v. Saunders, 30 Atl. 470, 471, 18 R. I. 590, 26 L. R. A. 232.

In construing a will made by an illiterate testator, which stated that a certain beneficiary should have testator's personal property, and another beneficiary should have his real estate, it was held that the latter clause operated to pass the absolute interest to testator, as it was the appropriate meaning of the testator, who did not know that a difference of expression was necessary when applied to real or personal estate. Guthrie's Lessee v. Guthrie (Va.) 1 Call, 7, 13.

The word "have," in a contract in which one party agrees to sell a negro for a certain sum, and which provides that, if such money is not repaid at a certain time, the negro should be returned, but in the meantime that the lender is entitled to have the negro as security, means have the property, and not the possession, in the negro, if there is no change of possession contemplated by the parties. Chapman v. Turner (Va.) 1 Call, 280, 294, 1 Am. Dec. 514.

Where the indictment charged that defendant falsely pretended to H. B., with intent to defraud, that he had one small black mare mule, an instruction "that the word 'had,' as used in the indictment, means more than to assert the mere possession of the mule, but meant to assert the ownership of the mule," was correct. The indictment

meant that defendant falsely pretended that he had the mule as owner. Franklin v. State, 52 Ala. 414.

The word "having," in the original statute of wills, authorizing all persons having real estate to dispose thereof by will, was said to import two things—ownership and time of ownership. George v. Green, 13 N. H. 521, 524.

#### Future time imported.

A will reciting, "creating St. Mary's and creating St. Olave's, I make liable to all debts I have contracted," must be construed to mean "shall contract." Bridgman v. Dove, 3 Atk. 201.

The word "has," in Rev. St. c. 38, § 59, imposing a fine on any person who during the holding of a camp meeting sells or hawks any goods, merchandise, or gives or sells any liquor, without the consent of the parties in charge of such meeting, within one mile thereof, provided that whosoever has his regular place of business within such limits is not required to suspend his business, is to be construed to mean "may have"; and the statute only operates to preclude persons having an established business before the camp meeting commenced from being prohibited from conducting such business during the meeting. The statute is not void as in restraint of trade or creating monopoly. Meyers v. Baker, 12 N. E. 79, 80, 120 Ill. 567, 60 Am. Rep. 580.

A guaranty reciting that, in consideration of parties "having this day advanced a certain sum of money," the grantor thereby undertook to pay the same on default, etc., may mean "in consideration that you have this day advanced," or "in consideration that you shall have this day advanced." Goldshede v. Swan, 1 Exch. 154, 161.

The word "having," in the original statute of wills, authorizing all persons having real estate to dispose thereof by will, was said to import two things—ownership and time of ownership. The rule that the will does not pass land acquired after its execution was thought by Lord Coke to depend upon the use of the word "having" in the statute of wills; but Lord Mansfield says that the same rule held before the statute, when lands were devisable by custom. George v. Green, 13 N. H. 521, 524.

Act March 10, 1873, § 1, providing that when any person has peaceable possession of land under a deed, without notice of any defects invalidating the same, he shall not be ejected therefrom until he is compensated for improvements made by him, refers to the time of making the improvements, and not to the time of the passage of the act; and hence a person who has taken peaceable possession of the land after the passage of the

act is entitled to compensation for improvements made thereafter, before he can be ejected therefrom. *Wilson v. Red Wing School Dist.*, 22 Minn. 488, 491.

#### **Present time imported.**

Where defendant wrote to another that he might say to "every man you have in your employ" that defendant would pay them, such phrase meant men at that time employed by the one addressed, and had no reference to persons not then employed. *McDonald v. Bewick*, 5 N. W. 425, 426, 43 Mich. 438.

The words "we have purchased," as used in a transaction in open stock board, do not necessarily import a present transfer of the property to the purchaser, if it appears that the intention of the parties was otherwise. *Frazier v. Simmons*, 2 N. E. 112, 114, 139 Mass. 531.

#### **Past time imported.**

The expression, "we have settled" certain business, is not only grammatically, but according to the usual form of speech, the declaration of an anterior event. *Cook v. Swan*, 5 Conn. 140, 147.

"Hath," as used in St. 14 Geo. III, providing that no insurance should be made on the life or lives, wherein the assured should have no interest, or by way of gaining or wagering, and that, in all cases wherein the assured "hath" interest in such life, no greater sum should be recovered than the amount or value of such interest, must be construed as necessarily referring to the time of effecting the insurance, and not to the time of the death. *Scott v. Dickson*, 108 Pa. 6, 13, 56 Am. Rep. 192 (citing *Dalby v. Life Ins. Co.*, 15 O. B. 365).

#### **HAVE BEEN.**

An allegation that plaintiff "has been" in all things free from negligence cannot be construed as alleging freedom from negligence at the particular time of the injury, and hence the complaint is demurrable. *Richmond Gas Co. v. Baker (Ind.)* 39 N. E. 552, 553.

A will making a bequest for the founding of a home for aged, respectable, indigent women who "have been residents of the city of New London," etc., should not be construed to mean only those who had been so at the time the will took effect by the death of the testator, but also to include those who, when the selection should be made under the will, had then been such residents. *Coit v. Comstock*, 51 Conn. 352, 352, 50 Am. Rep. 29.

The expression "if any person has been found guilty," as used in Rev. Laws, p. 369, §

5, providing that, if any person has been found guilty of conveying away a slave, he shall be liable for the value of the same to the owner, to be recovered in an action of debt or on the case, is equivalent to "if any person shall be found guilty." *Boice v. Gibbons*, 8 N. J. Law (3 Halst.) 324, 327.

Under the act of 1705 relating to hogs, the phrase "have been running at large" cannot be regarded as tantamount to an averment that they were suffered to run at large. They may have been running at large when found by the seizer, without any default of the owner, and, if so, they were not subject to forfeiture. *Shaw v. Commonwealth*, 72 Pa. (22 P. F. Smith) 68, 70.

The words "have been," as used in a grant providing that when certain sections "have been sold or otherwise disposed of," etc., indicate an act completed at the time the grant was made. *Heydenfeldt v. Daney Gold & Silver Min. Co.*, 10 Nev. 290, 295.

#### **HAVE SOLD.**

A contract, which is not sufficient to constitute a deed, in which one of the contracting parties states that "I have sold" certain real estate to the other party to the contract, will be construed to mean "have agreed and contracted to sell." *Atwood v. Cobb*, 33 Mass. (16 Pick.) 227, 230, 26 Am. Dec. 657.

#### **HAVING.**

In a warrant committing a person for having been guilty of a contempt, the word "having" was a sufficient averment that the parties had been guilty of contempt. *Case of the Sheriff of Middlesex*, 11 Adol. & E. 273.

The word "having," in a devise to testator's daughter, which provides that, if the daughter dies without having heirs, then the property should pass to another, is a participle of the present time, and may therefore be considered as being used by the testator as embracing the present time; that is, at the time of the daughter's death, if she should die without having heirs. And taking the word in such sense, it means not only the birth of issue, but that such issue should be in esse at the time of her death. The word "having" is sometimes used as past time, and it has the same meaning as the perfect past participle of the verb "to have," to wit, "having had." *Bryson v. Davidson's Ex'r*, 5 N. C. 143, 144.

A guaranty stating that, "in consideration of having indorsed," etc., "we hold ourselves accountable, will not be construed to mean that the indorsement was a past act, but to mean that they were indorsed at the request of the guarantors, and hence the

consideration for the instrument is not a past consideration, insufficient to sustain the guaranty. *Bulkley v. Langdon*, 2 Conn. 404, 408.

Where a declaration speaks of the consideration of an agreement as the plaintiff "agreeing to stay" a "certain action," the words necessarily implied a continuing agreement till the action was stayed, and the words of the agreement referred to, "having agreed," necessarily imply the same, so that there was no variance. *Tanner v. Moore*, 9 Q. B. 1, 6.

#### HAVING NO INTENTION.

Under a statute declaring that the charges which a creditor is allowed to allege against a debtor who gives notice of his intention to take the poor debtor's oath will be considered in the nature of a suit at law, and allowing the creditor to charge his debtor with having contracted the debt with an intention not to pay the same, it is held that a charge that he contracted the debt, "having no intention" to pay the same, and no expectation that it would be paid, was not a charge under the statute; not intending or having no intention to do a certain act being substantially different from intending or having an intention not to do it. *Chamberlain v. Hoogs*, 67 Mass. (1 Gray) 172, 174.

#### HAVEN.

"Haven" is defined by Lord Hale to be "a place for the receipt and safe riding of ships, so situated and secured by land circumjacent that the vessels thereby ride and anchor safely, and are fully protected by the adjacent lands from danger of violent winds." *De Longuemere v. New York Ins. Co.* (N. Y.) 10 Johns. 120, 125, note; *United States v. Morel* (U. S.) 26 Fed. Cas. 1310, 1311.

"Havens," as used in the colonial patents of 1666, 1688, and 1694, granting to the town of Huntington title to all lands south of Long Island Sound, between certain points, including all havens, harbors, etc., includes a body of water lying between projecting necks, and capable of being used as a haven or harbor, though it is not landlocked, and is not a perfectly safe harbor or haven. *Board of Trustees of Town of Huntington v. Lowndes* (U. S.) 40 Fed. 625, 629; *Lowndes v. Board of Trustees*, 14 Sup. Ct. 758, 762, 153 U. S. 1, 38 L. Ed. 615.

The term "ports and havens," within the rule that all ports and havens are within the body of the counties of the realms, includes not merely port and haven towns, but all the tide waters included within the harbors and franchises. *De Lovio v. Boit* (U. S.) 7 Fed. Cas. 418, 429.

The term "rivers, haven, creek, basin, bay, or arm of the sea," in Rev. St. § 5346, providing that an assault committed with a dangerous weapon, or with intent to perpetrate a felony, on board of any vessel belonging in whole or in part to the United States, while in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, is limited to the high seas and other waters connected immediately with them, and does not include the rivers connecting the Great Lakes. *Ex parte Byers* (U. S.) 32 Fed. 404, 405.

#### HAWKER.

See, also, "Peddler."

The term "hawkers" is defined in Jacob's Law Dictionary as "those deceitful fellows who went from place to place, buying and selling brass, pewter, and other merchandise which ought to be uttered in open market; and the appellation seems to grow from their uncertain wanderings, like persons that with hawks seize their game wherever they can find it." *Morrill v. State*, 38 Wis. 428, 437, 20 Am. Rep. 12; *City of Greensboro v. Williams*, 32 S. E. 492, 493, 124 N. C. 167; *Wrought Iron Range Co. v. Carver*, 183 N. C. 834, 24 S. E. 352, 353; *Fisher v. Patterson*, 13 Pa. (1 Harris) 335, 336; *Grafty v. City of Rushville*, 107 Ind. 502, 506, 8 N. E. 609, 57 Am. Rep. 128; *City of South Bend v. Martin*, 142 Ind. 81, 40, 41 N. E. 315, 29 L. R. A. 531; *Levy v. State*, 68 N. E. 172, 175, 161 Ind. 251; *State v. Montgomery*, 92 Me. 433, 437, 439, 43 Atl. 13, 15.

The leading, primary idea of the hawker and peddler is that of an itinerant or traveling trader who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale, and sells them in a fixed place of business. *Commonwealth v. Ober*, 66 Mass. (12 Cush.) 493, 495; *State v. Wells* (N. H.) 45 Atl. 143, 144, 48 L. R. A. 99; *Hewson v. Inhabitants of Township of Englewood* (N. J.) 27 Atl. 904, 905, 21 L. R. A. 736; *Martin v. Town of Rosedale* (Ind.) 29 N. E. 410, 411; *Emmons v. City of Lewistown* (Ill.) 24 N. E. 58, 59, 8 L. R. A. 328, 22 Am. St. Rep. 540.

A hawker is a trader who goes from place to place, or along the streets of a town, selling the goods which he carries with him, although it is generally understood from the word that a hawker also seeks for purchasers, either by outcry, as the derivation of the word would seem to indicate, or by attracting notice and attention to them as goods for sale by actual exposure or exhibition of them by placards or labels, or by some conventional signal or noise. *Clements v. Town*

of Casper, 35 Pac. 472, 474, 4 Wyo. 494; *Grafty v. City of Rushville*, 8 N. E. 609, 611, 107 Ind. 502, 57 Am. Rep. 128.

One who in his own person goes from house to house with his goods, and offers them for sale, is a hawker, within Code, § 1735, requiring a hawker and peddler to take out a license. *Temple v. Sumner*, 51 Miss. 13, 15, 24 Am. Rep. 615.

The term in the act of April 16, 1840, making it criminal for any person to be found hawking without a license, includes the selling of groceries from a canal boat. *Fisher v. Patterson*, 13 Pa. (1 Harris) 335, 336.

Whoever, except itinerant venders, commercial travelers, selling agents, or dealers in the usual course of business, and persons selling by sample for future delivery, goes from town to town, or from place to place in the same town, carrying for sale or exposing for sale goods, wares, and merchandise, shall be deemed a hawker or peddler, within the meaning of the chapter relating to itinerant merchants, hawkers, and peddlers. Rev. Laws Mass. 1902, p. 598, c. 565, § 13.

#### **Buying or exchanging goods.**

A hawker primarily means one who sells, and one who buys produce from licensed bucksters in a certain county, to sell again at retail in another, is not a hawker in the former, within the terms of the statute relating to hawking. *Lebanon County v. Kline*, 2 Pa. Co. Ct. R. 621, 622.

A hawker, within Act March 27, 1848, forbidding any person from selling goods as a hawker, is one who goes about with goods, making sales; and it is not a violation of the act to travel from farm to farm, exchanging the goods of a merchant for farm produce, but taking orders for goods while traveling through the country, and afterwards delivering the goods and taking pay, is a violation of the statute. *Commonwealth v. Edson*, 2 Pa. Co. Ct. R. 377, 379.

#### **Canvasser of books.**

Canvassers of books or publications on the street, or from house to house, taking orders for future delivery, are not hawkers, within the meaning of the statute authorizing villages to license, regulate, etc., hawkers and peddlers. *Emmons v. City of Lewistown*, 24 N. E. 58, 59, 132 Ill. 380.

#### **Local merchant.**

"Hawker," as used in Act 1893, requiring hawkers and peddlers of goods to pay a license fee, means an itinerant trader, who carries goods through the streets from town to town and from place to place, but does not apply to local merchants who carry a

stock, and at their store take orders for sewing machines, and deliver them in the country through their agents, and, while in the country, filling orders, occasionally sell from the delivery wagon a new machine, or an old one taken in trade. *Alexander v. Greenville County*, 27 S. E. 469, 49 S. C. 527.

"Hawker," as used in a city ordinance requiring hawkers, peddlers, and itinerant venders of merchandise to obtain a license, cannot be construed to include one driving a grocer's wagon to the grocer's customers, taking their orders, and afterwards delivering the goods ordered; he not selling or delivering goods in any other way. *Hewson v. Inhabitants of Township of Englewood*, 27 Atl. 904, 55 N. J. Law (26 Vroom) 522, 21 L. R. A. 736.

#### **Peddler synonymous.**

"Hawker," as formerly defined, was an itinerant trader, who, like a peddler, carried his goods with him for sale, but also attracted attention by public outcry or placard or exposure. Now, however, the terms "peddler" and "hawker" are considered equivalent and synonymous, and are so used in an ordinance licensing the vocation of hawker or peddler. *Kennedy v. People*, 49 Pac. 373, 375, 9 Colo. App. 490. See, also, *Emmons v. City of Lewistown*, 24 N. E. 58, 59, 132 Ill. 380, 8 L. R. A. 328, 22 Am. St. Rep. 540.

The words "hawkers" and "peddlers" are used synonymously and interchangeably in Acts 1895, c. 4322, § 9, subd. 11, requiring hawkers and peddlers to pay a certain license; and the terms include such persons as are ordinarily and popularly understood to be such; the clause defining a peddler to be an unlicensed traveling peddler, who shall bargain and sell, etc., not being intended to limit, define, or restrict the meaning of the words "hawkers" and "peddlers," but only to class as peddlers certain dealers not included within the popular and ordinary meaning of those words. Chief Justice Shaw in the case of *Commonwealth v. Ober*, 68 Mass. (12 Cush.) 493, says that "the leading, primary idea of a hawker and peddler is that of an itinerant or traveling trader, who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale, and sells them in a fixed place of business. Superadded to this, though perhaps not essential, by a hawker is generally understood one who not only carries goods for sale, but seeks for purchasers either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them as goods for sale by actual exhibition or exposure of them by placards or labels, or by conventional signals, like the sound of a horn for the sale of fish." It is there admit-

ted, however, that the distinction drawn is not essential, and all of the standard dictionaries to which we have access give one definition of the word "peddler" as a hawker, and vice versa. So, in many definitions of the term by the courts and text writers, the words are regarded as synonymous, when undefined by statute. *Hall v. State*, 23 South. 119, 121, 39 Fla. 637 (citing Bish. St. Crimes, § 1074; *Fisher v. Patterson*, 13 Pa. [1 Harris] 336; *City of South Bend v. Martin*, 142 Ind. 31, 41 N. E. 315, 29 L. R. A. 531; *Emert v. State of Missouri*, 15 Sup. Ct. 367, 156 U. S. 296, 39 L. Ed. 430).

The words "peddler" and "hawker" have a settled meaning, independently of statutory definition. The former is an itinerant trader—a person who sells small wares, which he carries with him in traveling about from place to place—while the latter is also a trader who goes from place to place, or along the streets of a town, selling the goods which he carries with him, although it is generally understood from the word that a hawker seeks for purchasers either by outcry, as the derivation of the word would seem to indicate, or by attracting notice and attention to the goods as being for sale, by actual exposure or exhibition of them, by cards or labels, or by conventional signals or signs. *Clements v. Town of Casper*, 4 Wyo. 494, 500, 35 Pac. 472.

#### Picture agent.

An agent, in delivering portraits which his principal manufactured under contracts requiring their delivery in frames, sold the frames to the portrait buyers; the option to purchase being given them by the contracts. He did not sell them to others than portrait buyers, or go anywhere to sell them except where he had to deliver portraits. Held, that he was not within Act 1893, requiring hawkers and peddlers of goods to pay a license fee. *State v. Coop*, 30 S. E. 609, 52 S. C. 508, 41 L. R. A. 501.

Hawking is the offering of goods for sale in the streets by outcry, and includes the soliciting of orders for pictures and frames. *City of South Bend v. Martin*, 41 N. E. 315, 317, 142 Ind. 31, 29 L. R. A. 531.

#### Sewing machine agent.

"A hawker is an itinerant trader who goes from place to place and from house to house, carrying for sale and exposing to sale the goods, wares, and merchandise which he carries. He generally deals in small and cheap articles, such as he can conveniently carry in a cart or on his person." The term does not include a sewing machine agent who goes from place to place, exhibiting a sample machine, and soliciting orders to be filled by the company, and delivering on conditional contracts of sale the machines sent him on such order, though occasionally he

fills an order by immediate delivery of the sample, and though once he makes an absolute sale. *Commonwealth v. Farnum*, 114 Mass. 267, 270.

The term "hawker" includes a sewing machine agent who solicits orders, and at the same time offers for sale, and sells and delivers, the sample machine which he carries with him. *Emert v. State of Missouri*, 15 Sup. Ct. 367, 369, 156 U. S. 296, 39 L. Ed. 430.

#### Single shipment.

A hawker and peddler is one who travels from town to town, or from plantation to plantation, carrying to sell, or exposing to sale, goods, wares, and merchandise. A single shipment of goods regularly consigned to a certain firm by the owner, and sold by the latter or by the firm for the use and benefit of the former, is not hawking and peddling, within the meaning of a statute licensing hawkers and peddlers. *State v. Belcher* (S. C.) 1 McMul. 40, 41.

#### Solicitor of orders for goods.

The term "hawker," as used in Laws 1897, c. 76, § 1, providing that no person shall do any business as a hawker without a license, cannot be construed to include a person who solicited orders for his employers—a firm having a permanent place of business in the state—and subsequently delivered the goods thus ordered; he making no sales on his own account, and carrying no goods about with him for sale. *State v. Wells*, 45 Atl. 144, 69 N. H. 197, 48 L. R. A. 99. It does not include one who goes about the village, carrying samples, and taking orders for a nonresident firm. *Village of Cerro Gordo v. Rawlings*, 25 N. E. 1006, 135 Ill. 36; *Clements v. Town of Casper*, 35 Pac. 472, 474, 4 Wyo. 494; *Martin v. Town of Rosedale*, 29 N. E. 410, 411, 130 Ind. 109. It includes one going from house to house, offering goods for sale at retail to individuals not dealers in such commodities, whether the goods be carried along for delivery personally, or whether the sales are made for future delivery. *Graffy v. City of Rushville*, 8 N. E. 609, 611, 107 Ind. 502, 57 Am. Rep. 128.

The term "peddler or hawker," in a village ordinance requiring the licensing of peddlers or hawkers, does not include a nonresident merchant tailor exhibiting samples of cloth, and taking orders for suits of clothing to be made and delivered afterward. *Radebaugh v. Plain City*, 11 Ohio Dec. 612, 613.

#### Leasing goods with option to purchase.

Within the meaning of a statute requiring hawkers and peddlers to produce proof of good moral character and pay a license

fee, one who went about renting clocks for the term of 13 months, at the rent of 25 cents per week, or \$13 for the term—the lease providing that the lessee at any time during the term could purchase the clock for the price of \$13, and be allowed all rents as a credit on such purchase—is a hawker. Such lease was merely a subterfuge, the real transaction being a sale. *Commonwealth v. Harmel*, 166 Pa. 89, 94, 80 Atl. 1036, 1037, 27 L. R. A. 388.

## HAY.

"Hay" is a generic term, and covers all kinds of hay, so that an interstate commerce rate for hay prevents a contract at a different rate for the transportation of old hay; the single term "hay" including every variety of the article, without regard to its age. *Missouri, K. & T. Ry. Co. v. Bowles*, 40 S. W. 899, 901, 1 Ind. T. 250.

"Hay" is defined to be grass cut and dried for fodder; grass prepared for preservation. Citing Webster. Hence wild prairie grass is not hay until cut and raked, which involve labor, and in such sense is a product of labor, within the lien law. *Emerson v. Hedrick*, 42 Ark. 263, 265.

In *Reg. v. Good*, 17 Ont. 725, it is said that the word "hay" does not import whether it was hay from natural grass, or from grass sown and cultivated. The census shows that six out of every seven tons of hay cut in the state are cultivated grass, only one-seventh being natural grass. Hay is not cultivated like cotton, any more than wheat is cultivated in the sense that corn is; but the court could not therefore lay down the proposition that either wheat or hay is not a cultivated crop, it appearing that the great bulk of hay is in fact cultivated. *State v. Crook*, 44 S. E. 32, 33, 132 N. C. 1053.

### Grass synonymous.

"Hay" means grass that has been cut and dried for fodder, but, where a complaint speaks of hay as growing on land, the complaint will not be held insufficient, as not alleging the destruction of the grass. *Baumgartner v. Sturgeon River Boom Co.*, 79 N. W. 566, 567, 120 Mich. 321.

The term "hay" means the flora of a meadow after it is severed, and is therefore distinguished from the term "grass," which is the hay before it is severed and cured. An allegation, however, in an action for the conversion of grass and hay, did not necessarily import a joinder of two causes of action, one relating to real estate and the other to personality, since cases may arise where even before severance grass belongs to persons other than the owner of a fee, or even the owner of a possessory estate therein, which ownership may depend on contract. *Reed v. McRill*, 59 N. W. 775, 41 Neb. 206.

Under a statute declaring it to be arson to willfully burn "any grain, grass, or herbage growing or standing in a field," an indictment for burning haystacks is good. Hay is but grass cut and cured for fodder, and so the words "grass standing in the field" may well include haystacks. *State v. Harvey*, 42 S. W. 938, 939, 141 Mo. 843.

## HAYSTACKS.

Haystacks are included in the provisions of a statute making the burning of grass standing in the field arson. *State v. Harvey*, 42 S. W. 938, 939, 141 Mo. 842.

## HAYWARD.

A hayward is an officer regularly appointed to impound stray cattle. *Adams v. Nichols* (Vt.) 1 Aik. 316, 319.

## HAZARD.

See "Moral Hazard."

To engage in a wager of any kind is a hazard, within the meaning of that word as used in Ky. St. § 1977, subjecting to fine one who shall engage in any hazard or game on which money is bet, won, or lost. *Cheek v. Commonwealth*, 37 S. W. 152, 100 Ky. 1.

The word "hazard," in its direct philological sense, means chance, luck, or accident, rather than mere uncertainty or contingency. But the word, in a statute authorizing a suit for restitution by any person who has paid money lost on any game, hazard, or sport, does not include an election bet, in view of the fact that a subsequent clause of the statute authorizes a like action by a bettor on any game, sport, or pastime against a depositor for money staked and unpaid to the winner, as the word "hazard" is to be understood ejusdem generis, as importing some chance or risk, like its associate terms, "game," "sport," or "pastime," which have been construed not to apply to money staked on the event of an election. *Graves v. Ford*, 42 Ky. (3 B. Mon.) 113, 114.

The terms "bet, hazard, and wager," applied to the result of an election, include the act of selling property for more than its value, payable, or not, upon the contingency of the result of the election. *Somers v. State*, 37 Tenn. (5 Sneed) 438.

### As risk.

Under a provision that a fire policy shall be void if the hazard is increased without the consent of the company in writing, the policy is not voided by an increase in the risk caused by explosives kept in an adjoining house, not under the control of the insured, since the language, "hazard is increased without the consent of the company



in writing," should be construed as only applying to the insured premises, or the property under the control of the insured. *State Ins. Co. of Des Moines v. Taylor*, 24 Pac. 833, 336, 14 Colo. 499, 20 Am. St. Rep. 281.

The mutual hazards assumed by parties when they enter into a partnership relation, and which qualify the terms of partnership agreements, includes sickness, which is the act of God, temporary absence, or death, or other casualties. *Hart v. Myers*, 12 N. Y. Supp. 140, 141, 25 Abb. N. C. 478.

## HAZARDOUS.

See "Not More Hazardous."

"Hazardous," as used in a statute authorizing a board of health to abate nuisances, sources of foulness, or causes of sickness hazardous to the public health, means simply dangerous or perilous. *Butterfoss v. Board of Health of City of Lambertville*, 40 N. J. Eq. (18 Stew.) 325, 330.

Within the meaning of a statute authorizing boards of health to abate nuisances hazardous to the public health, a fat rendering factory, by the odors from which more than a dozen individuals living in the vicinity were made sick at their stomachs or nauseated, one being sick for two days; another lost his appetite, and on several occasions was unable to eat his meals; one man felt so ill that he was obliged to quit his work; others refused to work because of the stench; and a number of families were obliged to stay indoors and close their windows to protect themselves from the odors—constitutes a hazard to the public health which justified the abatement of such nuisance. *Board of Health of Hamilton Tp. v. Neidt* (N. J.) 19 Atl. 818, 820.

An appropriation to a more hazardous use, within the meaning of a fire policy on property as part of a manufactory of wool carpets, is not shown by the fact that the making of blankets is substituted for the making of carpets by the factory, as the factory remains a woolen mill. *Smith v. Mechanics' & Traders' Fire Ins. Co.*, 32 N. Y. 399, 403.

The terms "hazardous" and "extrahazardous," as used in an insurance policy authorizing the insured premises to be used for hazardous and extrahazardous purposes, have no technical meaning, and must be taken in their ordinary and popular meaning, of dangerous and extradangerous, and, if unrestricted by other clauses, would authorize the occupancy of such premises for a business in which benzine and gasoline are kept. *Russell v. Manufacturers' & Builders' Fire Ins. Co.*, 52 N. W. 906, 907, 50 Minn. 409.

As the term "hazardous" is used in a fire policy describing the goods as hazardous,

it does not include extrahazardous or specially hazardous, as such terms are used to designate different classes of goods. *Pindar v. Continental Ins. Co.*, 88 N. Y. 364, 365, 97 Am. Dec. 795.

## HAZARDOUS CONTRACT.

See "Aleatory Contract."

## HE.

The use of the pronoun "he" in a note, mortgage, and certificate of sale can have little, if any, greater effect than to raise a suspicion that the person referred to was a male, and not a female. *Berniaud v. Beecher*, 11 Pac. 802, 804, 71 Cal. 38.

The word "he," in Taylor's St. c. 119, §§ 31-33, authorizing the admission of attorneys in circuit courts, and giving the right to persons so admitted to practice in all courts except the Supreme Court, but providing that, to entitle any one to practice in the latter court, he shall be licensed by order of this court, is not to be construed as applying to females as well as males, notwithstanding the statutory rule of construction that words of the masculine gender may be applied to females unless such construction is inconsistent with the manifest intention of the Legislature, in view of the universal exclusion of females from the bar by the common law, and in the absence of any other evidence of a legislative intent to require their admission. *In re Goodell*, 39 Wis. 232, 241, 20 Am. Rep. 42.

Under St. 5 & 6 W. IV, c. 76, § 9, requiring that, before a person be put on the burgess list of a borough, "he shall have paid certain rates," the payment must have been by the party's own act. It was not sufficient that another person, without his authority, paid the rate for him. *Reg. v. Bridgenorth*, 10 Adol. & E. 66, 68.

The pronoun "he," when used in the Penal Code, includes a female as well as a male, unless there is some express declaration to the contrary. *Pen. Code Tex.* 1895, arts. 21, 22.

The word "he," when used in the revenue act, includes male, female, company, corporation, firm, society, singular or plural number. *Hurd's Rev. St. Ill.* 1901, p. 1493, c. 120, § 292, subd. 7.

When the word "he" or "his" occurs in the title relating to education, referring to either the members of the city board of directors, county superintendents of common schools, city superintendents, directors, clerks, state board of education, or other school officers, it shall be understood to mean also "she" or "her." *Ballinger's Ann. Codes & St. Wash.* 1897, § 2462.

**HEAD.**

Chief; leading; principal; the upper part or principal source of a stream. Black, Law Dict.

**HEAD CHAIR.**

A head chair is a part of a block switch—a device used in railroading by which the footings of the ends of the two stationary rails are covered. This device is about 3 inches wide and 15 inches long, and is laid parallel with the tie. Between the rails this head chair presents a convex surface, which rises to a point two inches below the surface of the rails. This device prevents the blocking from reaching the ends of the rails, leaving a space of about two inches and a quarter which is unblocked. The head chairs in common use are made of iron, with a flat surface, and are so constructed as not to interfere with or prevent the furring of the rails. *Eastman v. Lake Shore & M. S. R. Co.* (Mich.) 60 N. W. 309, 310.

**HEAD MONEY.**

"Head money" is but another term for bounty, which the act of April 23, 1800, § 7, provides shall be paid for each person on board any ship of an enemy at the commencement of an engagement which shall be sunk or destroyed by any ship or vessel belonging to the United States, of equal or inferior force; the same to be divided among the officers and crew in the same manner as prize money. It is not a prize, under the law, but a gratuity which the government has promised to distribute, under the direction of the Secretary of the Navy, in the same manner as prize money is distributed. In *re Farragut*, 7 D. C. 94, 97.

**HEAD OF BUREAU.**

The term as used in Laws 1873, c. 335, p. 491, which gives to the commissioners of the fire department of the city of New York power to remove certain officers from office, except the heads of bureaus or regular clerks, does not include a superintendent of telegraph in the fire department. *People v. Board of Fire Com'rs of City of New York*, 86 N. Y. 149, 151.

**HEAD OF CORPORATION.**

The California process act declares that the summons in a suit against a corporation may be served on the president or other head of the corporation. Held, that where a city charter declared that the president of the board of trustees should be the governor of the city, and that he should be the general executive officer of the city government, head of the police, and general executive head of the city, the president of such board

was the president or other head of the corporation, within the meaning of such process act, and was the proper person to be served with summons thereunder in a suit against the city. *City of Sacramento v. Fowle*, 88 U. S. (21 Wall.) 119, 122, 22 L. Ed. 592.

**HEAD OF DEPARTMENT.**

Heads of principal department, see "Principal Department."

"Heads of departments," as used in Const. art. 2, § 2, providing that Congress may by law invest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of the departments, means members of the Cabinet. *United States v. Mouat*, 8 Sup. Ct. 505, 506, 124 U. S. 303, 31 L. Ed. 463.

A city charter providing that every head of a department and person in the section named, except as otherwise provided, should hold his office for the term of six years—the terms of office of all such heads of departments and persons to commence on the 1st day of May—means every head of department and person in the section named, except as therein otherwise provided. *Gilroy v. Smith*, 5 N. Y. Supp. 784, 787.

The commissioner of pensions is not a head of a department, within the Constitution, prescribing by whom officers of the United States shall be appointed. *United States v. Germaine*, 99 U. S. 508, 511, 25 L. Ed. 482; *United States v. Van Leuven* (U. S.) 62 Fed. 62, 65.

**HEAD OF A FAMILY.**

As to what constitutes family, in the phrase "head of family," see "Family."

The head of a family is a person in charge of a family, which is a collective body of persons living in one house under one head or management. The relations between them must be of a permanent and domestic character, not that of those abiding temporarily together as strangers. The head of a family need not necessarily be a husband or father, but may be any person who has charge or manages the affairs of the collective body residing together. *Duncan v. Frank*, 8 Mo. App. 286, 289.

"The head of a family primarily is the husband or father. One may be such head, however, without being either. Thus a mother may become such upon the death of the husband. So a son having mother, brothers, and sisters, or either, depending on him for a support and living, in a household which he controls, might be such head; and yet in

each case he must, for the purpose of this inquiry, stand in the place of a father—he must be the master, in law, of the family.” The term is thus used in a statute creating exemptions in favor of a head of a family. *Per Wright, J., in Whalen v. Cadman*, 11 Iowa, 226, 227.

A statute requiring a juror to be the head of a family means one in a position to exercise some degree of authority or control over the conduct and means of support of a person or persons who live with him, and who look to him for guidance and support. Even the relations of parents and son may be such as to place the son at the head of the family. This relation would subsist if his parents lived with him, and looked to and depended on him for support. *Territory v. Lopez*, 2 Pac. 364, 365, 3 N. M. (Johns.) 104.

“Head of a family,” as used in Code, § 3072, which provides that, when a decedent leaves a widow, all personal property which in his hands, as the head of a family, would be exempt from execution, shall be set apart as her property in her own right, and be exempt as in the hands of the decedent, means one upon whom a family depends for support; but, in order to constitute one the head of a family, he must actually support it. A mere legal liability for the support of one's wife would not constitute one the head of a family. There must exist the family relation. *Linton v. Crosby*, 9 N. W. 311, 312, 56 Iowa, 386, 41 Am. Rep. 107.

The phrase “head of a family,” when used in statutes, shall include any person who has charge of children, relatives, or others living with such person. *Gen. St. Kan.* 1901, § 7342, subd. 29.

The phrase “head of a family,” as used in the chapter relating to homesteads, includes within its meaning: First. The husband, when the claimant is a married person. Second. Every person who has residing on the premises with him or her, and under his care and maintenance, either (1) his or her minor child, or the minor child of his or her deceased wife or husband; (2) a minor brother or sister, or the minor child of a deceased brother or sister; (3) a father, mother, grandfather, or grandmother; (4) the father or mother, grandfather or grandmother, of a deceased husband or wife; (5) an unmarried sister, or any other of the relatives mentioned in this section who have attained the age of majority, and are unable to take care of or support themselves. *Cobbey's Ann. St. Neb.* 1903, § 6214; *Civ. Code Cal.* 1903, § 1261; *Civ. Code Mont.* 1895, § 1694. A like definition is given in *Civ. Code Idaho* 1901, § 2494, and *Ballinger's Ann. Codes & St. Wash.* 1897, § 5238, except that it is there provided that the phrase includes, also, the wife, when the claimant is a married person. *Rev. Codes N. D.* 1899, § 3625, and

*Rev. St. Utah* 1898, § 1154, add “but in no case are both husband and wife entitled each to a homestead.”

Under a statute providing that a homestead may be selected “by any head of a family,” and declaring that the phrase “head of a family” shall include the husband, when the claimant is a married person, and that the husband or other head of a family must execute and file with the recorder a declaration containing a statement showing that the person making it is the head of a family, the statement in such a declaration that the party making it is the head of a family is sufficient, and he need not state that he is married, or who were the members of his family. *Security Loan & Trust Co. v. Kauffman*, 41 Pac. 467, 468, 108 Cal. 214.

#### **Father with widowed daughter.**

A father who has living in his house with him a widowed daughter and her infant children is the head of a family, within the homestead laws, allowing a homestead to the head of a family. *Blackwell v. Broughton*, 56 Ga. 390, 391.

#### **Guardian.**

A guardian of one minor child is the head of such a family of minor children, under the Constitution and laws, as will entitle him to the homestead. *Rountree v. Dennard*, 59 Ga. 629, 630, 27 Am. Rep. 401.

#### **As householder.**

The head of a family, within the homestead exemption statute, is a householder or person on whom other members of the household are dependent for support, or to whom such householder owes a duty. *Brokaw v. Ogle*, 48 N. E. 394, 397, 170 Ill. 115.

In the Constitutional provision that every householder or head of a family shall be entitled to claim an exemption, the terms “householder” and “head of a family” are convertible, and employed as explanatory one of the other. Each signifies one who provides for a family; one who keeps house with his family; a master or a mistress of a dwelling house. In *Calhoun v. Williams* (Va.) 32 Grat. 18, 34 Am. Rep. 759, the term “householder” was held to signify one who occupies such a relationship towards persons living with him as to entitle them to a legal or moral right to look to him for support. This relation of dependence and support constitutes the one upon whom the burden is cast, the head of a family. *Oppenheimer v. Myers*, 39 S. E. 218, 220, 99 Va. 582.

#### **Husband and wife jointly.**

In Washington Territory, by virtue of the statutes giving the wife equal control with the husband over the affairs of the family, the husband is not the head of the family,

but that position is held jointly by the husband and wife. *Rosencrantz v. Territory*, 5 Pac. 805, 2 Wash. T. 267.

**Husband during absence or separation of wife.**

While a marriage de jure exists, the husband is the head of a family, within the meaning of a homestead act, though his family may consist only of a wife who has left him. *Gates v. Steele*, 4 S. W. 53, 54, 48 Ark. 539; *Brown v. Brown's Adm'r*, 68 Mo. 388, 391.

A married man is the head of a family, within the homestead act, and entitled to homestead exemptions as such, though his wife may have deserted him, and may be residing in another state, and he is living in improper relations with another woman. *Whitehead v. Tapp*, 69 Mo. 415.

The term "head of a family," as used in exemption statutes, includes a man whose wife and children are temporarily absent from the city, even though he has ceased to keep house. *State, to Use of Coddling, v. Finn*, 8 Mo. App. 261-264.

Under Const. art. 1, § 14, providing that no distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment, or descent of property, an alien resident of the state, whose wife and children still remain in England, is entitled to the protection of the exemption laws. These benefits are secured to him not because of the residence of his family, but his own. They attach to him in his own right, as the head of a family actually residing here. That his family did not accompany him in his removal to our state is of no consequence, so long as he came with the settled purpose of abandoning his residence in England, and on his arrival fixed upon this state as his home, to which he intends to bring them. *People ex rel. Dobson v. McClay*, 2 Neb. 7, 9.

A husband whose family resides out of the state, and which he supports, is nevertheless the head of a family, within the exemption laws. *Pettit v. Muskegon Booming Co.*, 41 N. W. 900, 901, 74 Mich. 214.

Where a wife moved to another state, taking her children with her, and there obtained a divorce from her husband, and was awarded the custody of the children, the husband, while he continued to furnish support for the children, notwithstanding the divorce, was the head of a family, and entitled to the benefit of the exemption law. *Roberts v. Moudy*, 80 Neb. 683, 48 N. W. 1013, 27 Am. St. Rep. 428.

**Married not synonymous.**

In a statute providing for homestead exemptions and exemptions of personal property to a person who is married or the head

of a family, the expressions "married" and "head of a family" are not synonymous or mere equivalents the one for the other. All of either sex who are either married or the heads of families are entitled to the exemptions, and, where the homestead belongs to the wife, who dies, leaving minor children, it becomes the homestead of such minor children, to the exclusion of the husband's right to curtesy during the minority of such children. *Thompson v. King*, 54 Ark. 9, 11, 14 S. W. 925, 926.

**Nonresidents.**

Act 1889, relating to the exemption of the wages of certain persons in the hands of employers, and providing that the wages of laborers, mechanics, and clerks who are the heads of families, in the hands of those by whom such laborers, mechanics, or clerks may be employed, shall be exempt from the operation of attachment, execution, and garnishee process, applies as well to heads of families who are not residents of the state as to those who are residents of the state. *Wright v. Chicago, B. & Q. R. Co.*, 27 N. W. 90, 92, 19 Neb. 175, 56 Am. St. Rep. 747.

**Partnership.**

A partnership cannot be the head of a family, within the meaning of a state law allowing property of a certain value to be selected and claimed as exempt by heads of families. *In re Lentz* (U. S.) 97 Fed. 486, 487; *State ex rel. Billingsley v. Spencer*, 64 Mo. 355, 356, 27 Am. Rep. 244.

A partnership is a legal, but not a social, entity, and consequently cannot be regarded as the head of a family, within the meaning of an exemption statute. *Lynch v. Englehardt-Winning-Davison Mercantile Co.*, 96 N. W. 524, 525, 1 Neb. (unof.) 523.

Two equal partners, living together in the same house, and under a contract that their employes, as a part of the consideration, should board and lodge them at their house, and all—partners and employes—should eat at the same table, would not of itself constitute the family relation, within the meaning of the statute requiring jurors to be heads of families. Such relation must consist of some tie closer in its moral obligation, and of greater permanence in its character, than merely boarding employes during the limited term of their service; and as to two equal partners living and messing together as a matter of convenience and economy, perhaps, in their business relations, neither could be considered the head of the other, in the sense of the family relation. *Territory v. Lopez*, 2 Pac. 364, 365, 3 N. M. (Johns.) 104.

**Single person.**

A woman who has never been married and has no children is not a family, or head

of a family, so as to be entitled to hold a homestead. *Woodworth v. Comstock*, 92 *Mass.* (10 *Allen*) 425.

The term "head of a family," within the homestead exemption statute, does not apply to an unmarried man having no inmate of his house depending on him, although he has hired servants or laborers in his employ. *Cochran v. Miller*, 74 *Ala.* 50, 57; *Garaty v. Du Bose*, 5 *S. C.* (5 *Rich.*) 493, 499; *Calhoun v. McLendon*, 42 *Ga.* 405, 406; *Calhoun v. Williams* (Va.) 82 *Grat.* 18, 20, 84 *Am. Rep.* 759.

"Head of a family," within the meaning of the clause of the Texas Constitution exempting a homestead to the head of a family, does not include an unmarried man having orphan children bound to him under the apprentice laws of Texas, and keeping house, hiring servants, and conducting the household. *In re Summers* (U. S.) 23 *Fed. Cas.* 379, 380.

The term "head of a family," within the meaning of the statutes of South Carolina creating exemptions in favor of the head of a family, does not include an unmarried person who adopts another's child, and maintains servants and a household. *In re Lambson* (U. S.) 14 *Fed. Cas.* 1047, 1048.

#### Single person supporting relatives.

An unmarried man residing with his mother, paying the rent and household expenses, and supporting his mother, is the head of a family, within the exemption laws. *State, to Use of Smythe, v. Kane*, 42 *Mo. App.* 253, 255; *Parsons v. Livingston*, 11 *Iowa*, 104, 106, 77 *Am. Dec.* 185.

Though a man supporting his widowed mother and sisters, and living with them, is ordinarily deemed the head of the family, within the exemption law, it is not so when the claim of exemption is invoked against an execution issued under a judgment obtained against him by his wife for maintenance. *Spengler v. Kaufman*, 46 *Mo. App.* 644, 649.

A man may be the head of a family, within the meaning of the exemption act, though he has neither wife nor children. It is not necessary that the relation of husband and wife should exist in every case to constitute a family, and, where a brother had his widowed sister and her children living with him, and he supported them, he will be considered manager of the house and head of the family. *Wade v. Jones*, 20 *Mo.* 75, 77, 61 *Am. Dec.* 584. *Contra*, see *Dendy v. Gamble*, 64 *Ga.* 528.

The term "head of the family," in the constitutional provision providing that the homestead of any married man or head of the family shall not be incumbered, except, etc., includes a son of a former owner of the homestead, who succeeds his deceased father

in the care of his minor sisters, who continue to live with him in the family mansion when not at school. *Greenwood v. Maddox*, 27 *Ark.* 648, 658.

The term "head of a family," in the exemption law, means any one upon whom others are dependent for support, where they live in a family relation, and would include a man who lives with his invalid sister and supports her, though his sister owns the property on which they live. *Moyer v. Drummond*, 10 *S. E.* 952, 953, 32 *S. C.* 165, 7 *L. R. A.* 747, 17 *Am. St. Rep.* 850.

The man who controls, supervises, and manages the affairs of the house is the head of the family, and such a man need not necessarily be a husband or father. So it is held that a person who resides with his widow mother and two sisters, who are wholly dependent upon him for their support and maintenance, is the head of the family, within the meaning of an exemption in a garnishment statute. *Rolater v. King*, 78 *Pac.* 291, 292, 18 *Okl.* 37.

Where one's mother, brothers, and sisters lived on his land, and in his house with him, and he, to this extent, at least, contributed to their support, he was, though unmarried, the head of the family, within the homestead act of 1875, providing that the homestead, on the death of the head of the family, shall pass to the widow and children, etc. *Broyles v. Cox*, 54 *S. W.* 488, 489, 153 *Mo.* 242, 77 *Am. St. Rep.* 714.

Where a bachelor lived on a farm owned by him, a widowed sister living with him, making the farm her home, and having her furniture there, and paying no board, they constituted a family, though she, owing to ill health, spent much of her time visiting with other relatives; and he was entitled to the farm as a homestead exempt from seizure for his debts, as the head of a family, under the Missouri homestead exemption laws. *Bailey v. Comings* (U. S.) 2 *Fed. Cas.* 367, 368.

Within the meaning of *Rev. Code*, § 3625, defining "head of family," as used in the chapter relating to homestead exemptions, as including "every person who has residing on the premises with him or her, and under his or her care and maintenance, either \* \* \* a minor brother or sister \* \* \* or an unmarried sister, or any of the relatives mentioned in this section who have attained the age of majority, and are unable to take care of or support themselves," an unmarried man who had living with him a brother who was afflicted with asthma, who was unable to do manual labor, except to work in the garden for an hour or two in the morning, and who was practically without any means of support, and who required more or less care all the time, and some days required constant attendance, and whose wife, who lived with them, had no property

or means of any kind—such unmarried man furnishing all the provisions and the clothing and expenses necessary for the house—was the head of a family, and entitled to the homestead exemption as such. *Webster v. McGauvarn*, 78 N. W. 80, 81, 8 N. D. 274.

Rev. St. §§ 5430, 5483, providing, among the exemptions granted to heads of families and widows, that every person who has a family and every widow may hold the following property, to wit, the personal earnings of the debtor, and the personal earnings of his or her minor child or children, when it is made to appear that such earnings are necessary to the support of such debtor, or of his or her family, do not include a debtor residing with his widowed mother and invalid brother, who are supported by him. The words of the statute suggest and imply support or maintenance by a parent. The exemption from execution and attachment of the personal earnings of the debtor, and of his or her minor child or children, points to the parental relation, and to one as the head of a family who is under a legal obligation to provide for their support. *Riley v. Hitzler*, 32 N. E. 753, 49 Ohio St. 651.

Within the meaning of Const. Ark. art. 9, § 3, which exempts the homestead of any resident of the state who is married or the head of a family, the term "head of a family" should be given a broader construction than merely applying it to the husband or father; and, while it is true that there is some conflict of authority as to whether an unmarried man can be the head of a family, the weight of authority is in favor of considering every person the head of a family who keeps house, and has living with him and is supporting some persons whom it is either his legal or moral duty to support, so that an unmarried man, who owns a house in which he resides with his widowed mother and minor brother, who are not able to support themselves unaided, and to whose support he contributes from his wages, is the head of the family. *In re Morrison* (U. S.) 110 Fed. 734, 735.

"Although in general it is the husband, father, or mother who is the head of the family, yet, where a son of full age assumes the obligation of providing for the widowed mother and her children, with whom he lives, and who are dependent upon him, he is, in legal contemplation, the head of the family; and the provision of Rev. St. c. 134, § 31, apply to him, as such, and will protect from sale or execution for his debts grain belonging to him, not exceeding what is required for the food of the family." *Connaughton v. Sands*, 32 Wis. 387, 392.

The clause of the Constitution entitling the head of a family to a homestead, includes an unmarried man whose indigent mother and sisters live with him and are supported

by him. "A husband, a widow, a guardian or trustee, who represents those who are dependent upon him or her for a support, and is the head of a family of such dependents, is entitled to a homestead; and we see no reason why the same rule does not apply in favor of the head of any other household of dependents whom it is his legal duty to support." *Marsh v. Lazenby*, 41 Ga. 153, 154.

An unmarried woman who has the care and custody of her minor child is entitled to an exemption under a statute exempting a certain amount of property of the head of a family; and this is true even though she has never been married, and the child is illegitimate. *Ellis v. White*, 47 Cal. 73, 75.

"Head of family," as used in the statute providing that the homestead of the head of a family shall be exempt from sale on execution, etc., would include a feme sole who has living with her, and dependent on her for support, an invalid sister, though it does not appear that she lives on the land in which the homestead is claimed. *Chamberlain v. Brown*, 11 S. E. 439, 33 S. C. 597.

The term "head of a family," within the meaning of the homestead exemption law, includes an unmarried woman living upon premises owned by her, and having living with her two children of a deceased sister, for whom she provides and cares. *Arnold v. Waltz*, 6 N. W. 40, 53 Iowa, 706, 36 Am. Rep. 248.

"Head of the family," within the meaning of the homestead law, does not apply to a daughter owning a half interest in the premises occupied by her parents, with whom she does not live, but whom she and her brother help to support. It is plain that the daughter does not control, supervise, or manage the homestead. It is one thing to aid one's parents by remittances from time to time, and quite another to assume control of their household, and manage and supervise the matters about the house. *Ridenour-Baker Grocery Co. v. Monroe*, 43 S. W. 633, 634, 142 Mo. 165.

#### Widow.

A widow with two infant children wholly dependent on her for support is a "head of a family," within the meaning of a constitutional provision that every householder or head of a family shall be entitled to claim certain exemptions. *Oppenheim v. Myers*, 99 Va. 582, 586, 39 S. E. 218.

In *Bachman v. Crawford*, 22 Tenn. (3 Humph.) 213, 215, 39 Am. Dec. 163, a widow who had gone with her children to live with her father, who owned land and permitted her children to cultivate such land as they chose, was correctly held to be the head of a family. Judge Green in the opinion in this case, in defining "head of a family,"

goes on the idea that the party must have a family circle, with his wife or children, or other similar relations, at a place of residence within his own home or house, or in some one else's house over whom he exercised the control, and over which he has the direction as the head. The very idea of a family is plural, carrying with it the notion of more than one, and such parties occupying a peculiar social relation to each other. There must be a home, and a family circle at that home of one or more under his control. That home may be the occupation of an entire house, or it may be of a single room. If his family are there habitually with him, or usually with him, this is his home, and that of such family as he has. *Searcy v. Short*, 69 Tenn. (1 Lea) 749, 751.

#### Widow without children.

The term "head of the family," within the meaning of the homestead act, includes a husband while living, and upon his death the widow takes that capacity, and all the incidents, privileges, and responsibilities attached to it. The leading idea is the protection of the family. To carry out this intent any individual of either sex may be the head of the family. It is not necessary that the head of the family should be a married person. As the primary object of the law was the protection of the family, when the family ceases to exist, the reason for the privilege is gone. *Revalk v. Kraemer*, 8 Cal. 66, 72, 68 Am. Dec. 304.

The term "head of a family" does not include a widow who has no children living with her dependent on her for support, and therefore she is not entitled to a homestead out of the property of her deceased husband as the head of a family, according to the true intent and meaning of the Constitution of 1868. *Kidd v. Lester*, 46 Ga. 231.

The term "head of a family," as used in statutes providing that the homestead of the "head of a family" is exempt from sale on execution, includes a widow who undertakes to support and care for the minor children of her deceased husband by a former marriage. *Holloway v. Holloway*, 12 S. E. 943, 944, 86 Ga. 576, 11 L. R. A. 518, 22 Am. St. Rep. 484; *Lathrop v. Soldiers' Loan & Building Ass'n*, 45 Ga. 483, 485.

That a widow has no child or children is no ground for holding that she is not the head of a family, entitled to the homestead exemption allowed by the Constitution. *Bradley v. Rodelsperger*, 8 S. C. 226.

"Head of a family" does not include a widow residing in her house, with no other persons save her employes and servants. *Murdock v. Dalby*, 18 Mo. App. 41, 47.

"Head of a family," as used in Rev. St. § 2343, providing that the homestead shall be

exempt from execution when owned by the head of a family, should be construed to include a wife whose husband had occupied the premises as a homestead until forced to leave, about the close of the Civil War, by the disturbed condition of the country, when they removed to another state, where he shortly afterward died; the wife, who had no children, then returning to the homestead and residing thereon, keeping house with her brother. *Leake v. King*, 85 Mo. 413, 417.

The term "head of a family," within the meaning of exemption laws, includes a widow, who has been left in the possession of a farm and its appointments by her husband's death, and who has cultivated it as such for eleven years, it being her only means of support; and this is true, although her children are married and not living with her, and though she has rented the farm to another person, who uses her stock in its cultivation, she having reserved one room in the house for her own occupation. *Collier v. Latimer*, 67 Tenn. (8 Baxt.) 420, 35 Am. Rep. 711.

The term "head of a family," in Code 1873, § 3072, providing that a debtor who is the head of a family may hold certain property exempt from execution, does not include a widow living alone, though she once had others living with her who depended on her for support. *Emerson v. Leonard*, 65 N. W. 153, 154, 96 Iowa, 311, 59 Am. St. Rep. 372.

Const. 1870, art. 11, § 11, providing that a homestead in the possession of each head of a family to the value of a certain sum should be exempt from sale under legal process during the life of such head of a family, should be construed to include a widow residing on her dower land, keeping house, and having the charge of the orphan children of a sister and children of a sister of her late husband. The phrase "head of a family" would clearly embrace a husband with a wife and children, or a husband with a wife alone, occupying a homestead. *Ex parte Brien*, 2 Tenn. Ch. 33, 35.

#### Widower.

The term "head of a family," as used in Gen. St. 1897, c. 118, § 8, was held not to include a husband, who after the death of his wife placed his two children with relatives, disposed of nearly all of his household goods, and lived at different places as a boarder, but did not reside with either of his children. *Gibson v. Gross*, 54 Pac. 796, 8 Kan. App. 548.

The "head of a family," within the exemption laws, includes "a widower having a minor child residing with him and supported by him at his dwelling place. Probably the primary signification would be the husband

and father of a wife and children, residing together; but the term cannot be thus restricted, especially when used in a statute requiring a liberal construction in order to accomplish the humane object of the statute. One may be the head of a family who is not a husband or father, provided he is the head or manager of a household of collected persons." *Barney v. Leeds*, 51 N. H. 253, 265.

Within exemption laws, a "head of a family" would include a man whose wife had moved out of the state and obtained a divorce, decreeing that she have the custody of the children, provided he continued to contribute to the support of the said children. *Roberts v. Moudy*, 46 N. W. 1013, 30 Neb. 683, 27 Am. St. Rep. 426.

The term "head of a family," in the homestead laws, applies to a negro father living with a child of a woman with whom he had lived as husband and wife prior to the Civil War, and who was included in the act of 1865, declaring such persons to be lawfully married. *Myers v. Ham*, 20 S. C. 522, 528.

#### Widower with adopted child.

A man, whose wife and children die after he has informally adopted a niece, with whom he continues to live, is a head of a family, within the meaning of the statute giving a homestead exemption to heads of families. "The authorities in this state, as well as elsewhere, show very clearly that it is not necessary that the relation of husband and wife or parent and child should exist in order to constitute a family. Nor is it necessary that there should be any blood relationship between one claiming to be the head of a family and the members thereof, nor is it necessary that there should be any legal obligation on the part of one claiming to be the head of a family to support the members thereof, but a moral duty arising from ties of consanguinity or affinity, or perhaps other similar relations, will be sufficient. But those who are said to constitute the family must be persons who are in some measure dependent upon the head of the family for support, and who have a right to expect the same, and who, therefore, have an interest in the head of the family, holding a portion at least of his property, and would be prejudiced by its seizure and sale under execution. *Fant v. Gist*, 15 S. E. 721, 36 S. C. 576.

"Head of a family," within the meaning of the exemption laws of Georgia, exempting a homestead to the head of a family, includes a man whose wife is deceased, but who maintains a house, and hires servants, and resides therein with a widow not related by blood to him, but whom he and his wife had educated and regarded as their adopted daughter, but had failed to adopt in accord-

ance with the law. In *re Taylor* (U. S.) 23 Fed. Cas. 730.

"Head of a family" does not include a childless widower, who shelters, but does not support, an informally adopted daughter and her husband. *Hill v. Franklin*, 54 Miss. 632, 634.

#### Wife.

The husband, and not the wife, is primarily the "head of the family," and as a result merely of the conjugal relation, a wife, who is a debtor, does not occupy the relation of head of the family, for the purpose of claiming exemptions, though the statute provides that the wife, when a claimant, is included within the meaning of the phrase "head of the family," but that under certain conditions, which may be shown to exist from necessity, the wife may be compelled to accept the burden of maintaining the family, and in such exceptional conditions the law concedes to her the family headship for the purpose of claiming exemptions. *Ness v. Jones*, 88 N. W. 706, 708, 10 N. D. 587, 88 Am. St. Rep. 755.

A married woman living with her husband is not the head of the family; for, where the husband and wife are living together, the law recognizes the husband as the head of the family, so that a wife is not entitled to an exemption, under a statute authorizing a homestead exemption to the head of a family, while she is living with her husband. *Bennett v. Trust Co. of Georgia*, 32 S. E. 625, 626, 106 Ga. 578.

The term "head of the family" is used in reference to the relation existing between the members of the family as recognized by law and the usage of society. There may be a head of the family when there is no marriage relation existing. When, however, the marriage relation does exist, the headship of the family would not be one of fact, but of law. That it is a question of law when the husband is resting under no disability cannot be doubted. One reason, and only one, can be given. It is this: The universal sentiment of the people is, and has been for ages, that the husband is the head of the family. The term was used by the Legislature in the statute in question in its universally accepted significance. *Van Doran v. Marden*, 48 Iowa, 186. Thus a wife is not the head of the family, even though she own the land upon which the family live and from which they derive their living. *McGinnis v. Wood*, 47 Pac. 492, 495, 4 Okl. 499. Contra, see *McPhee v. O'Rourke*, 15 Pac. 420, 10 Colo. 301, 3 Am. St. Rep. 579.

A wife, residing with her husband, is not shown to be the "head of the family," within the meaning of the exemption laws, by the mere fact that she is on the premises, and that the property thereon is her sole



and separate property, and that she has children by a former husband residing with her. *Clinton v. Kidwell*, 82 Ill. 427, 429.

Under Const. Va. art. 11, which secures to every householder or "head of the family" a homestead exemption, a married woman who holds the title to the property, although living with her husband, is entitled to claim the exemption as against her own creditors. She is the head of the family, either alone or jointly with her husband, for homestead purposes. *Richardson v. Woodward* (U. S.) 104 Fed. 873, 876, 44 C. C. A. 235.

Where a woman, a resident of Kansas, at the time of her marriage, marries a man in Missouri, who had never been a resident of Kansas, and who had no residence anywhere, and who did not live with his wife in Kansas, to which she returned, she may be a head of a family in Kansas, so as to hold property exempt from judicial process. *Adams Exp. Co. v. McConnell*, 27 Kan. 238, 240.

Where a wife, although doing business in her own name and with her own money, does not have exclusive charge of the family, managing and controlling the earnings and productions of the family, and the financial and business interests necessary to support and keep it together, she is not the "head of the family," within the meaning of exemption laws. *John V. Farwell Co. v. Martin*, 65 Ill. App. 55.

A married woman, whose husband lives in another county and occasionally visits her and sends her money, all the children being of age, is not a householder or head of a family. *Oppenheimer v. Myers*, 39 S. E. 218, 219, 99 Va. 582.

#### Wife supporting family.

Where a husband absconded, and the maintenance and support of the family thereby devolved upon the wife, she was the head of the family, and as such entitled to the exemption of property allowed by law to the head of the family. *State v. Wilson*, 31 Neb. 462, 48 N. W. 147; *Frazier v. Syas*, 4 N. W. 934, 935, 10 Neb. 115, 35 Am. Rep. 466. So, also, where by the departure of her husband for temporary or permanent purposes the maintenance and support of the family devolved upon the wife. "To hold that by a departure of the husband the family would be deprived of the right to hold such property would in effect destroy the beneficial purpose of exemption laws." *Hamilton v. Fleming*, 41 N. W. 1002, 1004, 26 Neb. 240.

Within the statute of exemptions, the head of a family includes a married woman who has been abandoned by her husband, but who is living with and supporting her child, *Nash v. Norment*, 5 Mo. App. 545.

The terms "householder" and "head of a family," within the meaning of the exemp-

tion statute, may be properly used to characterize a married woman, who separates from her husband, though by agreement, and maintains herself and family without the aid of her husband. *Kenley v. Hudelson*, 99 Ill. 493, 500, 39 Am. Rep. 81.

A married woman, on whom a family is dependent for maintenance, is the head of the family; the husband being an invalid. *Schaller v. Kurtz*, 41 N. W. 642, 25 Neb. 655; *Linander v. Longstaff*, 68 N. W. 775, 7 S. D. 157. So, also, where he was a cripple and unable to work, and contributed nothing for the support of the family, while the wife solely supported the family. *State v. Houck*, 49 N. W. 462, 32 Neb. 525.

Where the husband had been insane, but was so far recovered as to live at home with his wife and children, doing nothing, however, toward his own support or that of the family, while the wife, with the assistance of her children, carried on the farm on which they lived, taking the actual control and management of the farm, she thereby made herself the head of the family, and as such was entitled to the exemption allowed by statute to the head of a family. *Temple v. Freed*, 21 Ill. App. 238, 239.

Under Code, § 1753, declaring that the husband is the head of the family, a wife living with her husband could not be the head of the family, though the husband was physically unable to work, and she had a separate estate, and supported herself and minor children. *Johnson v. Little*, 17 S. E. 294, 295, 90 Ga. 781.

Const. art. 9, § 2, exempts certain "personal property of any resident of this state" who is "married or the head of a family" from seizure on attachment or sale on execution or other process from any court, etc. Held, that this provision of the statute did not apply to men alone, but was applicable to one of either sex who was charged with the care and maintenance of a family, and that it would include a married woman who has a separate estate. *Memphis & L. R. Ry. Co. v. Adams*, 46 Ark. 159, 163.

The term "head of the family," within the meaning of the homestead law, applies to a husband, and not to his wife, though her four minor children live and are supported by her in a building constructed with her own earnings, while the husband for eight years has slept in a cabin back of the house, is indolent, and has worked a little at intervals, and testifies that it was his fault that he has not been steadily at work, and who has often left home after quarrels with his wife. *Barry v. Western Assur. Co.*, 49 Pac. 148, 149, 19 Mont. 571, 61 Am. St. Rep. 530.

#### In Indian treaties.

Dancing Rapids Creek Treaty 1830, between the United States and the Choctaw

Nation (article 19), provides that each head of a family who has cultivated 30 acres of land during the year of 1880 should have three quarter sections of land, to include his improvements, etc. Held, that the term "head of a family," mentioned in the treaty, must be presumed to mean one who is so in the Choctaw sense of the term, or according to the usages and customs of that nation, which might include a white man married to a woman who was a member of the Indian nation, he having adopted her domicile and lived within the territory belonging to the nation. *Turner v. Fish*, 28 Miss. (8 Cushm.) 306, 311.

The phrase "head of an Indian family," as used in treaties with the Indians of 1817 and 1819, giving to each and every head of an Indian family certain lands, etc., should be construed to include a white man who has married an Indian woman. *Morgan v. Fowler*, 10 Tenn. (2 Yerg.) 450, 455.

### HEAD OF STREAM.

The head of a stream, meaning the origin thereof, is seldom to be found in a spring or fountain whose center can be readily taken, but in a swamp overspreading several acres of ground, through which the water flows in guts of various directions, except in a drought, when some of them become dry or stagnant, or the motion of them becomes different from another, or what was a water channel at one season may have none existing in it at another season. So a finding that a certain spot is "at or about" the head of a stream is a sufficient designation of the head of the stream. *State v. Coleman*, 13 N. J. Law (1 J. S. Green) 98, 104.

The "head of a creek" means the source of the longest branch, unless general reputation has given the appellation to another. *Davis v. Bryant*, 5 Ky. (2 Bibb) 110, 113.

The "head of a stream," called for in a boundary, is the highest point on the stream which furnishes a continuous stream of water, and not necessarily its longest prong. *Uhl v. Reynolds* (Ky.) 64 S. W. 498.

### HEAD OF WATER.

The term "head of water," as occurring in a contract calling for water power to be used in propelling a mill, being a technical term in hydraulics, constitutes "words of art," and as such may be properly explained by an expert witness. *Cargill v. Thompson*, 59 N. W. 638, 640, 57 Minn. 534.

A covenant in a lease provided that a head of not less than eight feet, measuring from the tail race of the mill at its lowest stage of water, should be maintained. In an action on the lease, the question was suggested whether this meant the lowest oper-

ating stage, or stage when the water is being furnished to the mill and it is being operated, or meant the stage when the mill was at rest and but little water running through the tail race. It was held that the term "head of water" was a word of art or a highly technical term in the science of hydraulics, and that an expert might testify as to its meaning, if there was any, for measuring to ascertain the head of water—whether to measure from the surface of the water in the tail race when the mill is in operation, or to measure from the surface of the water when the mill is at rest, and, *prima facie* construed, the words of the lease mean the lowest stage of water at any time, without reference to whether the mill was running or not, though its apparent meaning might be modified by expert testimony. *Cargill v. Thompson*, 59 N. W. 638, 640, 641, 57 Minn. 534.

In an action for flooding plaintiff's land by raising a dam, the court, in speaking of the word "head," as applied to water power in moving water wheels, said: "I had supposed that it was a matter of common knowledge that the signification of the term, when water is applied to such use, is the vertical distance between the water in a dam or place from whence it is drawn to the tail water of the wheel by which the power is communicated to the machinery, and unless it is shown that the water at the bottom of the dam is on the same level as the tail water of the wheel it would afford no evidence of the head." *Shearer v. Middleton*, 50 N. W. 737, 739, 88 Mich. 621.

### HEAD ON.

See "Meeting Head on."

### HEADACHE.

Where, in an application for life insurance, a general question precedes an enumeration of specific disorders inquired about, and directs the attention to such of them as are properly called diseases, a negative answer by the insured to a question whether he has "headaches" is not a misrepresentation, by reason of the fact that, when he is overworked, he is subject to headaches. The question concerning headaches has, in our opinion, no reference to occasional and temporary attacks of that character, which proceed from and evidence no vice in the constitution, but rather the result of casual causes. *Mutual Life Ins. Co. v. Simpson* (Tex.) 28 S. W. 837, 838.

### HEADING.

As used in 71 Ohio Laws, p. 81, providing that all ballots shall be printed on plain white printing paper, without any device to distinguish one from the other, except the

word at the head of the ticket, and that whenever any ballot with a "certain designated heading" shall contain printed thereon, in place of another, any name not found on the regular ballot having such heading, such name shall be regarded as having been placed there for the purpose of fraud, has reference only to the words at the top of the ticket, which designate the party, and does not apply to the other words on the ballot, which designate each class of offices to be filled. *Roller v. Truesdale*, 28 Ohio St. 586, 592.

### HEADQUARTERS.

"Headquarters," as used in Laws 1883, c. 356, as amended by Laws 1886, c. 205, providing that the Governor shall appoint some suitable person, who shall be designated "commissioner of statistics of labor," with headquarters in the new capitol at Albany, means not temporary headquarters, but permanent headquarters during his term of office. It does not mean that he is to occupy the corridors, rotunda, or some other open space in the capitol. Obviously it means that, like other public officers, he is to have a room in the capitol for his occupation and for the discharge of his duties. The statute gives him the right to such a room, and thus it is made the duty of those who by law have charge of the capitol to assign him a room, and if they should refuse to do so they could be compelled by mandamus. *People v. Peck*, 34 N. E. 347, 350, 138 N. Y. 386, 20 L. R. A. 381.

### Of railroad.

In reference to the place of business of a corporation, "headquarters" is synonymous with the words "principal office"; neither term signifying the location of the purely administrative offices of the company. *Jossey v. Georgia & A. Ry.*, 28 S. E. 273, 274, 102 Ga. 708.

"Headquarters," as used in Sp. Laws 1879, c. 182, voting bonds to a certain railroad, provided the eastern terminus, general offices, and headquarters of said railroad should be in a certain city, should be construed to mean the headquarters of the railroad maintained for the purpose of the operation and management thereof. *State v. City of Minneapolis*, 21 N. W. 722, 723, 32 Minn. 501.

### HEADRIGHT CERTIFICATES.

A headright certificate is a certificate issued under authority of Act Jan. 4, 1839, by which it was provided that every person immigrating to the republic between October 1, 1837, and January 1, 1840, who was the head of a family and actually resided within the government with his or her family, should be entitled to a conditional grant of

640 acres of land; the conditions of the grant being that both grantee and his or her family should reside permanently within the republic and perform all conditions required of other citizens for the term of three years, after which time he should receive an unconditional deed for the grant of land. It was provided that no sale of the claim should be valid and binding on the person selling the same until an unconditional deed should be obtained, and that in no case should a grant be made except on satisfactory proof that all the provisions and conditions of the law had been complied with. *Cannon's Adm'r v. Vaughan*, 12 Tex. 399, 401; *Turner v. Hart*, 10 Tex. 438, 441.

### HEADACHE WAFERS.

The phrase "headache wafers," employed as the name of a medicine, being in common use and descriptive, is such that no exclusive right to the same as a trade-mark can be obtained. *Gessler v. Grieb*, 48 N. W. 1098, 1100, 80 Wis. 21, 27 Am. St. Rep. 20.

### HEALERS.

The term "healers" is used by the believers of Christian Science to designate those who attempt demonstrations of the science, and who treat disease without the use of any material means whatever. "They do not claim to cure all bodily ills, but they attribute their failures, not to the nature of the illness, but to the imperfect realization by the healer of the divine mind, since to them the possibilities of Christian Science are infinite. It is their belief, on the other hand, that, when a patient does recover, the healer has realized sufficiently the truths as taught by 'Science and Health' and the Bible, and has, by his understanding of the power of God as thus demonstrated by Christian Science, been able to remove the imperfections of which the disease was the result." These beliefs, being founded on the religious convictions of those professing them, do not authorize the court to say that they are mentally unsound. In *re Brush's Will*, 72 N. Y. Supp. 421, 425, 35 Misc. Rep. 689.

### HEALTH.

See "Board of Health"; "Good Health"; "Sound Health."

Act March 23, 1871, incorporating the city of Paterson, creates a department of health, and enacts that for the preservation and promotion of the health of the city that department would have power to regulate and control the manner of erecting and constructing dwelling houses and other buildings in said city, but contains no general welfare clause, or clause conferring general po-

lice powers. Held, that the power of such department to regulate the erection, etc., of buildings, is limited to such matters as affect health, in the sense of freedom from disease, and it has not the power to regulate the thickness of the outside walls of buildings, etc. *Hubbard v. City of Paterson*, 45 N. J. Law (16 Vroom) 310, 312, 46 Am. Rep. 772.

### HEALTHY.

The act of Vermont of 1797, relating to a settlement that might be gained by a "healthy and able-bodied person" by a continuous residence for one year, did not mean that such person should invariably continue in health throughout the year, nor remain wholly exempt from those accidents which might impair his physical energies for a time; but it was sufficient if the words of the statute could be predicated of the person in his usual condition. *Town of Starksboro v. Town of Hinesburgh*, 15 Vt. 200, 209.

"The term properly applies to a condition of the body, and not to the mind. We do not say that a person has a healthy mind when we wish to convey the idea of a sound intellect, nor do we say that a person has an unhealthy mind when we wish to convey the idea of a weak intellect." *Nelson v. Biggers*, 6 Ga. 205, 206.

Judge Pearson, in *Bell v. Jeffreys*, 35 N. C. 356, in holding that myopia, or shortness of sight, in a negro slave, was unsoundness, though not unhealthiness, within the meaning of a warranty that a slave was sound and healthy, said that "the word 'healthy,' in its ordinary acceptation, means free from disease or bodily ailment, or a state of the system peculiarly susceptible or liable to disease or bodily ailments." A defect in the structure of the little fingers of a slave can be no more a want of soundness in health, in the ordinary acceptation of the term "health," than myopia, or shortness of sight. *Harrell v. Norvill*, 50 N. C. 29, 32.

A statement by a seller of a horse to the purchaser that the horse is healthy and sound, though made with the knowledge that it is false, is merely a statement of a falsehood, and does not constitute a false pretense. *State v. Holmes*, 82 N. C. 607, 608.

### HEAR.

The words "receive, hear, and determine," in Act March 3, 1803, c. 93, § 2, authorizing appeals from the District Courts of the United States to the Circuit Court, and requiring the Circuit Court to receive, hear, and determine such appeals, does not authorize a retrial by jury of a cause which has been tried by jury in the District Court. *United States v. Wonson* (U. S.) 28 Fed. Cas. 745, 747.

The Constitution, in providing that the concurrence of four justices present at the argument is necessary for a judgment by the court in bank, and that if four justices so present do not concur in a judgment all the justices qualified to sit in the cause shall "hear the argument," does not mean that the justices qualified to sit shall literally hear the argument, but means that the argument shall be considered by the court. *Niles v. Edwards*, 30 Pac. 134, 135, 95 Cal. 41.

### As implying power to determine.

"Hear," as used in Laws 1887, p. 30, providing that, when a petition to organize an irrigation district is presented, the board of supervisors shall hear the same, and may adjourn the hearing from time to time, and on the final hearing may make such changes in the proposed boundaries as they may find to be proper, and shall establish and define such boundaries, cannot be held to include the power to determine the entire merits of the petition, in view of the affirmative requirements contained in the same sentence that on its final hearing the board shall establish and define such boundaries. *Bradley v. Fallbrook Irr. Dist.* (U. S.) 68 Fed. 948, 962.

The term "hear," in the consent of a party that a court may hear his cause, amounts to a consent that it shall make a decree therein, and a consent that the court shall decree in the case wholly abandons the objection arising from the want of parties. *Mayo v. Murchie* (Va.) 3 Munf. 358, 397.

### HEAR AND DETERMINE.

Authority to hear and determine a cause is jurisdiction to try and decide all the questions involved in the controversy. *Quarl v. Abbott*, 1 N. E. 476, 480, 102 Ind. 233, 52 Am. Rep. 662.

The power to hear and determine is an essential ingredient of original jurisdiction, and the authority to examine and correct errors is the distinguishing characteristic of appellate power. To hear and determine a criminal case is to proceed after bill found, and to try the issues of fact and pass sentence. *Commonwealth v. Simpson* (Pa.) 2 Grant, Cas. 438, 439 (citing 4 Bl. Comm. 270).

The words "hear and determine" refer to judicial determination after the hearing and weighing of testimony on both sides, and do not include an ex parte accounting. *Stanton v. United States* (U. S.) 37 Fed. 252, 255.

The power to hear and determine, in a statute authorizing the board of claims to hear and determine certain claims, includes power to reject, as well as to allow. *Cole v. State*, 6 N. E. 277, 278, 102 N. Y. 48.

**HEARD.**

The right guaranteed by the Constitution of Texas to the accused in all criminal cases of being heard by himself or counsel, or both, gives him a right to be heard in person as well as by counsel in the trial court; but it does not give him the right to be taken from jail to the appellate court and be heard by himself there on the consideration of his appeal. *Tooke v. State*, 3 S. W. 782, 783, 23 Tex. App. 10.

**As implying oral argument.**

The use of "heard," in Bill of Rights, § 24, providing that the right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied, does not indicate that an oral presentation of a controversy to the court should not be refused, but was intended in the sense of review, and hence Sup. Ct. Rule 2, § 3, providing for the submission of the cause without argument, is not unauthorized. *Schmidt v. Boyle*, 74 N. W. 964, 965, 54 Neb. 387.

"Heard," as used in the Constitution, providing that, within 30 days after judgment has been pronounced in a cause by a judge, an order may be made that it be heard and decided in bank, merely means that the cause may, after such judgment, be considered and determined by the court in bank, and does not necessarily imply that an additional or oral argument must be made or listened to before it can be so considered and determined. "The term 'heard' as here used is taken from the practice in equity procedure, and corresponds to the term 'trial' as used in cases of law. It signifies the consideration and determination of a cause by the court or by a judge, as distinguished from the trial of a cause, which is a term more properly predicated of its determination by a jury." *Niles v. Edwards*, 30 Pac. 134, 135, 95 Cal. 41.

**As importing a trial.**

Laws 1873, c. 335, § 25, providing that the heads of all departments in the city of New York, and all other persons whose appointment is in this section provided for, may be removed by the mayor for cause after an opportunity to be heard, "implies that a hearing must be had, which is equivalent to a trial." *People v. Thompson*, 94 N. Y. 451, 465.

**HEARD FROM.**

"Heard from," as used when saying that one person has not heard from another, refers to some direct personal communication by letter or otherwise. Hence, in an action for divorce under the New Hampshire statutes, which declare that absence for three years without being heard of is a ground for

divorce, proof that the party had not been "heard from" is not equivalent to proof that the party had not been "heard of." *Fellows v. Fellows*, 8 N. H. 160, 162.

**HEARING.****See "Final Hearing or Trial."**

The term "hearing," within the removal statute, requiring a petition for removal to be made before the final hearing or trial of the suit, refers to equity suits. *Waggener v. Cheek* (U. S.) 28 Fed. Cas. 1324, 1325; *Vannevar v. Bryant*, 88 U. S. (21 Wall.) 41, 43, 22 L. Ed. 476; *Wooster v. Handy* (U. S.) 23 Fed. 49, 53; *Chandler v. Coe*, 56 N. H. 184, 186, 22 Am. Rep. 437; *Akerly v. Villas*, 24 Wis. 165, 171, 1 Am. Rep. 166; *Jones v. Foster*, 20 N. W. 785, 786, 61 Wis. 25; *Burson v. National Park Bank of New York*, 40 Ind. 173, 179, 13 Am. Rep. 285.

"Hearing" is an equity term, properly applied to the argument and consideration of the case at the several stages of its orderly progress, and, when applied to that upon which the case is absolutely determined, it is qualified by the word "final." *Miller v. Tobin* (U. S.) 18 Fed. 609, 616.

The trial of a chancery suit is called a "hearing," and, technically considered, this includes not only the introduction of the evidence and arguments of the solicitors, but the pronouncing of the decree by the chancellor. *Babcock v. Wolf*, 70 Iowa, 676, 679, 28 N. W. 490.

A hearing in equity is the trial of a case, including the introduction of evidence, the argument of the solicitors, and the decree of the chancellor. It is clear that the words are not used in such technical sense in Act June 6, 1900, c. 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 550], providing that where, upon a hearing in equity, an injunction shall be granted or continued, or a receiver appointed, an appeal may be taken from such interlocutory order; for the statute applies to interlocutory orders only. It is true the statute does not say "on an ex parte hearing," nor does it say "on the hearing of both parties," nor "on an adversary hearing"; but the words "hearing in equity" could not have been used in their technical sense, and therefore we must place on them some other interpretation, and one that will not defeat the purpose of Congress. When a motion to appoint a receiver is heard by the court and granted, whether on the averment and prayer of the bill or on a petition in the pending suit, there has certainly been a "hearing," in the ordinary sense in which the word is used. *Joseph Dry Goods Co. v. Hecht* (U. S.) 120 Fed. 760, 763, 57 C. C. A. 64.

In construing the federal removal act of 1866, requiring applications to remove cases

from the state to the federal courts to be made "before the trial or final hearing," it was said: "It is well known to every lawyer, and must have been understood in Congress, that according to the general usage by the bench and bar the term 'trial' is uniformly, though perhaps not universally, applied to the actual litigation of the merits in an action at law, as contradistinguished from the debate on the merits in a case in equity, and that 'hearing' is a term more precisely applied to equity cases and others savoring of civil law forms, as contradistinguished from those proceedings which are either grounded on the common law or are shaped by analogy to its forms and methods. It is, then, reasonable to suppose that in using the term 'trial,' Congress referred to proceedings of a common-law nature, and in using the term 'hearing' had in contemplation cases of equitable cognizance and any others of a civil law nature within the reason of the enactment, and that in using both terms they intended to mark and preserve the distinction which exists between them, and prescribe and confine their application to their respective subjects." *Crane v. Reeder*, 28 Mich. 527, 535, 15 Am. Rep. 223.

A stipulation of attorneys for the respective parties, which declares that the compensation of the referee shall be a certain sum per day for "every hearing," does not include days appointed for a hearing, but on which no hearing in fact was had, and when, in advance of the time appointed, the parties had agreed on a postponement, and in pursuance thereof had omitted to appear before the referee. *Mead v. Tuckerman*, 12 N. E. 64, 65, 105 N. Y. 557.

Within the legal signification of the term "hearing," as applied to objections made to commissioners appointed to assess damages for street improvements, is meant simply the receiving of facts and arguments thereon for the sake of deciding correctly, and, in the absence of statutory requirements that the objections should be in writing, it is not necessary that written objections be made as a basis for such hearing. *Merritt v. Village of Portchester* (N. Y.) 8 Hun, 40, 45.

Code 1892, § 933, provides that "when the trial of any case, civil or criminal, has been commenced and is in progress," and the time for the expiration of the term as fixed by law arrives, the court may proceed with "such trial or hearing," and bring it to a conclusion, in the same manner and with the like effect as if the stated term had not expired. Section 1522 provides that words and phrases are used in statutes in their ordinary meaning, and technical words and phrases in their technical meaning. Held that, as used in section 933, the hearing of a criminal case commenced, not at the later stage when jeopardy attaches, but at the instant the court enters on the impaneling

of a jury for an investigation of the matters of fact presented by the pleadings. *Lipcomb v. State*, 25 South. 158, 164, 76 Miss. 223.

#### As examination of issues.

In a statute relating to seizure and search of property, providing that the property taken shall be safely kept so long as necessary for the purpose of being produced or used as evidence on the trial, and that if, on the hearing, it appears that the warrant was issued without probable cause, the complainant may be required to pay the costs, the words "trial" and "hearing" are generally understood as meaning a judicial examination of the issue between the parties, whether of law or of fact. *Glennon v. Britton*, 155 Ill. 232, 243, 40 N. E. 594, 598.

Rev. Laws, § 2976, providing that if the commissioners appointed for the apportionment of expenses in repairing a highway and bridge among the towns to be benefited should, on an examination of all the circumstances relating to the road, be of the opinion that a town would be excessively burdened by defraying all the expenses, they should give reasonable notice to one or more of the selectmen of such towns as they deem especially benefited by the road or bridge of the time and place for a "hearing in the premises," embraces all the questions which are to be considered and passed upon by the commissioners. It covers the whole, and not a part, of the questions involved. After such notice is given, the whole matter is open for hearing and final determination. *Town of Weybridge v. Town of Addison*, 57 Vt. 569, 574.

#### Power to administer remedy implied.

The term "hearing," in a statute providing that reports of commissioners on proposed improvements shall be received, and a time shall be fixed by the court for hearing the report, necessarily implies the power to administer some adequate remedy. *Adams v. City of Shelbyville*, 57 N. E. 114, 121, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. Rep. 484.

Within the provision entitling a deputy marshal to a per diem for attendance before a commissioner as for hearing, where a case was set for trial on the day, but the defendant failed to appear, and his bond was estreated, and an attachment issued, there was a hearing, so as to entitle him to his fee; the commissioners' court being open in order to determine the question of default. *Puleston v. United States* (U. S.) 88 Fed. 970, 975.

#### Preliminary hearing.

As used in a statute allowing a United States marshal attendance fees for the "hearing and deciding" of criminal cases, the phrase is not confined to the actual trial of

the cause on its merits, but includes a hearing on the question of admissions to bail, or on motion to adjourn, or on arraignment or commitment. *Kinney v. United States* (U. S.) 54 Fed. 313, 316.

"Hearing and deciding" any criminal charges, within the meaning of Rev. St. § 847, allowing a United States commissioner five dollars a day for the time necessarily employed in hearing and deciding any criminal charges, includes hearing and deciding motions on bail and the sufficiency thereof, and motions for continuance. *United States v. Jones*, 10 Sup. Ct. 615, 616, 134 U. S. 483, 33 L. Ed. 1007.

Within the meaning of Rev. St. § 847, fixing the fees of commissioners, and allowing them "for hearing and deciding on criminal charges \$5 a day for the time necessarily employed," the hearing referred to is an examination of a prisoner charged with a crime or misdemeanor and of the witnesses for the prosecution and defense, and it does not include the examination of complaining witnesses to determine whether a warrant shall issue. *United States v. Patterson*, 14 Sup. Ct. 20, 21, 150 U. S. 65, 68, 37 L. Ed. 999.

#### Testimony required.

The mere inspection of a mine by arbitrators appointed to determine a controversy in relation thereto, without taking testimony or deciding points involved in the litigation, is not a "hearing," at which all the arbitrators are required to be present. *Glass Pendery Consol. Min. Co. v. Meyer Min. Co.*, 1 Pac. 443, 445, 7 Colo. 51.

#### HEARING ON BILL AND ANSWER.

A hearing in the chancery practice on the bill and answer has a definite legal meaning. It is when the complainant files no replication to the answer. In that case the complainant takes the risk of recovering upon his allegations and the defendant's answer; all the statements in the answer being taken as true, whether responsive to the bill or not. *Fall v. Simmons*, 6 Ga. 265, 268.

#### HEARSAY EVIDENCE.

"The term 'hearsay,'" says Mr. Greenleaf, "is used in reference to that which is written as well as that which is spoken, and in its legal sense denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but rests also in part on the veracity and competency of some other person." *State v. Ah Lee*, 23 Pac. 424, 425, 18 Or. 540; *Hopt v. Utah*, 4 Sup. Ct. 202, 205, 110 U. S. 574, 28 L. Ed. 262; *Morell v. Morell*, 60 N. E. 1092, 1093, 157 Ind. 179; *Dixon v. La-*

*bry* (Ky.) 29 S. W. 21, 22; *Shaw v. People* (N. Y.) 5 Thomp. & C. 439, 444, 2 Cow. Cr. R. 200, 204.

Hearsay evidence is not admissible to prove which of two persons, claiming by the same name a particular grant or reservation made by the treaty of Saginaw between the United States and the Chippewa Indians, was the person intended. Hearsay evidence is a statement which a witness professes to have heard, made by a third person as to some particular transaction or thing; literally, what the witness says he heard another person say. 1 Starkie, Ev. 229. To justify the introduction of hearsay evidence it must be shown to fall within some one of the exceptions recognized by the adjudged cases on that subject. These are divided by Mr. Greenleaf into four classes: (1) Those relating to matters of public and general interest; (2) those relating to ancient possession; (3) declarations against interest; (4) dying declarations, and some others of a miscellaneous nature. While the treaty itself was a public transaction, and perhaps a matter of public and general interest, the question as to which of two individuals was the person to whom a certain grant or reservation was made in such treaty was not one in which the public was interested, and could not be shown by hearsay evidence. *Stockton v. Williams* (Mich.) 1 Doug. 546, 570.

Hearsay evidence is a statement made by a person not called as a witness, which is received in evidence on the trial; and to this class dying declarations belong. *People v. Kraft*, 36 N. Y. Supp. 1034, 1035, 91 Hun, 474. Under this rule a narrative of a past transaction will be excluded, but where the question to be ascertained simply is whether the declaration was made, and not whether it was true, the fact testified to depends solely upon the credibility of the witness, and is therefore strictly and properly original evidence. *Shaw v. People* (N. Y.) 5 Thomp. & C. 439, 444.

"Fame," says Crabb, "has a reference to the thing which gives birth to it. It goes about of itself, without any apparent instrumentality. \* \* \* Hearsay refers to the receivers of that which is said, and hence it is limited to a small number of reporters or speakers. Fame serves to establish a character, either to a person or thing. There is a distinction, therefore, between hearsay and evidence of repute." *Commonwealth v. Murr* (Pa.) 42 Wkly. Notes Cas. 263.

Testimony which purports to relate what a testator said, after making a will, in relation to the causes which influenced him to make it, is in the category of hearsay evidence. *Schierbaum v. Schemme*, 57 S. W. 526, 530, 157 Mo. 1.

Evidence as to what a witness said at a former trial had between different parties is hearsay evidence. *Boardman v. Reed*, 31 U. S. (6 Pet.) 328, 341, 8 L. Ed. 415.

Proof of the general reputation of a person for sobriety among those employed with him is hearsay evidence. Intemperance, sobriety, and drunkenness are facts, to be proven like other facts. *Stevens v. San Francisco & N. P. R. Co.*, 35 Pac. 165, 169, 100 Cal. 554.

## HEARSE.

A hearse is a carriage for conveying the dead to the grave (Webst. Dict.), and is exempt under a statute exempting wagons. *Spikes v. Burgess*, 27 N. W. 184, 65 Wis. 428.

## HEART DISEASE.

A statement that "phlebitis and heart disease" were the cause of a death is not necessarily equivalent to a statement that organic heart disease had existed for any length of time, or existed at the time of death; phlebitis being an inflammation of the veins, capable of being communicated to the lining membranes of the heart, so that an inflammation of the heart is produced which is denominated "endocarditis" and is apt to result fatally. In such case, however, the acute inflammation of the veins should be regarded as the primary cause, and heart disease as the result or secondary cause, of the death. *Succession of Bidwell*, 27 South. 281, 284, 52 La. Ann. 744.

"Heart disease," within the meaning of a question in an application for a life policy whether the applicant's parents, etc., have been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or other hereditary disease, is to be construed only as an inquiry whether such relatives have been afflicted by such disease in a hereditary form; the word "other" in the question plainly indicating that the inquiry is so limited. *Gridley v. Northwestern Mut. Life Ins. Co.* (U. S.) 11 Fed. Cas. 2, 3.

## HEAT.

In a contract with a carrier to transport a lot of hogs for plaintiff from Buffalo to Albany, plaintiff assumed the risk of injuries in consequence of heat, etc., in consideration of a reduced rate of freight. Held, that the phrase "injuries in consequence of heat" should be construed as exempting defendant from injuries by heat, the result of negligence of defendant's employes in not watering and cooling the hogs by wetting, since the common-law liability of carriers does not apply to live stock, but in the transportation there-

of they were only liable for negligence, and hence such meaning must be given to the words of exemption, if they are to have any effect. *Cragin v. New York Cent. R. Co.*, 51 N. Y. 61, 64, 10 Am. Rep. 559.

## HEAT OF PASSION.

See "Sudden Heat and Passion."

The term "heat of passion," used to characterize murder in the second degree, is not used in its technical sense, but as a condition of mind, contradistinguished from a cool state of blood. *State v. Wieners*, 66 Mo. 18, 25.

The phrase "heat of passion" has a technical meaning, and should not be used in an instruction without explanation. *State v. Andrew*, 76 Mo. 101, 105.

By "heat of passion" is not meant passion or anger which comes from an old grudge, or no immediate cause of provocation, but it means passion or anger suddenly aroused at the time by some immediate reasonable provocation by words or acts of deceased at the time. *State v. Seaton*, 17 S. W. 169, 171, 106 Mo. 198.

### Anger synonymous.

See "Anger."

### As caused by just or lawful provocation.

The heat of passion that will take away the malice from an act manifestly dangerous to human life, and reduce homicide to manslaughter, must be caused by lawful provocation. *State v. Wilson*, 11 S. W. 985, 988, 98 Mo. 440.

"Heat of passion" at common law meant the heated state of the blood caused by a lawful provocation. In drawing the distinction between the two degrees of murder, passion or excitement of mind is divided into two phases. One phase reduces the act to murder in the second degree, and the other to manslaughter. When used in the definition of the various degrees of manslaughter, it is used in its ordinary common-law sense; that is, such heat of passion as is produced by a lawful provocation. The other is that passion which is produced by a just provocation. Opprobrious language, insulting gestures, and the like are a just provocation. Where the passion or excitement of mind is produced by such provocation to the extent that it materially interferes with the judgment and reason, an act done at once under its immediate influence is done in the heat of passion. *State v. Bulling*, 15 S. W. 367, 371, 105 Mo. 204.

The words "in the heat of passion," in the statutory definition of voluntary manslaughter, mean any heat of passion recog-



nized by law, whether produced by a just cause or provocation, or a lawful, adequate, or reasonable cause. *State v. Berkley*, 109 Mo. 665, 673, 19 S. W. 192.

#### As result of altercation.

It is held that an instruction that "heat of passion" means a quarrel, an altercation, in which the party killed is immediately concerned—that is, the heat of passion must not be all on one side, but there must be sufficient cause for it—is erroneous; the court observing that it is not always necessary to the existence of heat of passion that there should be a quarrel or altercation, in which the party killed is immediately concerned, but that, if the contemplated heat of passion actually exists, it would palliate the offense if the accused should, while thus excited, kill some other than the one engaged in the altercation with him. It was further said that the instruction was erroneous in stating that the heat of passion must not be all on one side, and that there must be sufficient cause for it. In criticism of this portion of the instruction the court said that the accused might be severely injured and his passions excited by the acts of one who was entirely cool and deliberate. *Wilson v. People* (N. Y.) 4 Parker, Cr. R. 619, 646.

### HEAVILY INVOLVED.

The expression "heavily involved in debt," in a testamentary provision that the rents and profits of certain property should be paid to a beneficiary, unless he became heavily involved in debt, is not of such vague and uncertain meaning as to make it void for uncertainty; but the court can ascertain from proof when the beneficiary is heavily involved in debt. *First Nat. Bank v. Nashville Trust Co.* (Tenn.) 62 S. W. 392, 403.

### HEAVY ARTICLE.

A charter of a railroad company prescribed a maximum rate of charge for the transportation of heavy articles by the 100 pounds and of articles of measurement by the cubic foot. It was held that it was properly left to the jury to determine whether cotton in bales were heavy articles, within the meaning which custom had given to those terms at the date of the charter. The term "heavy" is a comparative term as applied to different articles. Iron is heavy, feathers are light or bulky, yet a pound of feathers is as heavy as a pound of iron. Hence an article is heavy when a certain bulk has a certain weight, while one which has the same bulk, but weighs less, will not be heavy. On this principle we call iron heavy and feathers light. The difficulty is in drawing the line of demarcation or in ascertaining when the weight of an article,

compared with its bulk, makes it a heavy article. It may be said that lint cotton is not heavy, and that cotton compressed in very small bales, as is now done by powerful steam or hydraulic presses, is heavy. Considering bales of cotton as usually packed by farmers, with the bulk of 35 cubic feet, weighing only 460 pounds, they are not heavy articles. *Elder v. Charlotte, C. & A. R. Co.*, 13 S. C. 279, 281.

"Heavy articles," as used in the charter of a railroad company, providing that for the transportation of goods, produce, merchandise, and other articles it should not charge an amount exceeding 50 cents per 100 pounds for each 100 miles on heavy articles, and 15 cents per cubic foot on articles of measurement for every 100 miles, cannot be construed as a matter of law to include cotton packed in bales in the manner used for the purpose of transportation; but such question is to be determined by the customs and usages of railroads and carriers at the date of the charter. The term "heavy articles" is used in a technical sense, and not according to its popular sense, from the fact that it is contrasted with articles of measurement. *Bonham v. Charlotte, C. & A. R. Co.*, 13 S. C. 267. A bale of cotton is a "heavy article," and not an article of measurement, according to the custom and practice with railroads and common carriers in South Carolina. *Bonham v. Railroad Co.*, 16 S. C. 633.

### HEIFER.

A heifer is a young cow, so that, under an indictment for stealing a heifer, one could not be convicted of stealing a bull, and a conviction for such offense is not a bar to a prosecution for stealing a bull. *State v. McMinn*, 34 Ark. 160, 162.

A heifer is a young cow, but the term does not include calves. *Milligan v. Jefferson Co.*, 2 Mont. 543, 546.

#### As a cow.

In *Dow v. Smith*, 7 Vt. 465, 29 Am. Dec. 202, and in *Freeman v. Carpenter*, 10 Vt. 433, 33 Am. Dec. 210, it was decided that a heifer was a cow, within the meaning of a statute exempting cows from execution. *Mundell v. Hammond*, 40 Vt. 641, 645. See, also, *Stirman v. Smith* (Ky.) 10 S. W. 131, 132; *Johnson v. Babcock*, 90 Mass. (8 Allen) 583.

In a writ in a replevin suit an animal was described as a heifer, and in the certificate of appraisement was described as a cow. Held, that the words should be construed as practically synonymous, and hence there was no variance justifying the dismissal of the writ. *Pomeroy v. Trimper*, 90 Mass. (8 Allen) 398, 403, 85 Am. Dec. 714.

"In *Carruth v. Grassie*, 77 Mass. (11 Gray) 211, 71 Am. Dec. 707, under a statute exempting a cow, a heifer only 20 months old, and not giving milk for more than a year thereafter, was held to be exempt; it appearing that the owner was raising it for his family cow." *Mallory v. Berry*, 16 Kan. 293, 295.

Proof that an animal stolen was a heifer was held not to be a variance under an indictment charging the theft of a cow. *People v. Soto*, 49 Cal. 67, 70; *Parker v. State*, 39 Ala. 365.

Where an indictment charges the larceny of a heifer, there is no variance between it and the verdict fixing the value of the cow stolen at a certain sum, as a heifer is defined to be a young cow. *Garvin v. State*, 52 Miss. 207, 209.

## HEIR.

"To heir an estate" is a common expression, which means "to take as heir; to inherit." *Hall v. Chaffee*, 14 N. H. 215, 224.

The definition of the word "heir" is "to inherit" or "to succeed to," and cannot be applied to any less estate in land than that held by the ancestor, from whom the heir inherits or to whose property right he succeeds. Thus a testator's contract with his daughter to refund certain money to her if she did not heir a certain portion of his land at his death was not fulfilled by a devise of a life estate to her, with remainder to his other children in the event of her death without issue. *Parrott v. Graves' Ex'x* (Ky.) 32 S. W. 605, 606.

## HEIR APPARENT.

An heir apparent is one whose right of inheritance is indefeasible, provided he outlives the ancestor, as the eldest son, who must by the common law of England become the heir of his father on his death. *Jones v. Fleming* (N. Y.) 37 Hun, 227, 230.

"Heirs apparent" is a term which applies to those who will probably inherit from a live ancestor. *Ward v. Stow*, 17 N. C. 509, 512, 27 Am. Dec. 238.

## HEIR PRESUMPTIVE.

An heir presumptive is one who, if the ancestor should die immediately, would succeed to the estate, but whose right of inheritance may be defeated by the birth of a nearer heir. *Jones v. Fleming* (N. Y.) 37 Hun, 227, 230.

"Heirs presumptive" is a term which applies to those who will probably inherit from a live ancestor. *Ward v. Stow*, 17 N. C. 509, 512, 27 Am. Dec. 238.

He who is the nearest relation of the deceased capable of inheriting is presumed to be heir, and is called the "presumptive heir." This quality is given to him before the decease of the person from whom he is to inherit, as well as after the opening of the succession, until he has accepted or renounced it. Civ. Code La. 1900, art. 880.

## HEIRESS.

In the provision of a will: "I do order and will, at the death of my wife, M., that all property undisposed of shall be sold or divided in the following manner, that is: My brother J. to have one share, my nephew J. S. C. one share, my brother R. C.'s heirs another share, my brother T.'s heirs a fourth share, and my sister S. C.'s heiress a fifth share," the word "heiress" is construed to mean heirs. *Chadwick v. Chadwick*, 37 N. J. Eq. (10 Stew.) 71, 76.

## HEIRS.

See "Adopted Heir"; "Beneficiary Heir"; "Die Without Heirs"; "Expectant Heir"; "Forced Heir"; "Lawful Heirs"; "Legal Heirs"; "Legitimate Heir"; "Natural Heirs"; "Present Heirs"; "Right Heir"; "Unconditional Heirs."

All my heirs, see "All."

At common law an heir is he who is born in lawful wedlock, and upon whom the law casts the estate in lands, tenements, or hereditaments immediately on the death of the ancestor. *Hoover v. Smith*, 54 Atl. 102, 96 Md. 393.

At common law an heir is one who is born or begotten in legal wedlock, and upon whom the law casts the estate in lands, tenements, and hereditaments immediately upon the death of the ancestor. *Jarboe v. Hey*, 122 Mo. 341, 353, 26 S. W. 968.

An heir at common law has been defined to be one born in lawful matrimony, who succeeds by descent, right of blood, and the act of God to lands, tenements, or hereditaments, being an estate of inheritance. *Fletcher v. Holmes*, 32 Ind. 497, 510; *Lord v. Bourne*, 63 Me. 368, 379, 18 Am. Rep. 234; *Richardson v. Martin*, 55 N. H. 45, 47; *Sewall v. Roberts*, 115 Mass. 262, 268; *Meadowcroft v. Winnebago County*, 54 N. H. 949, 950, 181 Ill. 504.

The heirs of a decedent are those of his kindred on whom the law, immediately on his decease, casts the estate in real property. *Appeal of Dodge*, 106 Pa. 216, 220, 51 Am. Rep. 519 (citing 2 Minor, Inst. 452; 2 Bl. Comm. 201); *Hlester v. Yerger*, 31 Atl. 122, 123, 166 Pa. 445; *McCarthy v. Marsh*, 5 N. Y. (1 Seld.) 263, 275; *Phillips v. Carpenter*,

44 N. W. 898, 899, 79 Iowa, 600; Oroom v. Herring, 11 N. C. 393, 394; Stith's Heirs v. Barnes, 4 N. C. 96, 98, 6 Am. Dec. 547; Nye v. Grand Lodge A. O. U. W., 36 N. E. 429, 436, 9 Ind. App. 131; Barclay v. Cameron, 25 Tex. 232, 233, 242; Brooks v. Evetts, 33 Tex. 732, 742; Lavery v. Egan, 9 N. E. 747, 740, 143 Mass. 389; In re Donahue's Estate, 36 Cal. 329, 332; Ewing v. Barnes, 40 N. E. 325, 327, 156 Ill. 61; Long v. Beaumont, 1 P. Wms. 229.

By the word "heirs" is properly meant those upon whom the law casts the real estate immediately upon the death of the ancestor. Howell v. Gifford, 53 Atl. 1074, 1077, 64 N. J. Eq. 180; Brown v. Merchants' Bank of Appleton City, 66 Mo. App. 427, 431.

"The word heirs, when first introduced into charters and feoffments, was a word of very great importance. It enlarged the right of the vassal from one held either at the will of the lord or for his own life to a permanent and hereditary interest. It signified an undertaking of the lord that he would accept the heir as his vassal. It was in effect simply a stipulation for the renewal of the lease upon the same terms with the heir of the first lessee. Unless the lord bound himself that the fief should go to the heir of his vassal, the heir had no rights in it on the death of the ancestor or the lord; for the absolute owner of the soil might bestow the fief upon any stranger who would enter into homage and do fealty to him for the land upon such new services as he might impose." Sanborn v. Sanborn, 62 N. H. 631, 634.

In the Roman law and in the modern civil law, "hæres," or "heir," has a more extended significance than in the common law. The term is applied to all persons entitled to succeed to the estate of one deceased, whether by act of the party or by operation of law, and whether the property be real or personal in its nature. Adams v. Akerlund, 168 Ill. 632, 639, 48 N. E. 454, 457; Butterfield v. Sawyer, 58 N. E. 602, 604, 187 Ill. 598, 52 L. R. A. 75, 79 Am. St. Rep. 246.

Heirs are those persons in whom real estate vests by operation of law on the death of one who was last seised. Dukes v. Faulk, 16 S. E. 122, 127, 37 S. C. 255, 34 Am. St. Rep. 745.

The word "heir" has a technical significance, and, when uncontrolled by the context, designates the person appointed by law to succeed to the real estate in question in case of intestacy. Gauch v. St. Louis Mut. Life Ins. Co., 88 Ill. 251, 30 Am. Rep. 554; Cook v. First Universalist Church, 49 Atl. 389, 390, 23 R. I. 62; In re Aspden's Estate (U. S.) 2 Fed. Cas. 37, 59; Nye v. Grand Lodge A. O. U. W., 36 N. E. 429, 436, 9 Ind.

App. 131; Lincoln v. Aldrich, 21 N. E. 671, 149 Mass. 368, 4 L. R. A. 215; Olney v. Lovering, 45 N. E. 766, 167 Mass. 446; Merrill v. Preston, 135 Mass. 451, 457; Lawton v. Corlies, 27 N. E. 847, 848, 127 N. Y. 100; Proctor v. Clark, 12 L. R. A. 721, 724, 154 Mass. 45, 27 N. E. 673; Alexander v. Wallace, 76 Tenn. (8 Lea) 569, 570.

The word "heir" in a will, when uncontrolled by the context, designates the person appointed by law to succeed to the estate in question as in case of intestacy. Kelley v. Vigas, 112 Ill. 242, 245, 54 Am. Rep. 235.

The word "heir" of itself imports succession to the property ab intestato. Lavery v. Egan, 9 N. E. 747, 749, 143 Mass. 389.

"The word 'heirs' in itself imports succession to property by death, and, as the persons or the heirs of one deceased are designated by law, the heirs must be either those persons who by law would succeed to the real estate, or those who would succeed to the personal estate of the person whose heirs they are called, if that person had died intestate; and it is said that, if the property is personal, the inference is that those persons are meant who would succeed to personal estate, if the owner had died intestate, and who have been sometimes styled the 'statutory next of kin' or 'heirs of personalty.'" Swazey v. Jaques, 10 N. C. 758, 761.

The word "heirs" expresses the relation of persons to a deceased ancestor, and not to a living one. Its primary import relates to the succession to real property, but, when it is used to denote succession or substitution in connection with a legacy of personal property, it may have the sense of denoting the persons on whom the law will cast the succession to that class of property. Cushman v. Horton, 59 N. Y. 149, 151; Fabens v. Fabens, 5 N. E. 650, 652, 141 Mass. 395.

The word "heirs," in the strict legal meaning, when speaking of heirs of a certain person, includes all who will take if the deceased dies intestate leaving an estate composed entirely of real property. But in a case in which testator directed that his residuary estate, which consisted of nothing but personalty, should be paid to his heirs according to the laws and statutes of the state, the same as if he had died intestate, was construed, in view of the fact that testator, who had drawn the will himself, was not a lawyer, and that he had no relatives, except a sister and the children and grandchildren of other brothers and sisters, to be so ambiguous as to justify the admission of extrinsic evidence and the examination of other parts of the will for an explanation of the meaning in which he used the term. Armstrong v. Galusha, 60 N. Y. Supp. 1-4, 43 App. Div. 248.

"Heirs" is a technical word, and when it is made use of in any legal instrument there is a presumption more or less strong, according to the circumstances, that it is employed in a technical sense; but in common speech the word is frequently used to indicate those who claim in any manner the ownership of any species of property by reason of the death of an owner, and may then include next of kin and legatees, as well as those who take by descent. In wills, which are often very informal instruments and drawn without legal assistance, the word is sometimes employed with quite as little regard to the technical sense. The context may determine the meaning, and, when it does, effect must be given to the instrument accordingly. *Hascall v. Cox*, 13 N. W. 807, 808, 49 Mich. 435.

When land is devised to a person and his heirs, or to the heirs of a person named, the word "heirs" must be construed to embrace those only who are heirs in the strict legal sense of the term, unless there is something on the face of will to show that the word "heirs" was used by the testator in a more enlarged sense. *Heard v. Horton*, 1 Denio, 165, 169, 43 Am. Dec. 659; *Heath v. Hewitt*, 1 N. Y. Supp. 492, 49 Hun, 12; *Shaw v. Robinson*, 20 S. E. 161, 162, 42 S. C. 342.

An heir is one upon whom the law casts his ancestor's estate on the death of his ancestor; so that under a deed to one and the heirs of her body, forever, but, if she die without issue, then to her mother and her heirs, where the mother died leaving her as sole heir and she had three adult children, the title was not marketable, as it could not then be determined what heirs she would have. *Rozler v. Graham*, 48 S. W. 470, 471, 146 Mo. 352.

"The word 'heirs' is 'nomen generalissimum,' and in a comprehensive sense may include all kinds of heirs." *Miller v. Churchill*, 78 N. C. 372, 373.

In a will providing that the principal and income of the estate should be divided into four equal parts, one to each of four of the testator's children and to their heirs and assigns, forever, the word "heirs" appears to have been used as if it were a general word, which might mean those who were properly so, or "executors and administrators," or family or children. *Bradlee v. Andrews*, 137 Mass. 50, 53.

The word "heirs," when used in a will in which there is nothing to show a different intention on the part of a testator, "means all who are to take generally, without exception, as a class of inheritable persons." *Van Olinder v. Carpenter*, 19 N. E. 868, 871, 127 Ill. 42, 2 L. R. A. 455, 11 Am. St. Rep. 92.

An heir is one who takes by descent. *Inhabitants of Elliot v. Spinney*, 69 Me. 31, 32.

The word "heirs," in its ordinary meaning, is descriptive of those persons upon whom the law, upon the death of the ancestor, would cast the inheritance, including all possible heirs to take from generation to generation. *Ewing v. Barnes*, 40 N. E. 325, 327, 158 Ill. 61; *Brooks v. Evetts*, 33 Tex. 782, 742.

An heir is he who succeeds by descent to the inheritance of an ancestor, and in this sense the word comprehends all heirs and the heirs of heirs ad infinitum. *Ward v. Stow*, 17 N. C. 509, 512, 27 Am. Dec. 238; *Merrill v. Atkin*, 59 Ill. 19, 21.

The word "heir" not only means one to whom an estate has descended from his immediate ancestor, but includes one who has inherited through several successive descents. *Castro v. Tennent*, 44 Cal. 253, 262.

The term "heir" implies all those legal qualifications which the laws require in the persons who represent or stand in that place. Heir is one who succeeds by descent to lands. He must be such an one as is capable of inheriting the lands of an ancestor. *State v. Engle*, 21 N. J. Law (1 Zab.) 347, 366.

An heir at law is simply one who succeeds to the estate of a deceased person under the statute of a country or a state, or the decision of an Indian tribe. The law or decision for a country and state or an Indian tribe may make any person an heir; and, if not made an heir by such law, the person is not an heir. *O'Brien v. Bugbee*, 26 Pac. 428, 432, 46 Kan. 1; *McKinney v. Stewart*, 5 Kan. 384, 392; *Delashmutt v. Parrent*, 20 Pac. 504, 505, 40 Kan. 641; *Appeal of Nice*, 50 Pa. (14 Wright) 143, 148.

Ordinarily the statute of distribution must be looked to, to ascertain the persons who are entitled to the character of heirs. *Dukes v. Faulk*, 16 S. E. 122, 126, 87 S. C. 255, 84 Am. St. Rep. 745.

"Heirs," as used in Sp. Act Feb. 7, 1856, entitled, "An act for the relief of the heirs of C. S. H.," authorizing and requiring the Commissioner of the General Land Office to issue to the heirs of C. S. H. a headright certificate for a certain amount of land, etc., refers to the person or persons entitled to the estate of C. S. H. under the law of descent which was in force at the time of his death. *Goodrich v. O'Connor*, 52 Tex. 375, 378.

The heirs of a person are those whom the law appoints to succeed to his estate, in case he dies without disposing of it by will. In California, where the heirs of a person are determined by the provisions of the Code, the use of the term "heirs" in an in-

strument of conveyance to designate the persons in whom the estate granted is to pass will, in the absence of any qualifying term, be construed to mean his heirs as thus ascertained. Like all other legal terms, the word, when unexplained and uncontrolled by the context, is to be construed according to its strict technical import. Where a husband's deed to his wife provided that the property should, on her death, go to their children then living, and, in case of the death of any of such children, then to their heir or heirs, the words "heir or heirs" did not refer to children, but included all the heirs of such children as the law appointed to succeed to their estates. *Hochstein v. Berg-hauser*, 56 Pac. 547, 549, 123 Cal. 681.

Where a will devised land to those persons "who are natural heirs at law" of a third person, the phrase "heirs at law" did not mean the children of the third party, but were employed in their natural and proper sense, as including all those persons who should be capable of inheriting from him, or taking his property under the statute of distribution, if he died intestate. *Tingler v. Chamberlin*, 42 Atl. 718, 719, 71 Conn. 466.

A bequest of the proceeds of bank stock to a certain person for life, and providing that after her decease the stock should be sold and the proceeds equally divided among certain persons "or their heirs," means that the proceeds should be paid to such persons as would be entitled to them as their representatives by the law of the country; that is to say, they were not, in case of the death of one of the children, to go to the survivors, but to be considered as if vested in the deceased child. *Appeal of McGill*, 61 Pa. (11 P. F. Smith) 46, 50.

An heir is whoever by the laws of the country hath right to inherit or succeed to an estate immediately upon the death of an owner, and is different as the law varies in different countries. *Larabee v. Larabee* (Conn.) 1 Root, 555, 556.

The person who has become the universal successor of the deceased, who is possessed of all his property and rights, and who is subject to the charges for which the estate is responsible, is called the "heir," no matter whether he be such by law, by the institution of a testament, or otherwise. *Civ. Code La.* 1900, art. 884.

The term "heirs," as used in an act of Congress in which the United States relinquished title to land to the heirs of a British subject, should be construed in the sense fixed to the term in the United States, and not as referring to the English law of primogeniture. It was a mere act of grace, and doubtless intended for the benefit of the heirs of such person in the enlarged sense in which that term is understood in the

United States. *Eslava v. Farmer's Heirs*, 7 Ala. 543, 560.

The word "heirs," as used in the chapter relating to the distribution of estates, shall be construed as meaning the person or persons to whom land, tenements, and hereditaments descend as provided by the rule for the descent of real property. *Ballinger's Ann. Codes & St. Wash.* 1897, § 4643.

#### As word of limitation.

The words "heirs" and "heirs of the body," in their primary or natural sense, are words of limitation, and not words of purchase. *Taylor v. Gould* (N. Y.) 10 Barb. 388, 395; *Schoonmaker v. Sheely* (N. Y.) 8 Denio, 485, 490; *Nelson v. Davis*, 35 Ind. 474, 478; *Shimer v. Mann*, 99 Ind. 190, 191, 50 Am. Rep. 82; *Brasher v. Marsh*, 15 Ohio St. 103, 112; *Pritchard v. James*, 20 S. W. 216, 217, 93 Ky. 306.

An unbroken line of decisions in Pennsylvania establishes that the word "heirs," when uncontrolled by the expressed intention of the will, is to be taken as a word of limitation. *Grimes v. Shirk*, 32 Atl. 113, 118, 169 Pa. 74 (citing *Appeal of Muhlenberg*, 103 Pa. 587; *Appeal of McGill*, 61 Pa. [11 P. F. Smith] 46; *Appeal of Provenchere*, 67 Pa. [17 P. F. Smith] 463; *Appeal of Eby*, 84 Pa. 241). See, also, *Appeal of Cocklins*, 2 Atl. 363, 364, 111 Pa. 26; *Appeal of Charles* (Pa.) 2 Penny. 164, 169; *Campbell v. Jamison*, 8 Pa. (8 Barr) 498, 500; *Appeal of Barnett*, 104 Pa. 342; *In re Bowlby's Estate*, 4 Pa. Dist. R. 108, 109.

The word "heirs" must be regarded as a word of limitation, unless the superadded words make it clear that the testator employed it in a different sense from that annexed to it by the law. *Allen v. Craft*, 9 N. E. 919, 921, 109 Ind. 476, 58 Am. Rep. 425; *Chamberlain v. Runkle*, 63 N. E. 486, 488, 28 Ind. App. 599 (quoting *Gallini v. Gallini*, 5 Barn. & Adol. 621, which is also quoted in *Shimer v. Mann*, 99 Ind. 190, 193, 50 Am. Rep. 82); *Siceloff v. Redman's Adm'r*, 28 Ind. 251, 261; *Patterson v. Jackman*, 5 Ind. 283, 285; *Ridgeway v. Lanphear*, 99 Ind. 251, 254; *In re Sanders* (N. Y.) 4 Paige, 293, 296; *Lane v. Lane*, 50 S. W. 857, 106 Ky. 530; *Kay v. Connor*, 27 Tenn. (8 Humph.) 624, 633, 49 Am. Dec. 690; *Crockett v. Robinson*, 46 N. H. 454.

"Where the ancestor takes a freehold for life, and by the same conveyance, whether a deed or devise, an estate is limited, either mediately or immediately, to his heirs, the word 'heirs' is a word of limitation, not of purchase, and the fee vests in the ancestor." *McFeely's Lessee v. Moore's Heirs*, 5 Ohio (5 Ham.) 464, 466, 24 Am. Dec. 314 (citing *Shelley's Case*, 1 Coke, 104); *Armstrong v. Lane's Heirs*, 12 Ohio, 287, 289;

King v. Beck, 12 Ohio, 390, 471; Brockschmidt v. Archer, 60 N. E. 623, 624, 64 Ohio St. 502; In re Allen, 45 N. E. 554, 555, 151 N. Y. 243; Appeal of Cockins, 2 Atl. 363, 365, 111 Pa. 26; Appeal of Little, 11 Atl. 520, 527, 117 Pa. 14; Bassett v. Hawk, 11 Atl. 802, 803, 118 Pa. 94; Keniston v. Adams, 14 Atl. 203, 205, 80 Me. 290; Hommet v. Bacon, 17 Atl. 584, 585, 126 Pa. 176; Tarrant v. Backus, 28 Atl. 46, 48, 63 Conn. 277; Lippincott v. Davis, 28 Atl. 587, 588, 59 N. J. Law, 241; Hiestler v. Yerger, 31 Atl. 122, 123, 166 Pa. 445; Reimer v. Reimer, 44 Atl. 316, 317, 192 Pa. 571, 73 Am. St. Rep. 833; Young v. Kinkead's Adm'rs, 40 S. W. 776, 777, 101 Ky. 252; Brown v. Bryant, 44 S. W. 899, 400, 17 Tex. Civ. App. 454; Brownell v. Brownell, 10 R. I. 500, 514; Cross v. Hoch, 50 S. W. 786, 790, 148 Mo. 325.

The word "heirs," as used in deeds, is sometimes construed to mean children, but that is never so when the word is used in its technical, legal sense; and it will not be construed to mean children in a conveyance to one and her heirs, but, in case of no heirs, the land to revert to the parties of the first part, with a habendum, "to have and to hold the said premises unto the said party of the second part, her heirs and assigns, forever"; the word "heirs" being a word of limitation, and not one of purchase. Davis v. Sturgeon, 64 N. E. 1016, 1017, 198 Ill. 520.

Where a deed conveys an estate for life, with fee simple to the grantee's heirs, the word "heirs," under the rule in Shelley's Case, must be construed as a word of limitation, and not of purchase, and the grantee will take an estate in fee simple. Tucker v. Williams, 23 S. E. 90, 117 N. C. 119.

Within the meaning of a trust deed, reciting that upon the death of a cestui que trust the trustee shall transfer, convey, pay over, and deliver to a party named, or his heirs, the said trust fund, etc., "his heirs" are usually words of limitation, denoting heirs generally, or the whole line of heirs in succession, and therefore limiting or marking out the estate granted; but they may be words of purchase, where used to designate a particular person or persons who may stand in the relation of heirs at the happening of a certain event or at a certain period in the future, and the gift or grant may be alternative. So, also, adverbs of time ordinarily refer only to the time when the estate will vest in possession, and not when it will vest in interest; but if there is no direct gift or grant to take effect in the present, and the element of futurity is annexed to the substance of the gift itself, such terms may create an estate to commence in interest, and not in possession merely, at such future time. Hobbie v. Ogden, 53 N. E. 104, 106, 178 Ill. 357 (citing Ebey v. Adams, 135 Ill. 80, 25 N. E. 1013, 10 L. R. A. 162).

Prior to the Revised Statutes a devise to a person, without adding the words "and to his heirs," would only create a life estate, and, although those words are not now necessary to create a fee, their use ordinarily only serves as a limitation to vest the fee in the devisee. Thurber v. Chambers, 66 N. Y. 42, 46; Loring v. Elliot, 82 Mass. (16 Gray) 568, 572, 574.

In limitations to another for life, with the remainder over to his heirs or the heirs of his body, the heirs do not take remainder at all, but the word "heirs" is regarded as defining or limiting the estate which the first taker has, and his heirs take by descent, and not by purchase. So if a man by his will gives an estate to his devisee for life, with a remainder to his own heirs, they do not at common law take as remaindermen by the will, but by descent as reversioners and heirs; that being regarded as the better title. Akers v. Clark, 56 N. E. 296, 184 Ill. 136, 75 Am. St. Rep. 152 (citing 2 Washb. Real Prop. 242).

The word "heirs," in a deed to a married woman, "unto her and her heirs and assigns," does not designate persons who are to take, but is a limitation only, and used to describe the character of the estate conveyed to her; that is, a fee simple estate, an estate unincumbered by conditions of any kind. Rank v. Rank, 13 Atl. 827, 828, 120 Pa. 191.

In the case of *Riggle v. Love*, 72 Ill. 553, there was a deed conveying the premises to E. during her life, and at her death unto her husband, and in case of his death before hers then unto his "heirs at law." The husband died testate in the lifetime of his wife, and the words "heirs at law," although in the alternative provision, were construed not to be words of purchase, but words of limitation, because the property conveyed to him would have descended precisely as designated by those words. It is only where the future period is annexed to the grant that such terms would make it alternative. Hobbie v. Ogden, 53 N. E. 104, 106, 178 Ill. 357.

As used in a will by which testator bequeathed his personal estate to legatees, to be equally divided between them and their heirs and assigns, forever, the word "heirs" is a word of limitation, and not of purchase, although in regard to personal estate it is unnecessary and surplusage, merely expressing what the law would have said, had the testator been silent on the subject. Armstrong v. Moran (N. Y.) 1 Bradf. Sur. 314, 315; Zabriskie v. Huyler, 51 Atl. 197, 198, 62 N. J. Eq. 697; Palmer v. Munsell (N. J.) 46 Atl. 1094; Wood v. Seaver, 33 N. E. 587, 588, 158 Mass. 411.

After devising property to his wife and son, testator provided that, in case of their

deaths and no heirs to them be left, the property should revert to his brothers. He authorized his executors, as guardians of his minor son, to dispose of the property left to the son, and reinvest as they might deem most advantageous for his maintenance. Held, that "heirs" did not mean children, and absolute estates were created in the wife and son. *Hennegar v. Deadrick* (Tenn.) 54 S. W. 138, 140.

The word "heirs," as used in a will devising lands to the testator's daughter and the lawful heirs of her body, declaring it to be the testator's wish that the daughter's husband should have no control or management of the property, and appointing a trustee for his daughter and her heirs to manage the same, was a word of limitation. *McCaulley v. Buckner*, 8 S. W. 196, 197, 87 Ky. 191.

#### As word of purchase or description.

The words "heirs" and "their heirs" are technically words of limitation, but when used in wills they will be construed as words of purchase, when it sufficiently appears that the term is used to designate a particular person or particular persons who may stand in that relation at the happening of a certain event or at a certain period, and not to the whole line of heirs in succession. *Ebey v. Adams*, 25 N. E. 1013, 1016, 135 Ill. 80, 10 L. R. A. 162; *Gittings v. M'Dermott*, 2 Mylne & K. 69, 73; *Drake v. Pell* (N. Y.) 8 Edw. Ch. 251, 270; *Durbin v. Redman*, 40 N. E. 133, 134, 140 Ind. 694; *Wettach v. Horn*, 50 Atl. 1001, 1002, 201 Pa. 201; *Hamilton v. Wentworth*, 58 Me. 101, 105.

The word "heirs," as used in a will giving property to the heirs of testator's children, should be construed as descriptive of a class of beneficiaries. *Wyman v. Johnson*, 59 S. W. 250, 252, 68 Ark. 369.

The word "heirs," as used in a deed whereby the grantor conveyed certain land to a trustee for the benefit of his divorced wife, and providing that upon the death of the wife the trustee should transfer and deliver the property to the grantor or his heirs, is used as a word of purchase, and not a word of limitation; the gift of the remainder being alternative or substitutional, and the language of the deed being in effect as if it had directed that the trustee should pay the remainder after the death of the wife to the grantor, if he be then living, or, in the event of his death before the death of the wife, then to his heirs. *Hobbie v. Ogden*, 72 Ill. App. 242, 250, 254.

By Civ. Code, § 779, the word "heirs" is changed from a word of limitation to one of purchase, and becomes a specific designation of a class which will have the right to the property upon the termination of the life estate, so that its use in the granting clause of a deed is not repugnant to a

habendum clause creating a life estate. *Barnett v. Barnett*, 37 Pac. 1049, 1050, 104 Cal. 298.

Where a fund is bequeathed in trust to pay the interest to testator's wife, and on her death the fund to be paid to his right heirs, on the death of the wife the fund went to the testator's heirs at common law. The words "right heirs" were as plain a descriptive personarum as though the testator had mentioned the parties by their individual names. His right heirs were his heirs at common law, and he used the words properly as words of purchase. In re *McCrea's Estate*, 36 Atl. 412, 413, 180 Pa. 81.

The word "heirs," as used in a will giving a life estate to testator's widow, and providing that on the death of the widow one-half of testator's estate, both real and personal, shall be divided among testator's brothers and sisters and "their heirs, forever," should be construed "to designate to whom the division should be made in case of the death of any of his brothers and sisters, using them as words of purchase, and not of descent or limitation." *Flournoy's Devises v. Flournoy's Ex'r*, 64 Ky. (1 Bush) 515, 526.

By the use of the term "lawful heirs," in a will bequeathing to the testator's son "the one-half of my said effects, or to each of his lawful heirs," etc., the testator intended to provide against the lapse of any of its provisions. The testator intended that, if the primary legatee did not live to take the legacy, his child or children should take it by way of substitution, and the term "lawful heirs" was used as synonymous with children of the legatees. *Cody v. Bunn's Ex'r*, 18 Atl. 857, 858, 46 N. J. Eq. (1 Dick.) 131.

The words "legal heirs," as used in a will giving the rents and proceeds of real estate to testator's sons, and on the death of any one of them the proportion of such rents and profits which he would have received, if living, to be paid to his legal heirs, and the dividends and income of the personal estate to be paid thereafter to the legal heirs of such deceased son, and upon the decease of all the sons the personal property was given upon the further trust and to the use of the legal heirs of all the sons in equal proportion, mean the persons who would by the statute succeed to the real estate in case of intestacy. "It was not intended to denote succession; that is, to invest the estate in legatees as successors of or substitutes for the sons of the testator, so that they would take the same estate in nature and quality as that which would have come to them by descent. They are to take by force of the will as purchasers. The words are used to designate the persons who are to take the personal and real estate as independent objects. It is, therefore, to be interpreted as

a mere term of description, who in the prescribed contingency are to take the estate. There being nothing in the will to vary or change the natural or ordinary sense of the word 'heirs,' it must be held to describe those persons who, on the death of the sons, are to take the real estate, if it had been held in their right, and had not been the subject of a devise." *Clarke v. Cordis*, 86 Mass. (4 Allen) 466, 479.

The word "heirs," in a deed conveying land to one for life, and from and after her death to her husband, if he be alive, and to his lawful heirs, to and for their sole use and benefit, forever, is a word of purchase, and not of limitation. *Bishop v. Tinsley*, 41 S. E. 895, 898, 64 S. C. 180.

A grant of land to A., to continue for a yard to build vessels in by A. and his heirs, so long as they shall see fit, but, if they cease to use it for this purpose, not to be sold by them, but forever to remain to B. and his heirs, gives A. no more than an estate for life, and the remainder to B. is good; it being said that "heirs," as used in that part of the deed, is only descriptive of the persons for whose use the estate is conveyed, and cannot enlarge the estate. *Rutty v. Tyler* (Conn.) 8 Day, 470, 471.

The word "heirs," as used in the grant of a patent to one and his heirs or assigns, cannot be regarded as a definition of the patentee's own interest in the patent. There is nothing technical in the word when so used, and it indicates the persons who are to have the benefit of the patent in the event of the death of the patentee; but the absolute character of the interest of the patentee is not attributable to it, and if the word "heirs" were not used in the grant, the patent would not end with the life of the patentee, but would still possess a descendible or inheritable quality. The exercise of the right vested is not in its nature dependent on the continued existence of the persons whose merit earned the reward. *De La Vergne Refrigerating Machine Co. v. Featherstone*, 13 Sup. Ct. 283, 285, 147 U. S. 206, 37 L. Ed. 138.

#### **Adopted child.**

"Lawful heirs," as used in a will giving the residue of the testator's estate to his lawful heirs, means the testator's brothers and sisters, and the children of any deceased brother or sister by right of representation, and does not include the testator's adopted child, where an attempt had been made by the testator to revoke the adoption, notwithstanding the revocation might have been invalid. The proper terms to designate the relation of an adopted child is that of "adopted heir," or "heir by adoption." The relation of an heir by adoption is an exceptional and unusual one, and does not come within the original and usual meaning of the words

"lawful heirs," and those words ought not to be held *ex vi termini* to include an adopted heir. *Reinders v. Koppelman*, 7 S. W. 288, 290, 94 Mo. 338; *In re Session's Estate*, 38 N. W. 249, 254, 70 Mich. 297, 14 Am. St. Rep. 500.

#### **Adults in homestead law.**

Const. Fla. 1868, art. 9, § 3, providing that the exemption of a homestead to the head of a family residing in the state should accrue to his heirs, includes an adult son and an adult grandson, the son of a daughter deceased at the death of the head of the family, notwithstanding they were not at his death living at the home place. *Miller v. Finegan*, 7 South. 140, 141, 26 Fla. 29, 6 L. R. A. 813.

#### **Alien.**

The alien issue of a person are not his heirs in law, for they have no inheritable blood. *Orr v. Hodgson*, 17 U. S. (4 Wheat.) 453, 461, 4 L. Ed. 613.

#### **Blood relations.**

Where a testatrix used the word "heirs" in her will, in which she dealt with both real and personal property, devising the same to her heirs, the term was not used in its legal sense, but rather in a popular sense to designate the blood relations of the testatrix and embraces no one not thus related. *Tillman v. Davis*, 95 N. Y. 17, 25, 47 Am. Rep. 1 (cited and approved in *Lyons v. Yerex*, 58 N. W. 1112, 1113, 100 Mich. 214, 43 Am. St. Rep. 452).

"Heirs," as ordinarily used in a will, means those who would take the testator's property under the statutes in case of intestacy; but this meaning may be controlled by the context, and as used in a will, in which the testator, after giving certain property of his two grandsons, provided that, in case of the death of both without leaving an heir, the property should revert to the testator's estate, to be expended by the executors for charitable purposes, "or given to any of my heirs who are in need, or not in very comfortable circumstances," does not mean those who would take the testator's property under the statutes had he made no will, but means those who, upon the death of both of the testator's grandsons without issue, would be his other blood relations, and who might have become his heirs in case of the death of both his grandsons without issue. It does not include all relatives, however remote. *Webster v. Morris*, 28 N. W. 353, 363, 66 Wis. 366, 57 Am. Rep. 278.

It is well known that persons unskilled in the law use the word "heirs" as descriptive of a class of persons who cannot in fact take as heirs. In recognition of this doctrine the words "heirs at law" have been con-



strued to mean adopted children, next of kin, heirs of particular class or description, heirs presumptive, heirs apparent, heirs at the date of the will, heirs at the decease of the testator, or heirs even at a later date. The construction rests in each particular case upon an ascertainment of the testator's intention from the words used, from the context of the instrument, and from the surrounding circumstances. A citizen of the United States, though a native of Norway, in his will devised his real estate to the wife for life, remainder over one-half to the heirs and one-half to the heirs of his wife. He had no children, and his heirs were all non-resident aliens. Held, that under the will he intended to deliver one-half of his estate to those of his own blood who would have inherited it, but for Acts 22d Gen. Assem. c. 85, providing that nonresident aliens are prohibited from acquiring title by descent or devise, except as thereafter provided. *Furanes v. Severtson*, 71 N. W. 196, 197, 102 Iowa, 322.

#### Children.

The words "children," "issue," and "heirs" are not synonymous terms. They are technical terms, and have each acquired a peculiar and appropriate meaning. *Clarkson v. Hatton*, 44 S. W. 761, 762, 143 Mo. 47, 39 L. R. A. 748, 65 Am. St. Rep. 635.

A testator may use the word "heir" aside from its usual legal sense, if the plain intention manifested in the will shows that it was not employed in its legal sense. A mere presumed intention will not control its legal signification and operation, but with words of explanation, showing the manifest intent of testator, it can be made a word of purchase. *King v. Beck*, 15 Ohio, 559, 562.

In a suitable case the court may adopt the reading of the word "heirs" as meaning children or heirs of the body, but where the effect of the changed reading would be to defeat the clearly expressed intent of the testator and to reduce an expressed gift in fee simple to a lesser estate, the court would hardly feel authorized to do so. *Walsh v. McCutcheon*, 41 Atl. 813, 814, 71 Conn. 283.

From the fact that the estate of deceased persons usually descend to their children, the term "heirs" is frequently regarded as synonymous with "children." *Durfee v. MacNeill*, 50 N. E. 721, 722, 58 Ohio St. 238. But this arises not from the word alone but from the context, the manner and cause of speaking. *Croom v. Herring*, 11 N. C. 393, 395; *Wyman v. Johnson*, 59 S. W. 250, 252, 68 Ark. 369.

There is doubtless a technical difference in the meaning of the two words "heirs" and "children," and yet in common speech they are often used as synonymous. The tech-

nical distinction between the terms is not to be resorted to in the construction of a will, except in nicely balanced cases. Appeal of Lockwood, 10 Atl. 517, 519, 55 Conn. 157.

"When the general term 'heirs' is used in a will, it will be construed to mean 'child' or 'children,' if the context shows that such was the intent of the testator." *Brown v. Harmon*, 73 Ind. 412, 416 (citing *Jones v. Miller*, 13 Ind. 337; *Rusing v. Rusing*, 25 Ind. 63). And this applies to deeds, as well as to wills. *Griswold v. Hicks*, 24 N. E. 63, 64, 132 Ill. 494, 22 Am. St. Rep. 549; *Bland v. Bland*, 103 Ill. 11, 17; *Summers v. Smith*, 21 N. E. 191, 193, 127 Ill. 645; *Smith v. Kirnbell*, 38 N. E. 1029, 1030, 153 Ill. 368; *Fishback v. Joesting*, 56 N. E. 62, 63, 183 Ill. 463; *Plummer v. Shepherd*, 51 Atl. 173, 174, 94 Md. 466; *Albert v. Albert*, 12 Atl. 11, 14, 68 Md. 352; *Demarest v. Hopper*, 22 N. J. Law (2 Zab.) 599, 611; *Lott v. Thompson*, 15 S. E. 278, 279, 36 S. C. 38; *Tucker v. Tucker*, 78 Ky. 503, 504; Appeal of Haverstick, 103 Pa. 394, 396; *In re Hunt's Estate*, 19 Atl. 548, 549, 133 Pa. 260; *Jacobs v. Jacobs*, 42 Iowa, 600, 606; *Maguire v. Moore*, 18 S. W. 897, 899, 108 Mo. 267; *Boman v. Boman* (U. S.) 49 Fed. 329, 331, 1 C. C. A. 274; *Conger v. Lowe*, 24 N. E. 889, 891, 124 Ind. 368, 9 L. R. A. 165.

In order to construe the word "heirs" as meaning children, a child must be in existence when the will is made; yet, if such is not the case, the only effect would be to construe the word "heirs" as meaning heirs proper as to realty and next of kin as to personalty, and then, if children are in existence when the bequest took effect, they would take as such heirs or next of kin. The word "heirs" is flexible, and may mean next of kin or heir at law, according to the nature of property given. *Ingram v. Smith*, 38 Tenn. (1 Head) 411, 426.

Where the words "children" and "heirs" are used in the same instrument in speaking of the same persons, the word "heirs" will be construed to mean "children"; such usage being treated as sufficient evidence of the intention to use the word "heirs" in the sense of "children." Appeal of Ulrich, 86 Pa. 386, 392, 27 Am. Rep. 707; *Criswell v. Grumbling*, 107 Pa. 408, 413; *Warn v. Brown*, 102 Pa. 347, 352, 13 Wkly. Notes Cas. 458, 461. So, too, where the words "heirs" and "issue" are used interchangeably. *Findlay's Lessee v. Riddle* (Pa.) 3 Bin. 139, 148, 160, 5 Am. Dec. 355; *Johnson v. Brasington*, 34 N. Y. Supp. 200, 201, 86 Hun. 106; *Scott v. Guernsey*, 48 N. Y. 106, 122; *Hawn v. Banks* (N. Y.) 4 Edw. Ch. 664, 665; *Britton v. Johnson* (S. C.) 2 Hill, Eq. 430, 433; *Anthony v. Anthony*, 11 Atl. 45, 46, 55 Conn. 256; *Franklin v. Franklin*, 18 S. W. 61, 62, 91 Tenn. (7 Pickle) 119; *Fairchild v. Crane*, 13 N. J. Eq. (2 Beasli.) 105, 108; *Cowell v. Hicks* (N. J.)

30 Atl. 1091; *Bunnell v. Evans*, 26 Ohio St. 409, 410; *Bland v. Bland*, 103 Ill. 11; *McCartney v. Osburn*, 9 N. E. 210, 213, 113 Ill. 403; *Griswold v. Hicks*, 24 N. E. 63, 65, 132 Ill. 494, 22 Am. St. Rep. 549; *Hickman v. Quinn*, 14 Tenn. (6 Yerg.) 96, 103; *Collins v. Phillips*, 59 N. W. 40, 41, 91 Iowa, 210; *Hayne v. Irvine*, 25 S. C. 289, 292; *Moone v. Henderson* (S. C.) 4 Desaus. 459, 461; *Gindrat v. Western Ry. of Alabama*, 11 South. 372, 374, 96 Ala. 162, 19 L. R. A. 889.

Where a bequest is given to one, with remainder to another in case he leaves no heirs, and the remainderman would be an heir in the technical sense of the term, the word "heirs" will be construed to mean "children." *Sain v. Baker*, 38 S. E. 858, 859, 128 N. C. 256; *Durfee v. MacNeill*, 50 N. E. 721, 722, 58 Ohio St. 238; *Baxter v. Winn*, 13 S. E. 634, 87 Ga. 289; *Boyd v. Robinson*, 23 S. W. 72, 81, 93 Tenn. 1; *Findley v. Hill*, 32 South. 497, 498, 133 Ala. 229. Contra, holding that "heirs" meant heirs of the body, since, if the devisee died leaving grandchildren, but no children, the intention of the testator would be defeated, see *Lee v. Lee*, 46 Ky. (7 B. Mon.) 605, 607; *Davis v. Davis*, 89 N. J. Eq. (12 Stew.) 13, 14; *Beatty v. Trustees of Cory Universalist Soc.*, 39 N. J. Eq. (12 Stew.) 452, 463; *Bruere v. Bruere*, 85 N. J. Eq. (8 Stew.) 432, 435; *Smith v. Kimbell*, 38 N. E. 1020, 1030, 153 Ill. 308.

Where a will describes certain beneficiaries as the heirs of another person, whom the testator assumes to be living, the word "heirs" will be construed to mean "children." *Vannorsdall v. Van Deventer* (N. Y.) 51 Barb. 137, 146; *Hear v. Horton* (N. Y.) 1 Denio, 165, 168, 169, 43 Am. Dec. 659; *Heath v. Hewitt*, 27 N. E. 959, 961, 127 N. Y. 166, 13 L. R. A. 46, 24 Am. St. Rep. 438; *Feltman v. Butts*, 71 Ky. (8 Bush) 115, 120; *Starnes v. Hill*, 16 S. E. 1011, 1018, 112 N. C. 1, 22 L. R. A. 598 (citing *Ward v. Stowe*, 17 N. C. 509, 27 Am. Dec. 238; *Stevens v. Flannagan*, 30 N. E. 898, 899, 131 Ind. 122; *Arrants v. Crumley* [Tenn.] 48 S. W. 342, 343; See *v. Derr*, 24 N. W. 108, 109, 57 Mich. 369).

The word "heir," as used in statutes providing that, if the life of any person is lost by the carelessness or unskillfulness of another person or persons, company, corporation, or their agents, servants, or employees, then the widow, heir, or personal representative shall have right to recover damages therefor, will be construed as meaning "child," and not in its comprehensive sense. *Lintz v. Holy Terror Min. Co.*, 83 N. W. 570, 571, 13 S. D. 489 (citing *Noble v. City of Seattle*, 19 Wash. 133, 52 Pac. 1013, 50 L. R. A. 822); *Henderson's Adm'r v. Kentucky Cent. R. Co.*, 5 S. W. 875, 876, 86 Ky. 389; *Louisville & N. R. Co. v. Coppage* (Ky.) 13 S. W. 1086; *Hindry v. Holt*, 51 Pac. 1002, 1003, 24 Colo. 464, 39 L. R. A. 351, 65 Am. St. Rep. 235.

Technically persons in life can have no heirs, and therefore, where property was conveyed in trust for the benefit of the present, as well as the future, heirs of T. and R., the word "heirs" meant "children." *Read v. Fite*, 27 Tenn. (8 Humph.) 323, 330. See, also, *Chess-Carley Co. v. Purtell*, 74 Ga. 467, 468.

The term "heir," in a devise, has been construed to mean "child," by reason of the fact that the testator spoke in the will of the parent of such heir. *Dawson v. Schaefer*, 30 Atl. 91, 92, 52 N. J. Eq. (7 Dick.) 341; *In re Scott's Estate*, 29 Atl. 877, 878, 163 Pa. 165; *Eldridge v. Eldridge*, 3 Atl. 61, 62, 41 N. J. Eq. (14 Stew.) 89, 91; *Canfield v. Fallon*, 57 N. Y. Supp. 149, 151, 26 Misc. Rep. 345. So a provision that the heirs of a person are to receive their share on attaining their majority indicates that the word "heir" means "children." *Canfield v. Fallon*, 57 N. Y. Supp. 149, 151, 26 Misc. Rep. 345; *Underwood v. Robbins*, 20 N. E. 230, 231, 117 Ind. 308; *Jones v. Miller*, 18 Ind. 337, 338; *Patrick v. Morehead*, 85 N. C. 62, 66, 39 Am. Rep. 684.

A will giving property to a beneficiary and limiting the property to another person, in case such beneficiary dies without an "heir at death," will be construed to mean "child" or "descendant." *Robinson v. Bishop*, 23 Ark. 378, 387.

Children are included in the word "heirs" in a deed to B. and her heirs, naming them, when the designated persons were her children. *Brasington v. Hanson*, 149 Pa. 289, 290, 24 Atl. 344.

Where by statute estates tail have been abolished, the creation of a contingent remainder on the death of the devisee without heirs indicates an intention that the word "heirs" was used in the sense of "children." *King v. Beck*, 15 Ohio, 559, 562.

"It is well settled that the word 'heir' will be construed to mean 'child,' when it is plain that the testator employed it in that sense." It is so used in a will devising land to the testatrix's daughter, which provides that, in case the daughter shall die having no heirs born to her, the land will revert to the estate, and be divided among the heirs of the testatrix, but which provides that it is not to be sold until after there shall have been an heir born to the body of the daughter, as it is manifest in the last clause that such is the intention of the testatrix. *Eslick v. Caple*, 30 N. E. 900, 901, 131 Ind. 207.

The word "heirs," as used in a deed to A. and his heirs by B., his wife, is to be construed to mean the living children of A. and B. *Tinder v. Tinder*, 30 N. E. 1077, 131 Ind. 381.

The word "heirs," as used in a deed, the consideration of which is love and affection, from A. to the heirs of B., there being three children living of B. when the deed was executed, passed the title to those three children. *Tharp v. Yarbrough*, 4 S. E. 915, 916, 79 Ga. 382, 11 Am. St. Rep. 439. So, also, in wills. *Strain v. Sweeny*, 45 N. E. 201, 203, 163 Ill. 603.

The word "heirs" will be construed to mean "children," when from the whole will such appears to have been the intention of the testator; but where a devise was limited to H. "and his heirs," and where in another part of the will the testator spoke of the "estate hereby devised to H.," and the only intention in the will that the word was to be taken as one of purchase, rather than of limitation, was the fact that the words "and his heirs" were interlined, the word was not synonymous with "children," but was a word of limitation. *Thurber v. Chambers*, 66 N. Y. 42, 43.

The knowledge by testator, in giving to his daughters and their heirs, that some of the daughters were dead at the time of the execution of the will, is not sufficient to make the word "heirs" mean "children"; but the testator must express his intention in his will. *Appeal of Barnett*, 104 Pa. 342, 348.

Under the Spanish law in the state of Texas, prior to the act of the Republic of Dec. 18, 1837, the widow of a person dying intestate, without children, but leaving other relatives capable of inheriting, did not inherit the deceased husband's estate. By that act the survivor of the husband or wife dying intestate leaving no heirs inherits the estate of the deceased spouse. It was held that the act did not change the pre-existing law, so that the widow of the person so dying intestate would succeed by inheritance to the estate of her husband; the word "heirs" not being limited to children, but including other relatives by blood capable of inheriting. *Branch v. Tex. Lumber Mfg. Co.* (U. S.) 56 Fed. 707, 710, 6 C. C. A. 92.

#### Children living at execution of will.

"Legal heirs," as used by a testator in a will declaring that certain property should descend to his legal heirs, should be construed to mean the testator's then living children, who he probably expected would be alive when he died, and not his children, his grandchildren, or his collateral relations, who might be alive at the death of the testator's widow, who was entitled to a prior life estate, since, if he meant the former, a vested remainder in fee passed to his living heirs at the time of his death, but, if he meant the latter, then only a contingent remainder was created, and it could not be determined where the fee might eventually

go, and, such contingent remainders not being favored, they will not be created where the testator's words are susceptible of another result. *Bunting v. Speck*, 21 Pac. 283, 300, 41 Kan. 424, 3 L. R. A. 690.

#### Collateral heirs or parents.

"Heirs at law," in its general definition, "is not limited to children. It may be used, and often is used, in cases where there are no children, and as including parents, brothers and sisters," etc. *Roman v. Roman*, 49 Fed. 329, 331, 1 C. C. A. 274.

A testator devised and bequeathed all his property, real and personal, to his widow, "to keep and enjoy during her lifetime, and after her death, what shall be left shall be divided equally among 'my heirs and her heirs,' share and share alike." Both testator and his wife were childless and had collateral heirs only. Held, that by the phrase "my heirs and her heirs" he meant collateral, and not lineal, heirs. "It was impossible that anybody else could have been within the intent of the testator." *Appeal of Foilweller*, 102 Pa. 581, 583.

As used in the constitution of a mutual benefit life association, declaring that the object of the order is to afford financial aid and benefit to widows, orphans, and heirs or devisees of the deceased members of the order, "heirs" is not to be taken "in its restricted sense, but includes any one to whom the estate of the deceased might pass by operation of law, and thus would, in many cases, include persons who were but distantly related by blood to the deceased member, who had never been members of his family, and with whom he had no personal acquaintance." *Lamont v. Grand Lodge Iowa Legion of Honor* (U. S.) 31 Fed. 177, 179.

Where there is nothing in any other parts of a will that throws any light upon the meaning which the testator intended should be given to his use of the word "heirs," it will be taken in its primary and legal sense as referring to those who would take or inherit from him upon his death. Under such rule, a provision that the remainder, after two life estates, was "to be equally divided among the children or heirs" of a son, conveyed the estate to the collateral heirs of the son on his death without heirs of the body. *Johnson v. Brasington*, 50 N. E. 859, 156 N. Y. 181.

The term "heir," as used in Gen. St. c. 57, § 2, providing that the widow, heir, or personal representative of one whose life is lost by the willful neglect of another may sue the person causing the death, and may recover punitive damages means child, and does not include parents or collateral relatives. *Jordon's Adm'r v. Cincinnati, N. O. & T. P. Ry. Co.*, 11 S. W. 1013, 89 Ky. 40

(citing, *Henderson's Adm'r v. Kentucky Cent. R. Co.*, 5 S. W. 875, 86 Ky. 339; *Henning's Adm'r v. Louisville Leather Co. (Ky.)* 12 S. W. 550.

The term "heir," as used in Code, § 2337, which provides that, if a devisee dies before the testator, his heirs shall inherit the land so devised to him, unless from the terms of the will a contrary intent is manifest, is used in its ordinary sense, and is not limited to children, and hence would include a brother of the deceased. *Blackman v. Wadsworth*, 21 N. W. 190, 192, 65 Iowa, 80.

Where an insurance policy is made payable to the insured's wife, heirs, executors, administrators, or assigns, and the wife died before insured, who, when he died, left no heirs but brothers and sisters, it was held they came within the term "heirs." *Silvers v. Michigan Mut. Ben. Ass'n*, 53 N. W. 935, 937, 94 Mich. 89.

The word "heirs" is one of the strongest and most expressive terms in the law, and when employed it will be given its settled legal meaning, unless the context shows in the clearest and most decisive manner that the parties who used it intended that it should have some other meaning. Heirs are lineal and collateral, but the generic term includes both classes. Children in the lifetime of the parents may be heirs presumptive, but they are not heirs. A provision in an antenuptial agreement that land shall descend to the heirs of the parties, the same as it would if they were not married, includes collateral heirs, though when the agreement was made each party had children. *McNutt v. McNutt*, 116 Ind. 545, 560, 19 N. E. 115, 123, 2 L. R. A. 372.

The word "heir," in the statute giving the widow, heir, or personal representative of any person killed by willful neglect a right to sue, etc., is equivalent only to "child," and no right of action exists in favor of a father. *Louisville & N. R. Co. v. Coppage (Ky.)* 13 S. W. 1086.

#### Descendants or issue.

The word "heirs," as used in a will, "when unexplained or uncontrolled by the context or other provisions, has a technical meaning, which may not be departed from." But it is often used in a different sense, as meaning only children and issue. It is in all cases a question of intention. *Haley v. City of Boston*, 108 Mass. 576, 579. The word "heir," when used in a will, will be construed in its ordinary legal acceptance, unless the intention of the testator to use it in some other sense is clear and decisive. *Gold v. Judson*, 21 Conn. 616, 624; *Williamson v. Williamson*, 57 Ky. (18 B. Mon.) 829, 271; *Loring v. Thorndike*, 87 Mass. (5 Allen) 257, 269; *Long v. Beaumont*, 1 P.

*Wms.* 229; *Stith's Heirs v. Barnes*, 4 N. C. 96, 98, 6 Am. Dec. 547.

It is well settled that in construing wills the words "heirs at law," or "issue," will be given either their large or restricted sense as best exemplifies the wishes of the testator. In re *Cramer*, 69 N. Y. Supp. 299, 300, 59 App. Div. 541.

Within the meaning of a will providing that upon the death of the testator's wife his estate shall be equally divided between her children and his children then living, or their heirs, the word "heirs" was not used in its technical sense, but in the sense of issue or descendants. *Schwencke v. Haffner*, 50 N. Y. Supp. 165, 166, 22 Misc. Rep. 293. See, also, *Speakman v. Speakman*, 8 Hare, 180, 186; *Chadwick v. Chadwick*, 87 N. J. Eq. (10 Stew.) 71, 76.

Where a bequest is given to one, with remainder to another, in case the devisee die without heirs, and the remainderman would be an heir of the devisee, the word "heirs" will be construed "issue." *Klah v. Grenier*, 56 N. Y. 220, 225; *Randolph v. Randolph*, 40 N. J. Eq. (13 Stew.) 73, 74, 77; *Baldwin v. Taylor*, 37 N. J. Eq. (10 Stew.) 78, 80; *Coles v. Ayres*, 27 Atl. 375, 376, 156 Pa. 197; *Titzell v. Cochran (Pa.)* 10 Atl. 9, 11; *Goodell v. Hibbard*, 32 Mich. 47, 52; *Francks v. Whitaker*, 21 S. E. 175, 176, 116 N. C. 518.

Where a devise is to A. and his heirs, and, if he die without issue, to B. and his heirs, the words "die without issue" will limit the meaning of the word "heirs" in the primary devise, so that it will be equivalent to the word "issue." *Den v. Gifford*, 9 N. J. Law (4 Halst.) 46, 51; *Gifford v. Choate*, 100 Mass. 343, 345; *Kingsland v. Rapelye (N. Y.)* 8 Edw. Ch. 1, 9. Contra, see *Carter v. Reddish*, 32 Ohio St. 1, 14.

In a contract between two sisters, providing that, if either of them should die before the other without a living heir, the survivor should become sole owner of a note held by them jointly, the words "living heir" should be construed to mean "issue"; for to say that one sister died without a living heir, and at the same time leaving a surviving sister, would be absurd, unless the word "heir" was construed to mean "issue." *Taylor v. Smith*, 21 S. E. 202, 203, 116 N. C. 531.

The words "legal heirs," as used in the phrase "his children or legal heirs," are equivalent to "descendants," and the entire phrase has the force of the word "issue." *Sheeley v. Neidhammer*, 37 Atl. 939, 940, 182 Pa. 163.

The word "heirs," as used in the codicil of a will providing that the twelfth clause of said will shall apply to testator's granddaughter and her heirs as though she had

been originally named therein, which clause provides that, "if any of said grandchildren shall die previous to the death of my daughter leaving issue, then I direct that such issue shall take the share to which their parents would be entitled under the will, said share to be received by said grandchildren or their descendants free from control or claim of any husband," is used synonymously with "issue" and "descendants," as used in such twelfth clause. *Cochrane v. Kip*, 46 N. Y. Supp. 148, 152, 19 App. Div. 272.

"Lawful heirs," as used in the clause of a will as follows: "It is further my will that, if any of my sons and daughters die without lawful heirs, then in that case their portion reverts back to my heirs in common, share and share alike"—means "lawful issue." *Appeal of Biddle*, 69 Pa. (19 P. F. Smith) 190, 194.

#### Devisees or legatees.

Popularly the word "heirs" often includes devisees; the persons who are made heirs; "*haeredes facti*." *Clark v. Scott*, 67 Pa. (17 P. F. Smith) 446, 452.

The word "heirs" is commonly used by laymen to indicate the persons entitled by will or otherwise to share in the estates of decedents; hence it is held that "heir" may be regarded as a synonym of "legatee." *Graham v. De Yambert*, 17 South. 355, 356, 106 Ala. 279.

"Heirs" is sometimes used to mean devisees, legatees, or distributees, when it appears from the will that such was the obvious intention of the testator. *Greenwood v. Murray*, 9 N. W. 629, 631, 28 Minn. 120.

In common parlance the term "heir" is often employed to denote a person who acquires or may receive property, either personal or real, by right of blood relation. As used in a will, in which testatrix, after giving various legacies, gave to her husband the use of her real estate for life, "the principal to go to my heirs after his death," the word "heirs" will be held to mean those to whom she gave legacies, since any other construction would deprive them of the estate already willed to them. *In re Harvey's Estate*, 80 N. Y. Supp. 1, 2, 80 Hun. 371.

The word "heirs," as used in the residuary clause of a will providing that "the balance of my estate shall be equally divided among all the heirs herein named," should be construed as synonymous with "legatees," and to refer to those heirs who took under the will. *Townsend's Ex'rs v. Townsend*, 25 Ohio St. 477, 489; *Eisman v. Poindexter*, 52 Ind. 401. And though they were not limited to testator's heirs. *In re Hull's Will*, 63 N. Y. Supp. 725, 30 Misc. Rep. 281. *Contra*, see *Appeal of Porter*, 45 Pa. (9 Wright) 201, 207.

A testator, having made a will by which he devised the principal part of his estate to his wife and children, and directed that his slaves should be emancipated, subsequently added a codicil providing that "my heirs shall not be entitled to the provision made for them, unless they shall give security to the court for such negroes' good behavior." Held, that the word "heirs," as so used in a will, should be construed to mean those to whom he had devised his estate. *In re Weir's Will*, 39 Ky. (9 Dana) 434, 442.

Where testator's will disposed of all his personal property by various bequests, and by a codicil he directed that certain stocks should be reserved from sale, and that the executor should pay over the dividends as they accrued to the heirs of the testator, the word "heirs" should be construed to mean the legatees under the will. *Collier v. Collier's Ex'rs*, 3 Ohio St. 369, 375.

The term "heirs at law," as used in a will directing that "all of testatrix's personal estate shall be divided equally among her children and heirs at law," should be construed to mean the legatees named in the will. *Roland v. Miller*, 100 Pa. 47, 51.

In an accounting for settlement of an estate showing a balance due the executors, it was agreed that such matter should be submitted to arbitration. The articles of submission provided that the arbitrators "shall find what is due the estate by each heir by including the pro rata for each, which we promise to pay to present date." Held, that the word "heir," as used in the articles of submission, should be construed to refer only to the devisees named in the testator's will, and by "pro rata" was meant the proportion which each devisee was to pay of the claims against the estate. *Cross' Ex'rs v. Cross*, 17 N. J. Eq. (2 O. E. Green) 288, 291.

Rev. St. art. 2248, prohibiting parties from testifying in actions by or against the heirs or legal representatives of the decedent, does not include legatees. *Newton v. Newton*, 14 S. W. 157, 158, 77 Tex. 508.

In construing a statute giving widows who elect to take against their husband's will such interest in the real estate of the husband as the widows of intestates are entitled to under existing laws, the court says that whatever difficulty may seem to arise is removed if the word "heirs" was used, as it probably was, in the popular sense, under which all persons who should take the estate of a decedent, whether by virtue of his will or by operation of law, are equally comprehended. *In re Petterson's Estate*, 45 Atl. 654, 195 Pa. 78.

Where a testator, who was residuary legatee in the will of his brother, made a will giving to his brother's widow "the pro-

portion coming to me as heir of" the said brother, the word "heir" cannot be construed in its technical sense, but in its most general sense, as indicating the person upon whom property devolves on the death of another, either by law or by will. *Shapleigh v. Shapleigh*, 44 Atl. 107, 108, 69 N. E. 577.

The word "heir," in an act to provide for the descent of intestate estates of and to illegitimates, is confined to those who take intestate, as distinguished from testate, estates, and whoever claims under a will claims, not as an heir or by descent, but by purchase as a devisee or legatee. *Lyon v. Lyon*, 34 Atl. 180, 183, 88 Me. 395.

A testator, having bequeathed certain legacies to his grandchildren, devised his real estate to his wife for life, naming also residuary devisees. In a codicil to his will he gave his wife a power to sell the real estate, subject to the approval of the heirs of the testator living at the time of the sale. Held, that the word "heirs" referred either to those who would have taken the real estate by descent, had there been no will, or those who were interested in his whole estate by the provisions of the will rather than merely the residuary devisees of the real estate. *Hoyt v. Hoyt*, 85 N. Y. 142, 151.

An heir is one who inherits, one who takes an estate by descent, as distinguished from the devisee, who takes by will. *Burrill*, Law Dict. Technically, in law, an heir is the person upon whom the law casts an estate in real property immediately on the death of the ancestor, as distinguished from one who takes by will, as a legatee or devisee, and one who succeeds by law to personal property as the next of kin. Cent. Dict. *Lyon v. Lyon* 34 Atl. 180, 183, 88 Me. 395.

In Pennsylvania, when the word "heirs" is used as a word of purchase, it means statutory heirs—those persons designated by the intestate act to take the estate not disposed of by last will and testament. *Clark v. Scott*, 67 Pa. (17 P. F. Smith) 448, 452.

#### Distributees.

The words "heir" and "distributee" are, when technically construed, not interchangeable. The first applies to an estate of inheritance; the heir takes the land, but not the personality. The word "heir" does not describe one who takes assets in the form of money from a personal representative, and in popular usage is more often used as meaning "child" than "distributee." *Louisville & N. R. Co. v. Coppage* (Ky.) 13 S. W. 1086.

On a limitation of personal property to heirs, the word will be construed "distributees." *Allison v. Allison's Ex'rs* (Va.) 44 S. E. 904, 908, 63 L. R. A. 920.

In a bequest of personalty, unless a contrary intent is indicated by the will, the words "heirs," "heirs at law," or "lawful or legal heirs" signify the testator's heirs as ascertained by the statutes of distribution. Appeal of McKee, 104 Pa. 571, 573; Appeal of Baskin, 3 Pa. (3 Barr) 304, 307, 45 Am. Dec. 641; Appeal of Eby, 84 Pa. 241, 245; In re Ashton's Estate, 19 Atl. 699, 700, 134 Pa. 390; In re Comly's Estate, 20 Atl. 397, 398, 186 Pa. 153; North Western Masonic Aid Ass'n v. Jones, 26 Atl. 253, 254, 154 Pa. 99, 35 Am. St. Rep. 810; Lord v. Bourne, 63 Me. 368, 379; Wright v. Trustees of M. E. Church (N. Y.) Hoff. Ch. 202, 212; Freeman v. Knight, 37 N. C. 72, 76; Corbitt v. Corbitt, 54 N. C. 114, 117; Clay v. Clay, 63 Ky. (2 Duv.) 295, 296; Kendall v. Gleason, 25 N. E. 838, 840, 152 Mass. 457, 9 L. R. A. 509; White v. Stanfield, 15 N. E. 919, 924, 146 Mass. 424; Ruggles v. Randall, 38 Atl. 885, 887, 70 Conn. 44; Cogan v. McCabe, 52 N. Y. Supp. 48, 51, 23 Misc. Rep. 739. So, also, in a conveyance of personalty. Sweet v. Dutton, 109 Mass. 589, 591, 12 Am. Rep. 744; Tompkins v. Levy, 6 South. 346, 348, 87 Ala. 263, 13 Am. St. Rep. 31; Montignani v. Blade, 145 N. Y. 111, 39 N. E. 719, 720; In re Fidelity Trust & Guaranty Co., 68 N. Y. Supp. 257, 260, 57 App. Div. 532; Armstrong v. Galusha, 43 App. Div. 248, 60 N. Y. Supp. 1. It is too well settled to need citation of many authorities for its support that the term "heirs," when used with reference to those to whom personal estate is given, means those who take by law or under the statute of distribution. *Lee v. Baird*, 44 S. E. 605, 609, 132 N. C. 755 (citing *Burgin v. Patton*, 58 N. C. 425, 428). The word "heirs," in a bequest of personalty, signifies heirs as ascertained by the statute of distribution, unless a contrary intent is indicated by the will. In re Gilmor's Estate, 26 Atl. 614, 617, 154 Pa. 523, 35 Am. St. Rep. 855. The word "heirs," in a certificate of life insurance, where there is no context to explain it, means those who would under the statute of distribution be entitled to the personal estate of the insured. *Johnson v. Knights of Honor*, 13 S. W. 794, 55 Ark. 255, 8 L. R. A. 732.

"In the common use of language, the children of a deceased intestate leaving personal property only would be called his 'heirs,' and such use of the term would be justified by the definitions of the word 'heir' by lexicographers; but technically they would not take the estate of the deceased as heirs, but they would take it as distributees, according to the rules established by the existing laws." As used in Acts 1848, c. 73, which provides that the real and personal estate of a married woman who shall die intestate shall descend or be distributed to her heirs, the word "heirs" was evidently intended to designate those persons who were en-

titled to the property of the deceased according to the laws then in force. *Mace v. Cushman*, 45 Me. 250, 262.

In a policy of life insurance, providing that money to become due upon the death of the person insured shall be payable to his heirs, the word "heirs" means the persons entitled to the surplus of his estate under the statute of distribution. *Leavitt v. Dunn*, 28 Atl. 590, 56 N. J. Law (27 Vroom) 309, 44 Am. St. Rep. 402; *Northwestern Masonic Aid Ass'n v. Jones*, 26 Atl. 253, 254, 154 Pa. 99, 35 Am. St. Rep. 810; *Johnson v. Knights of Honor*, 13 S. W. 794, 795, 53 Ark. 255, 8 L. R. A. 732; *Hubbard v. Turner*, 20 S. E. 640, 641, 93 Ga. 752, 30 L. R. A. 593; *Walsh v. Walsh*, 20 N. Y. Supp. 933, 935, 66 Hun, 297; *Hubbard v. Turner*, 20 S. E. 640, 641, 93 Ga. 752, 30 L. R. A. 593; *Elsev v. Odd Fellows' Mut. Relief Ass'n*, 7 N. E. 844, 845, 142 Mass. 224.

Under the New York decisions the meaning and scope of the word "heirs," when used to designate those who are to take personal property, either in a will or in any document having the same effect as a testament, as in an insurance policy, are to be determined from the context and the circumstances, so that, where it appears that the insured changed the beneficiary from his wife to his heirs, the word "heirs" will be construed to mean those who would take his personal estate in case of intestacy. *Knights Templars & Masonic Mutual Aid Ass'n v. Greene* (U. S.) 79 Fed. 461, 467.

Where a mixed fund of realty and personality is given to heirs, the testator's heirs take the land, as provided by the statute of descents, and his next of kin take the personality, as prescribed by the statute of distributions. *Alexander v. Wallace*, 76 Tenn. (8 Lea) 569, 570; *Croom v. Herring*, 11 N. C. 393, 398. Contra, holding that heirs at law would not include those who would be entitled to a share of personal property under the statute of distributions. *Lombard v. Boyden*, 87 Mass. (5 Allen) 249, 255.

The word "heirs," as used in a will in which the testator, after certain devises and bequests, directed all the residue of his estate to be divided among his legal heirs according to the laws of Michigan should be construed to mean distributees and not those who take by descent. *Hascall v. Cox*, 13 N. W. 807, 808, 49 Mich. 435.

The word "heirs," in Code Civ. Proc. § 377, allowing heirs to recover for the death of an adult by wrongful act, includes all of those capable of inheriting from the deceased generally, uncontrolled by limitation of statutes relating to the distribution of community property, and hence includes minor children of deceased. *Redfield v. Oakland Consol. St. R. Co.*, 42 Pac. 822, 825, 110 Cal. 277.

### Grandchildren.

The word "heirs" is not limited in its own meaning or by anything in the will to children, and applies either to children or to his more remote descendants, whichever may be his heirs, if he be dead. *Barber v. Pittsburgh, Ft. W. & C. Ry. Co.*, 17 Sup. Ct. 488, 494, 166 U. S. 83, 41 L. Ed. 925.

"Heirs," as used in a will, means children living at the time of the will, and does not include grandchildren. *Watson v. Watson*, 19 S. W. 543, 110 Mo. 164.

In the award of arbitrators that the personal property in dispute should be equally divided among the heirs of a certain person, the award should be construed liberally, and therefore the term "heirs," or "heirs at law," may be construed to mean all such persons' children living, and the issue or children of any of them who died in his lifetime; the grandchildren taking by right of representation. *Smith v. Smith* (Va.) 4 Rand. 95, 103.

In *Huss v. Stephens*, 51 Pa. (1 P. F. Smith) 282, where a grant was to the heirs of A. "in consideration of the natural love and affection he hath for his grandchildren," the grant was held good, and the word "heirs" applied to the grandchildren as persons in being and competent to take. *Darrah v. Darrah*, 52 Atl. 183, 184, 202 Pa. 492.

A testator, who at the date of his will and of his death had four children living and four others who had previously died leaving children, devised his real estate to his wife for life, and directed the remainder thereof to be divided in equal shares between his children and their heirs, respectively. Held, that the word "heirs" should be construed to mean "grandchildren," and that the real estate should be distributed in equal shares between the surviving children and the representatives of the dead ones. *Appeal of Bond*, 81 Conn. 183, 192.

The term "legal heirs," in a will in which testator directed that after the termination of a precedent life estate his son should receive 40 acres of land and the residue should be divided equally among all his legal heirs, was construed to be limited to the grandchildren of testator, and thus limit the son to the lands specifically devised to him. The term "legal heirs" will be construed to mean "children," when it clearly appears that such was the intention of the deceased; and the principle is not different for grandchildren, when definitely referred to, as in the will in question. *Griffin v. Ulen*, 39 N. E. 254, 255, 139 Ind. 565.

### Heirs construed as heir.

The word "heirs," as used in a will devising certain land to his heirs, should be construed to mean "heir," where a daughter of the testator was his sole heir. The use

of the plural word "heirs" cannot exclude the idea that the testator's intent was to limit the estate to his daughter in case of her being the sole heir. The word "heir" is "nomen collectivum," and embraces all legally entitled to partake of the inheritance, and is interchangeable with the term "heirs." The converse is also true. *Stokes v. Van Wyck*, 8 S. E. 387, 390, 83 Va. 724.

A testator, having executed his will, giving in trust, for the benefit of his sole and only child, property consisting of nonancestral real estate and personal property, and directing that, "in case my said child should die without issue" her surviving, then all and singular property so devised shall pass to and vest in my heirs at law, died, leaving surviving him his said child, and also his wife, a brother, and two sisters, who survived the child. Held, that the words "heirs at law" would be construed so that the property should take the identical course under the will that it would have taken under the statute of descent and distribution, if the testator had died childless and intestate, and that, since under such statutes the widow would succeed to the property, the words "heirs at law" would be construed to mean "heir at law," and that the property would go to the widow. The term "heirs at law," though used in the plural number, refers to a class, and the class cannot be deprived of the bounty merely because the number of persons composing the class does not correspond with the number of the noun used in describing it. *Weston v. Weston*, 38 Ohio St. 473, 473.

#### Heir apparent or presumptive.

"In the strictly proper sense of the word 'heir,' no one is an heir until after the death of the ancestor; yet we use the word 'heirs' as including heirs at law, heirs presumptive, and heirs apparent. In arriving at its true meaning in a particular will, we must look at all parts of the will to see in what sense the word is used by the testator." *McKelvey v. McKelvey*, 1 N. E. 594, 597, 43 Ohio St. 213; *Darblson v. Beaumont*, 1 P. Wms. 229, 232; *Heard v. Horton* (N. Y.) 1 Denio, 165, 167; *Stith's Heirs v. Barnes*, 4 N. C. 96, 98, 6 Am. Dec. 547; *Barber v. Pittsburg*, F. W. & C. R. Co., 17 Sup. Ct. 488, 494, 166 U. S. 83, 41 L. Ed. 925.

When the will shows on its face that the person whose heirs are referred to is to the knowledge of the testator at that time living, it is obvious that "heirs" is not used in its strict technical sense, but means in the case of land heirs apparent, or those who would be the heirs were the living ancestor deceased, and in the case of personal property next of kin, or those who would be such were the ancestor deceased. So the use of the term in a will personally drawn by an unskillful testator, in referring to the heirs of a

son mentioned several times in the will as living, will be construed to mean those who will be the heirs or next of kin of the son, if dead. *Montignani v. Blade*, 39 N. E. 719, 720, 145 N. Y. 111.

"The term 'heir' is not always used in the law as denoting a person whose ancestor is dead. There are many cases where it applies, though the ancestor be living, and there it means the heir apparent. In this sense it is frequently used in statutes and in legal documents." As used in a note promising to pay the heirs of B. a certain sum, the word was construed to mean the child and presumptive heir of B., and it was held that such child might maintain an action on the note before the death of the father. *Lockwood v. Jesup*, 9 Conn. 272, 273; *Cox v. Beltzhoover*, 11 Mo. 142, 146, 47 Am. Dec. 145.

The word "heirs," in a will giving the income of property held in trust to be applied to the support of the testator's son during his life, and after the son's death the principal, with any accumulated interest, to be divided equally among the rest of testator's heirs who may be living at the time of the son's decease, exclusive of his wife and any child which he has or may have, should be construed to mean heirs apparent; the son having died previously to the testator. *Morton v. Barrett*, 22 Me. (9 Shep.) 257, 262, 39 Am. Dec. 575.

Testator gave his real property to his wife for life, and "after the death of my wife, then half of said property to go to my lawful heirs and the other half to the lawful heirs of my said wife." He had no children, and expected none. Held, that the words "lawful heirs of my said wife" was not used in its technical sense as meaning "her children," etc., but meant those persons who, whenever her interest ceased, from whatever cause, would be entitled to take as his and her next of kin and apparent heirs at that time. *Howell v. Ackerman*, 11 S. W. 819, 820, 80 Ky. 22.

When, in a will, an immediate devise is made to the heirs of a person known to be living, the word "heirs" under such circumstances should be interpreted to mean heirs apparent or children. *Reld v. Stuart*, 13 W. Va. 338, 347.

The word "heir," when used in a will, is to be taken in its technical sense, unless there is in the will a plain demonstration that the testator used it in a different sense, in which case effect will be given to his intention. There is some support for the doctrine that, if it is shown aliunde that the testator knew that the person whose heirs are mentioned was alive at the making of his will, it will have the effect to change the meaning of the word "heirs" from its strict



legal, to a less accurate and popular, sense. But where a will left all of testator's property to his wife for life, and on the termination of her life estate gave one-third to the heirs of a sister, who was living at the time of the death of testator's wife, such devise lapsed, because the sister being then living, she had no heirs, and there was, therefore, no one to take such third. *Irvine v. Newlin*, 63 Miss. 192, 196, 197.

The word "heirs" is a legal term, to be construed according to its strict legal import, unless there is something in the context to control the meaning. Sometimes it means children or issue, where it is plain that it is used in a popular sense as a word of description, referring to a certain class of persons; but in a deed, where there is no reason to depart from the technical meaning, it is given its usual signification. In the ordinary signification of the word "heir," no one could be an heir of another before her death. *Gardiner v. Fay*, 65 N. E. 825, 182 Mass. 492 (citing *Wheatland v. Wheatland*, 48 Mass. [7 Metc.] 169; *Putnam v. Story*, 182 Mass. 205; *Wason v. Ranney*, 107 Mass. 159, 45 N. E. 85).

A deed to C.'s heirs, while C. is living, is void for uncertainty as to grantee, since the grantor may have meant heirs, or he may have meant children, and if he meant heirs, C. while living could have none, and if he meant those who would become C.'s heirs on his death, that also is a matter of great uncertainty until C. dies. *Booker v. Tarwater*, 37 N. E. 979, 982, 138 Ind. 385.

Technically persons in life can have no heirs, and hence a deed to the "heirs of B.," B. being at that time living, vests the title in the children of B. in esse. *Grimes v. Or-rand*, 49 Tenn. (2 Heisk.) 298, 301.

A deed conveyed premises to grantor's sister and to her heirs by her present husband, for ever. It was held that, as the sister and her husband were living, there were no persons in esse who answered to the description of heirs, in consequence of the maxim: "No one can be heir during the life of his ancestor." The husband and sister being both living, the word "heirs" could not be construed as descriptio personarum of the children then living, and must be construed in its strict legal sense, as a word of limitation and not of purchase. *Rivard v. Glens-hof* (N. Y.) 35 Hun, 247, 249, 251.

#### Heirs at law, or lawful or right heirs.

The term "heirs" is synonymous with "lawful heirs," or "right heirs." In re *Ken-yon*, 20 Atl. 294, 297, 17 R. I. 149.

The terms "lawful heirs," "right heirs," and "heirs" are synonymous. Their signifi-cation is fixed by the law, and when they are used in a deed or will, without any su-

peradded words or phrases indicating a dif-ferent meaning, they are always understood to be used according to their legal accepta-tion. *Harris v. McLaran*, 30 Miss. 533, 571.

The word "heirs," as used in a note as follows: "For full value received, I promise to pay to the legal heirs of C. K. F., four years after his death, \$16," etc., means legal heirs in the popular sense of that term; that is, those persons who bore such relation to C. K. F. as would constitute them legal heirs at the time of his death—the children and issue of any deceased child. *Love v. Francis*, 29 N. W. 843, 848, 63 Mich. 181, 6 Am. St. Rep. 290.

An heir is one who receives, inherits, or is entitled to succeed to the possession of any property after the death of the owner; one in whom the title of an estate vests on the death of the proprietor. As used in a will providing that, if "my son die without heirs, such legacies, after his widow, are to go to the heirs of T.," the word "heirs" is used in its ordinary signification of heirs at law, and not in the sense of descendants, children, or heirs of the body. *Newcomb v. Lush*, 82 N. Y. Supp. 526, 529, 84 Hun, 254.

#### Heirs living at death of testator or an-cestor.

"Ordinarily the term 'heirs,' or 'heirs at law,' is used to designate those persons who answer this description at the death of the testator. The word 'heirs,' in its strict and technical import, applies to the person or persons appointed by law to succeed to the estate in case of intestacy." 2 Bl. Comm. 201; *Rawson v. Rawson*, 52 Ill. 62. Hence, where the word occurs in a will, it will be held to apply to those who are heirs of the testator at his death, unless the intention of the testator to refer to those who shall be his heirs at a period subsequent to his death is plainly manifested in the will. *Kellett v. Shepard*, 28 N. E. 751, 755, 34 N. E. 254, 139 Ill. 433; *Clark v. Shawen*, 60 N. E. 116, 118, 190 Ill. 47. See, also, *Burton v. Gagnon*, 54 N. E. 279, 283, 180 Ill. 345; *Wright v. Gooden* (Del.) 6 Houst. 397, 419; *Abbott v. Brad-street*, 85 Mass. (3 Allen) 587, 589; *Adams v. Jones*, 57 N. E. 362, 363, 176 Mass. 185; *Minot v. Tappan*, 122 Mass. 535, 536; *Dove v. Torr*, 128 Mass. 38, 40; *Whall v. Converse*, 15 N. E. 660, 662, 146 Mass. 345; *Heard v. Read*, 47 N. E. 778, 781, 169 Mass. 216; *Walsh v. McCutcheon*, 41 Atl. 813, 814, 71 Conn. 283; *Rand v. Butler*, 48 Conn. 293, 298; *Miller v. Gilbert*, 22 N. Y. Supp. 355, 357, 3 Misc. Rep. 43; *Goodtitle v. Pedgen*, 2 Term R. 720, 721.

The words "heirs," "heirs at law," or "lawful heirs," when used in a will giving property to one with remainder to his heirs, etc., will be construed to mean heirs or issue living at the death of the person named as

ancestor. *Woodham v. Maverick*, 2 Liv. Law Mag. 487; *Taggart v. Murray*, 53 N. Y. 233, 238; *Leake v. Watson*, 21 Atl. 1075, 1076, 60 Conn. 498; *Forrest v. Porch*, 45 S. W. 676, 100 Tenn. 391; *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802; *Moore v. Gary*, 48 N. E. 630, 632, 149 Ind. 51 (construing Rev. St. 1843, § 78); *In re Moore's Estate*, 46 N. E. 960, 961, 152 N. Y. 602 (construing 1 Rev. St. N. Y. p. 724, § 22).

When a remainder is limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the word "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor. *Gen. St. Minn. 1894, § 4383*; *Rev. St. Wis. 1898, § 2046*; *Yocum v. Siler*, 160 Mo. 281, 296, 297, 61 S. W. 208.

When a balance or residue in lands, tenements, goods, or property, is limited by writing or otherwise to take effect after the decease of any person without heirs, or bodily heirs, or successors, the words "heirs" and "successors" shall be so construed as to mean heirs or successors living at the time of the decease of the person styled ancestor. *Comp. Laws N. M. § 2044*.

A testator created a trust fund for the benefit of his nephews and nieces, or their legal heirs, directing that the proceeds therefrom should be paid to such nephews and nieces, or those who should legally represent them. The children of a nephew who died before the testator were embraced within the designation of "legal heirs," and were entitled to share in the proceeds of the trust fund, taking the place of their ancestor. *Connecticut Trust & Safe Deposit Co. v. Holister*, 50 Atl. 750, 751, 74 Conn. 228.

#### Heirs of the body.

The word "heirs," as used in a devise of property to a certain person, remainder over if said person die without issue or heirs, being used in connection with the word "issue," will be construed to mean heirs of the body. *Albee v. Carpenter*, 66 Mass. (12 Cush.) 382, 386; *Wood v. Taylor*, 30 N. Y. Supp. 433, 434, 9 Misc. Rep. 640; *Fisk v. Keene*, 35 Me. 349, 355; *Gifford v. Choate*, 100 Mass. 343, 345; *Kingsland v. Rapelye* (N. Y.) 3 Edw. Ch. 1, 9; *Thurston v. Thurston*, 6 R. I. 296, 300; *Snider v. Snider*, 54 N. E. 676, 160 N. Y. 151; *Cochran v. Cochran*, 17 Atl. 981, 982, 127 Pa. 486.

Testator devised his real estate to three of his sons, to be "equally divided between them, to them and the heirs of their body, lawfully begotten," except that, if either died without legal issue, his estate to be equally divided between the survivors or their legal heirs. Held, that the phrase "legal heirs" should be construed to mean "heirs of their

bodies." *Perry v. Kline*, 66 Mass. (12 Cush.) 118, 123.

A will giving property to testator's son, and providing that, in case he should die without heir, it should be equally divided among testator's brothers and sisters, means heir of the body of the son, his lineal descendant. *Benson v. Linthicum*, 23 Atl. 133, 134, 75 Md. 141; *In re Moore's Estate*, 33 N. Y. Supp. 419, 421, 11 Misc. Rep. 486; *Crockett v. Robinson*, 46 N. H. 454, 458.

The word "heirs," in a will giving all testator's property to two specified grandchildren, share and share alike, and providing that, on the death of either without heir or heirs, the share of the decedent should go to the survivor, was said not to have been used in its primary or broader sense, as indicating the persons who would take in case of intestacy, but must have been employed in the restricted sense, as heirs of the body or descendants, for the very obvious reason that the survivor would be an heir of the deceased, and could not have been within the contemplation of the testatrix. *Johnson v. Brasington*, 50 N. E. 859, 156 N. Y. 181; *In re Cramer*, 68 N. E. 279, 280, 170 N. Y. 271.

In a devise of an estate to a man and his heirs, and if he die without leaving heirs then to his brother or any other person who may be an heir, the word "heirs" is construed to mean heirs of the body, so that the devise will operate to convey an estate tail. *Turrill v. Northrop*, 51 Conn. 33, 37; *Lee v. Lee*, 46 Ky. (7 B. Mon.) 605, 607.

In a will providing that, if a beneficiary should die without an heir before he should arrive at the age of 21 years, the property given to him should be divided between others named, "heir" is equivalent to "heir of the body." *Lippett v. Hopkins* (U. S.) 15 Fed. Cas. 567, 568.

In construing a will, in which testator devised certain property to his daughter and to her heirs, forever, but, in case the daughter should die without any heir or heirs, then to another beneficiary, the courts say that by the use of the words "heir or heirs," in the statement of the contingency upon which the estate is to go over, deceased obviously intended to designate the issue or heirs of his daughter's body. Taking the words in this sense, the provision is that, if the daughter shall die without issue, then after her decease the residue of testator's estate shall go over, whatever it may be at the decease of his said daughter. *Wilson v. Wilson*, 19 Atl. 132, 133, 46 N. J. Eq. (1 Dick.) 321.

Testator gave all his property to his executors, in trust for the support of an illegitimate son, but not to be sold or conveyed. By the third clause he directed the prop-

erty after the decease of the son to go to such son's heirs when they should become of age, and if he died leaving no heirs or widow to go to the testator's niece, and after the decease of the heirs, if any, of his adopted son, the property should go to testator's niece. Held, that the word "heir" meant the heirs of the son's body, and not heirs generally. *Klah v. Grenier* (N. Y.) 1 *Thomp. & C.* 388, 392.

A will providing that the property devised and bequeathed to testator's daughter was for her own separate use and her heirs, forever, means heirs of the body. *Jordan v. Roach*, 32 *Miss.* 481, 604.

"Heirs," as used by a testator in directing that his freehold house and his leaseholds be kept in hand and let to the best advantage, and the produce be divided every year to certain named beneficiaries, or to their "lawful heirs," refers to heirs of the body. *Harris v. Davis*, 1 *Colly.* 416, 423.

#### Husband or wife.

The husband of a devisee cannot be considered one of her "legal heirs," in the sense of the term as used in the devise over to legal heirs. *Buck v. Paine*, 75 *Me.* 582, 589; *Appeal of Ivins*, 106 *Pa.* 176, 182, 51 *Am. Rep.* 516; *Brown v. Ransey*, 74 *Ga.* 210, 214, 216.

A widow is not an heir of her husband. *Wells' Guardian v. Moore*, 16 *Mo.* 478, 481; *Lord v. Bourne*, 63 *Me.* 368, 379, 18 *Am. Rep.* 234.

The widow is an heir at law under the statute. *Weston v. Weston*, 38 *Ohio St.* 473, 478.

The term "heir," as used in *Const. art. 9, § 3*, providing that the exemptions provided for in sections 1 and 2 shall accrue to the heirs of the party having enjoyed or taken the benefit of such exemption, means the persons who shall inherit the property, whether they be infants or adults. It does not include a widow of the deceased owner, when the latter leaves surviving children. *Miller v. Finegan*, 7 *South.* 140, 142, 26 *Fla.* 29.

The word "heirs," as used in *Code Iowa, § 2337*, providing that, if a devisee dies before the testator, his heirs shall inherit the land so devised to him, unless from the terms of the will a contrary intent is manifest, will not include the widow of a devisee. *Blackman v. Wadsworth*, 21 *N. W.* 190, 192, 65 *Iowa*, 80.

Under a statute providing that, on the death of the husband intestate, the wife shall be entitled to take a certain portion of his estate absolutely, it is held, under a will providing that if any of testator's children, to whom certain property was bequeathed,

should die without leaving issue, the share devised to such child should revert to the estate and go to the right heirs of testator, testator's widow is included in the term "heirs"; the court remarking that, in order to ascertain who is the heir, it is necessary only to inquire to whom by the law of the land the estate would pass in case of intestacy. *Seabrook's Ex'rs v. Sabrook* (S. C.) *McMull. Eq.* 201, 207. See, also, *Croom v. Herring*, 11 *N. C.* 393, 395.

The words "heir or heirs," as used in the will bequeathing a sum to a person and at his death to his heir or heirs, should he have any, should be construed to mean heirs of the body, and will not include his widow. *Snider v. Snider*, 42 *N. Y. Supp.* 613, 614, 11 *App. Div.* 171.

The word "heirs" is often controlled by the words with which it is associated, and as used in the following devise: "I give and devise to my beloved wife, M. E. F., the farm on which we now live in S. county, Ind., to have and to hold so long as she remains my widow, after which said real estate shall be equally divided among my heirs"—it will not be construed as including the widow; her estate being only for so long as she remains unmarried. *Wood v. Beasley*, 7 *N. E.* 331, 332, 107 *Ind.* 37.

The word "heirs," as used in a will directing that the rest of testator's property, such as the stock, farming utensils, and household and kitchen furniture, be sold and equally divided among all his heirs, with the exception of one child, means the testator's children as such, and confines the succession to them as his next of kin, and not as distributees under the statute, and his widow would not take under the residuary clause. *Henderson v. Henderson*, 46 *N. C.* 221, 223.

The word "heirs," when used in *Pennsylvania*, means statutory heirs—that is, those who take under the intestate act—and includes the widow of the deceased person. *In re Ryan's Estate* (Pa.) 14 *Wkly. Notes Cas.* 79.

Where a statute provides that the widow of a husband dying intestate is heir to one-half of his real and personal property, if there be any children living, such widow is entitled to share in the proceeds of an insurance policy payable to the husband's legal heirs. *Anderson v. Groesbeck*, 55 *Pac.* 1086, 1090, 26 *Colo.* 3. See, also, *Lyons v. Yerex*, 58 *N. W.* 1112, 1113, 100 *Mich.* 214, 43 *Am. St. Rep.* 452; *Hanson v. Minnesota Scandinavian Relief Ass'n*, 60 *N. W.* 1091, 1093, 59 *Minn.* 123; *Alexander v. Northwestern Masonic Aid Ass'n*, 18 *N. E.* 556, 559, 126 *Ill.* 558, 2 *L. R. A.* 161. But where the widow is thereunder entitled only after all the husband's kindred, she has no claim to the fund

as against his brothers and sisters. *Johnson v. Knights of Honor*, 13 S. W. 794, 53 Ark. 255, 8 L. R. A. 732. And where the assured leaves children at his death the policy is payable to them; his widow in such case not being included as a legal heir. *Gauch v. St. Louis Mut. Life Ins. Co.*, 88 Ill. 251, 254, 30 Am. Rep. 554.

Where an insured took out a certificate of membership in a mutual insurance association, which declared that the insurance should be paid to the assured's legal heirs, the term "legal heirs" would be construed to include the insured's widow; the court saying; "We think all this inconsistent with the theory that he used the phrase 'legal heirs' in its ordinary [legal] acceptation, but we think that he intended thereby to designate his wife and children, if he should have any; and this is the meaning often attached to the phrase 'legal heirs' by the unlearned, especially when only personal property is concerned." *Kaiser v. Kaiser* (N. Y.) 13 Daly, 522.

The word "heirs" signifies to laymen those who take an estate by inheritance; but where the word is used in an insurance policy, in which the applicant stated that he wished the benefit paid to his heirs, and that the beneficiaries stood in relationship to him as wife or daughters, it must be construed as meaning that the benefit should be paid to the widow, or, if the insured left no widow, to his surviving daughters. *Addison v. New England Commercial Travelers' Ass'n*, 12 N. E. 407, 409, 144 Mass. 591.

The words "heirs at law," in *Mansf. Dig.* §§ 5225, 5226, giving a right of action to the heirs at law of any person whose death is caused by the wrongful act, negligence, or default of another, are used in contradistinction to "devisees," and include all those entitled to a share in the distribution of the personal estate of persons dying intestate, including the widow. At common law the technical meaning of the term "heir at law" is "one on whom the law casts an estate in real property immediately on the death of the ancestor intestate." *St. Louis, I. M. & S. Ry. Co. v. Needham* (U. S.) 52 Fed. 371, 372, 3 C. C. A. 129. So, also, under 2 Hill's Code Wash. § 138. *Noble v. City of Seattle*, 52 Pac. 1018, 1015, 19 Wash. 133, 40 L. R. A. 822.

#### Illegitimate children.

The term "heirs at law," as used in a will in which the testator disinherited his nephew, the son of his sister, and provided that "my heirs at law will inherit my undivided estate, but he must have none," referring to the nephew disinherited, the testator leaving no descendants, but there being numerous descendants of testator's illegitimate half-brother, included the descend-

ants of such illegitimate half-brother, considering the fact that testator had kept two of such descendants in his own family, and had treated them with peculiar confidence and affection as nephew and niece, as long as he lived. *Strode v. Magowan's Heirs*, 65 Ky. (2 Bush) 621, 627.

Where a party, entitled to the benefits of the pre-emption laws of the United States, makes a pre-emption filing in Kansas, but dies before consummating his claim, and his administrator files the necessary papers to complete the same, and upon payment for the land obtains from the United States a patent granting the land to the heirs of the deceased pre-emptor, the word "heirs" is to be construed with reference to the laws of Kansas; and an heir by such law is one who is capable of inheriting from another, or one who succeeds to the estate of a deceased; and as by statute, also, illegitimate children inherit from the father, when such children have been generally and notoriously recognized by him as his own, the word "heirs" will include the illegitimate children. *Caldwell v. Miller*, 23 Pac. 946, 948, 44 Kan. 12. See, also, *Hutchinson Inv. Co. v. Caldwell*, 14 Sup. Ct. 504, 505, 152 U. S. 65, 38 L. Ed. 356.

The word "heirs" implies legitimacy and a capability of taking by inheritance. *Henderson v. Henderson*, 1 Atl. 72, 74, 64 Md. 185.

#### Legal representatives.

See, also, "Legal Representative"; "Personal Representative"; "Representative."

The term "heirs," as used in a will devising the residue of the testator's estate to a trustee, to be held for the benefit of certain devisees and legatees until a certain year, when "the said trustee may pay over to them, or heirs, their respective portions" of the principal, as well as interest, should be construed to include legal representatives, and not to have been used by the testator in its strict legal sense. *Wiggin v. Perkins*, 5 Atl. 904, 907, 64 N. H. 36.

The word "heirs," in a will directing that at the time specified for the termination of a trust created thereby the corpus of the estate should be divided into three parts, and the parts should go to the heirs or legal representatives of testator's children, was used in the same meaning as the words "legal representatives" were there used, and describes the persons who are to take the corpus of the estate at the time of the distribution. The words are used in their natural and proper sense, as including all those persons who at that time shall be capable of inheriting from either of the children named, or of taking the property of either of such children under the statute of distributions.

*Blakeman v. Sears*, 51 Atl. 517, 518, 74 Conn. 516.

The words "or his heirs," in a federal statute authorizing the Secretary of the Treasury to adjust the accounts of a former purser in the navy, and directing the payment of the sum that may be found due him on such adjustment to him or his heirs, are simply words of succession, and descriptive of his estate and the money found to be due him, and were used in the statute in the sense of "personal representatives" and intended to secure the money to his estate in the event of his death before it was paid. *Price v. Forrest*, 35 Atl. 1075, 1080, 54 N. J. Eq. (9 Dick.) 669.

#### Next of kin.

The word "heirs," when used by a testator to indicate the beneficiaries of a bequest of personal property, is equivalent to the term "next of kin," in the absence of anything in the will pointing to some other interpretation as more consonant with the testator's intention. In *re Sinzheimer* (N. Y.) 5 Dem. Sur. 321, 322 (citing *Tilman v. Davis*, 95 N. Y. 17, 47 Am. Rep. 1); *McCormick v. Burke* (N. Y.) 2 Dem. Sur. 137, 139; *Cushman v. Horton*, 1 Hun, 601, 602; *Id.* (N. Y.) 4 Thomp. & C. 103, 104; *Bodine v. Brown*, 42 N. Y. Supp. 202, 12 App. Div. 335; *Montignani v. Blade*, 39 N. E. 719, 720, 145 N. Y. 111; *Lord v. Bourne*, 63 Me. 368, 379, 18 Am. Rep. 234; *Scudder's Ex'rs v. Vanarsdale*, 13 N. J. Eq. (2 Beas.) 109, 110; *Reen v. Wagner*, 26 Atl. 467, 51 N. J. Eq. 1; *Tuttle v. Woolworth*, 50 Atl. 445, 447, 62 N. J. Eq. 532; *Harris v. McLaran*, 30 Miss. 533, 555. This is especially so when associated with the words "executors or assigns." *Tompkins v. Levy*, 6 South. 346, 348, 87 Ala. 263, 13 Am. St. Rep. 31; *Martling v. Martling*, 39 Atl. 203, 206, 55 N. J. Eq. 771. The word "heirs," in a will giving personal property to a person, or, in case of his death, to his heirs, means next of kin. *Trenton Trust & Safe Deposit Co. v. Donnelly* (N. J.) 55 Atl. 92, 94.

A by-law of a mutual benefit association, directing that, in case a member makes no appointment of a beneficiary, his benefit on his death shall be paid to his legal heirs dependent on him, should be construed to mean next of kin. *Britton v. Supreme Council of Royal Arcanum*, 18 Atl. 675, 679, 46 N. J. Eq. (1 Dick.) 102, 19 Am. St. Rep. 376.

A will in which, after specific legacies to his widow and his brother, the testator devised the remainder of his property, real and personal, to his widow for life, and at her death to his legal heirs as the law provides, other than those mentioned in the will, means those to whom the testator's property would go by descent or by the statute of distributions according to its quality. There being no issue, next of kin in equal

degree are the heirs contemplated by the testator. *Minot v. Harria*, 132 Mass. 528.

The word "heirs," as used in a devise of testator's real estate to his wife for life, remainder to his heirs, should be construed to mean next of kin. *Rusing v. Rusing*, 25 Ind. 63, 64.

The word "heirs," as used in a marriage settlement directing that personal property belonging to a wife shall be vested in trustees to the use of the husband for life, and after his death to the use of the wife and her heirs, and to no other uses, means "blood relation on whom the law casts the inheritance on the death of the ancestor, and is taken here as next of kin." *Tyson v. Tyson*, 9 N. C. 472, 481.

Testator died, and his will gave the residue of his estate to a trustee, in trust to keep the real estate in repair and renting, and the personal estate securely invested, and to pay the income of the whole to his daughters, and to hold the principal in one-third parts in trust for the uses and purposes declared by the last will of his daughters, respectively, and in default of wills for the use of the child or children of the daughters, and in default of such will and child and children, or issue of such, then the principal "to the heirs and next of kin of the daughters so dying as provided by the intestate law of Pennsylvania." In this provision there are apt terms which define with precision each of the two classes of beneficiaries, to wit, heirs and next of kin. It has been so often held that, when technical words are used in a will or other instrument, they must have their technical meaning, unless a contrary intent appear, that it would be a mere affectation of learning to cite the authorities. It is impossible not to draw from this language that the distinction between real and personal estate was constantly in the mind of the testator, and that he intended that the principal of the part which constituted the realty should go to the heirs, and that the part which constituted the personality should go to the next of kin. *Appeal of Ivin*, 106 Pa. 176, 182, 183, 184, 51 Am. Rep. 516.

The words "my heirs" mean next of kin. *Borroughs v. Adams*, 78 Ind. 160, 161.

In a legacy to the lawful heirs of A., when it appears in the will that the latter is living, the term "heirs" is equivalent to a legacy to his next of kin or to his children. "It is always a question of intention as to the meaning of a testator in the use of the word 'heirs.' If it appear that the intention was for the heirs, properly and technically such, to take the estate, there can be no objection to his title." *Simms v. Garrot*, 21 N. C. 393, 394.

It is a general and settled rule that upon the devise of real estate to a particular

person and to his heirs at law, which is to vest the estate at a future time upon the occurrence of some designated contingency, the words "heirs at law" have their common-law signification, and are not to be construed as meaning next of kin; and the same rule prevails where there is a devise and bequest of the whole real and personal estate embraced in one common provision; or where, there being different provisions, the same expressions are used in reference to each kind of estate; and more particularly where, in administering the estate under the will, the real estate may be blended with and made a part of the share or portion of the personal estate given to a particular legatee. *Lombard v. Boyden*, 87 Mass. (5 Allen) 249, 254.

In construing an act providing that in all cases where a citizen of this state or of the United States shall die or may have died possessed of or entitled to any real estate, and shall have no heir who can inherit the same, because of alienage, in such case the real estate shall not be considered subject to escheat, but shall be sold, and the proceeds paid to the devisees of the deceased citizen, etc., it was held that the words "shall leave no heir who can inherit" could not be construed to mean "shall leave no heir, next of kin, or devisee who can inherit," by reason of alienage, so that the real property should be sold and the proceeds paid over as required by the act only in such a case, but that the phrase meant, not the next of kin, but an heir that might inherit the real estate under the laws of the state. *McLearn v. Wallace*, 35 U. S. (10 Pet.) 625, 638, 9 L. Ed. 558.

The word "heirs" is sometimes used as descriptive of the next of kin, or of the person or persons appointed by law to succeed to personal property. In *re Aspden's Estate*, 2 Fed. Cas. 37, 42.

The word "heirs," when it is used to denote succession in a gift of personality, is always a misnomer, because "heirs" is a word of limitation, and there can be no limitation, in strictness, of a chattel interest. Its popular meaning comprehends those who succeed to the property of an ancestor, and hence includes next of kin and those who take under the statutes of distribution, as well as heirs at law. The courts are forced to accept this definition where a gift of personality is to one and his heirs, or to one for his life and then to his heirs. In *re Comly's Estate*, 20 Atl. 897, 898, 136 Pa. 153; In *re Neely's Estate*, 25 Atl. 1054, 1058, 155 Pa. 133; In *re Ashton's Estate*, 19 Atl. 699, 700, 134 Pa. 390; In *re McCrea's Estate*, 36 Atl. 412, 413, 180 Pa. 81.

#### Manner and amounts taken fixed.

"A devise to heirs designates not only the persons who are to take, but also the

manner and portions in which they are to take, and when there are no words to control the presumption of the will of the testator the law presumes his intention to be that they shall take as heirs will take by the rules of descent." *Dagget v. Slack*, 49 Mass. (8 Metc.) 450; *Holbrook v. Harrington*, 82 Mass. (16 Gray) 102, 104; *Rang v. Sanger*, 115 Mass. 124, 127; *Ohlids v. Russell*, 52 Mass. (11 Metc.) 16, 21.

When a legacy is given to the legal heirs or next of kin of a person, without mentioning the proportion in which the fund is to be divided, it is to be inferred that the legatees should take according to the statute of distributions. *Tillinghast v. Cook*, 50 Mass. (9 Metc.) 143, 148. See, also, *Leavitt v. Duan*, 28 Atl. 590.

The term "heir" carries with it the idea of representation. *Bartine v. Davis*, 48 Atl. 577, 578, 60 N. J. Eq. 202.

The word "heirs," *ex vi termini*, implies representation, and this meaning is not changed by being coupled with the word "children," as used in a bequest to testator's daughter and the children and heirs of his sons, so that the estate is to be divided *per stirpes*, and not *per capita*. In *re Ashburner's Estate*, 28 Atl. 361, 159 Pa. 545.

A bequest to the heirs of testator's niece, who died before testator, is a class gift, which, on his death, vests in her descendants who were then living *per stirpes*; the word "heirs" being used in its primary legal sense, and not to denote those who would succeed to her personal estate under the statute of distributions. *Ruggles v. Randall*, 38 Atl. 885, 887, 70 Conn. 44. See, also, *King v. Savage*, 121 Mass. 303, 306.

By the term "legal heirs," as used in a will giving his wife a life estate in the income of his property, and the reversion after her death to the legal heirs, the testator meant to designate those of his collateral kindred to whom the law would have given the property in case of intestacy, and the children of deceased brothers and sisters take *per stirpes*, and not *per capita*; the word "legal" seemingly having been used in the sense and to express the idea of "according to law." *Woodward v. James*, 22 N. E. 150, 152, 115 N. Y. 346. See, also, *Bailey v. Bailey*, 25 Mich. 185, 190.

A will giving all of testator's estate to his brothers and sister and their children, and in case of the death of either of them to their heirs, carries the gift of the whole estate over to the children who have survived their parents, *per capita* and not *per stirpes*; the word "heirs" being of the same meaning as the word "children." *Murphy v. Harvey* (N. Y.) 4 Edw. Ch. 136, 137.

A devise to heirs *simpliciter* is *per stirpes*. The term designates a class only,

and it is composed of those upon whom the statute would cast the inheritance if there was no will; and since, to ascertain who they are, resort must be had to the statute, it will determine also the proportion in which they take. But where the will indicates the proportion in which the heirs are to take, the will controls. Consequently, where property was to be "equally divided" among the testator's heirs, such provision of the will controls, and the property was divided per capita. *Best v. Farris*, 21 Ill. App. 49, 51, 52.

The word "heirs," while generally and technically conveying the idea of representation, is not necessarily always to be understood in that sense. Though a word of limitation, it may be used as one of designation of the devisees in whom at a fixed time the estate devised shall vest in possession. *Bisson v. West Shore R. Co.*, 38 N. E. 104, 105, 143 N. Y. 125.

Where by the terms of a will heirs take as purchasers though it may be necessary, in order to ascertain who the heirs are, to refer to the law of descents, yet such persons will take as individuals per capita, and not per stirpes as representatives of their ancestor. *Ward v. Stow*, 17 N. C. 509, 512, 27 Am. Dec. 238.

#### Conditional fee created.

A gift to A., "or to his heirs," or to his representatives, is an absolute gift to A., on condition that he is alive on the death of the testator; but, if he dies in the lifetime of the testator, the gift takes effect in favor of the other persons described as substitutes of the primary legatee. *Brokaw v. Hudson's Ex'rs*, 27 N. J. Eq. (12 C. E. Green) 135.

By a will certain land and other property was devised to testator's son, and by a subsequent clause it was provided that, if said son "died without heirs, then the property hereby given to him shall be equally divided between" testator's three sisters. Under this will the son took a fee, contingent only upon the event of his dying without heirs, or, as is evidently meant in this will, children, and not a life estate with the remainder to such children. *Cowan v. Wells*, 73 Tenn. (5 Lea) 652, 682, 684.

#### Contingent remainder created.

The word "heirs" in its strictly technical sense denotes the person to whom, at the ancestor's decease, the law passes the inheritance. During the life of the ancestor the heir must therefore be considered as a person either not in being or not ascertained, inasmuch as it is uncertain who will fill that character at the time of the ancestor's death. It would seem, then, to follow that the limitation to the heirs of a person in existence,

if it had the other qualities of a remainder, must be a contingent remainder. *Williamson v. Williamson*, 56 Ky. (18 B. Mon.) 329, 367.

Under a will giving land to testator's wife for life, and directing that at her death it should be divided between testator's heirs at law, the remaindermen are uncertain till the death of the testator's wife, and therefore the will creates a contingent remainder. *Forrest v. Porch*, 45 S. W. 676, 100 Tenn. 391.

In a devise of an estate for the use of a daughter during her natural life, and for the use of the heirs of that daughter after her death, the word "heirs" will be held to have been used in its technical sense, and not in the sense of "children," so that the devise created a contingent remainder for the heirs of the daughter, which does not become vested until after her death. *Wallace v. Minor*, 10 S. E. 423, 425, 86 Va. 550.

#### Estate of inheritance created.

The word "heirs," as ordinarily used in a deed, means that an estate of inheritance is created. *Unfreville v. Keeler*, 1 Thomp. & C. 486, 487; *Pierson v. Armstrong*, 1 Iowa, 282, 292, 63 Am. Dec. 440.

#### Fee simple passed.

"In a deed an estate in fee simple could not be created at common law, nor could an estate in fee tail be created under St. Westm. II, without the word "heirs" used in its technical sense of a word of inheritance. See *Fountain County Coal & Min. Co. v. Beckleheimer*, 102 Ind. 76, 1 N. E. 202, 52 Am. Rep. 645.

The word "heirs" is as necessary in the creation of an estate tail as of a fee simple. 1 Co. Litt. 20a; 4 Kent, Comm. 6; 2 Bl. Comm. 114. Littleton says: "If a man would purchase the lands or tenements in fee simple, it behooveth him to have these words in his purchase, 'To have and to hold to him and his heirs,' for the words 'his heirs' make the estate of inheritance; for if a man purchased lands by these words, 'To have and to hold to him forever,' or 'to have and to hold to him and his assigns forever,' in these two cases he hath but an estate for life, because of the absence of the words 'his heirs,' which words only make an estate of inheritance in all feoffments and grants." *Adams v. Ross*, 30 N. J. Law (1 Vroom) 505, 512, 82 Am. Dec. 237. And the grantee takes only a life estate in the premises. *Clearwater v. Rose* (Ind.) 1 Blackf. 137, 138; *Gaines v. Briggs*, 9 Ark. (4 Eng.) 46, 54.

A conveyance to one and his heirs always creates an estate in fee simple, and it has been settled that no words are so apt and appropriate for this purpose as "heirs." *Robinson v. Payne*, 58 Miss. 690, 708 (citing

1 Washb. Real Prop. 41, 71; 1 Shars. Bl. Comm. 470; Terrel v. Sayre, 3 N. J. Law (2 Penning.) 598, 601; Harris v. Taylor, 5 N. J. Law (2 Southard) 413, 416; Zabriskie v. Wood, 23 N. J. Eq. (8 C. E. Green) 541, 545; Young v. Kinkead's Adm'r (Ky.) 40 S. W. 776, 777; Keniston v. Adams, 14 Atl. 203, 205, 80 Me. 290.

In a will the legal force of the word "heirs" may sometimes be controlled by the context, but not so in a deed. It is in a deed a term of art, and unless it is used in a deed only an estate for life will pass. Brown v. Mattocks, 103 Pa. 16, 21. When used in a will "heirs" may be controlled in its meaning by the context, but in a deed it is a term of art and indispensable to carry a fee. Phillips v. Sawnk, 13 Atl. 712, 718, 120 Pa. 76, 6 Am. St. Rep. 691.

A devise to one "and his heirs" creates a fee simple, if unqualified by other words; but a restraining power is sometimes given to subsequent words or clauses. Den v. Gifford, 9 N. J. Law (4 Halst.) 46, 50; Korn v. Cutler, 26 Conn. 4, 6. So, also, in wills. Appeal of Evans, 51 Conn. 435, 437; Jamaica Pond Aqueduct Corp. v. Chandler, 91 Mass. (9 Allen) 159, 168.

As a general rule the word "heirs," in a mortgage or other deed of conveyance of land, is essential to pass a fee-simple estate; but where the language employed and the recitals and conditions of the mortgage plainly evidence an intention to pass the entire estate, it will be understood to pass such an estate, though the word "heirs" is not employed. Brown v. First Nat. Bank, 6 N. E. 648, 650, 44 Ohio St. 269.

A conveyance to the heirs of a person who has children then living, reserving a life estate in the grantor and another, is a present grant of the fee to such person. Heath v. Hewitt, 127 N. Y. 166, 27 N. E. 959, 13 L. R. A. 46, 24 Am. St. Rep. 438; Rivard v. Gisenhof (N. Y.) 35 Hun, 247, 249.

The application of the principle that in a common-law conveyance the use of the word "heirs" is necessary to create an estate in fee is not affected by the circumstance that the conveyance is made in trust, and that a less estate will not be sufficient to satisfy the trust. Weller v. Rolason, 17 N. J. Eq. (23 C. E. Green) 13, 17.

Where the contrary intention is not clear, or where, in connection with a grant of the fee, or even of a life estate, the word "heirs," "heirs of the body," or other words of inheritance, are used to denote the successive line of those who would be entitled to the estate, a fee simple absolute will pass; fees tail having been abolished by the statute, or, rather, having been declared to be the equivalent of fees simple. Granger v. Gran-

ger, 46 N. E. 80, 82, 147 Ind. 95, 36 L. R. A. 186, 190.

A limitation to heirs entitled the ancestor to the whole estate; and this, though the deed might express that the first taker should have a life estate only. Brooks v. Evetts, 33 Tex. 732, 742 (citing 4 Kent, Comm. 215; Hancock v. Butler, 21 Tex. 807); Ewing v. Barnes, 40 N. E. 325, 327, 156 Ill. 61.

A devise to one and his heirs carries the fee to the first taker. Allen v. Craft, 9 N. E. 919, 921, 109 Ind. 476, 58 Am. Rep. 425; Homet v. Bacon, 17 Atl. 584, 585, 126 Pa. 176; Tucker v. Williams, 23 S. E. 90, 117 N. O. 119; Brown v. Bryant, 44 S. W. 399, 400, 17 Tex. Civ. App. 454.

#### Legacy vested.

The word "heirs," when uncontrolled by the expressed intention of the will, has the effect to vest a legacy which would otherwise be contingent. Appeal of Little, 11 Atl. 520, 527, 117 Pa. 14; Appeal of Muhlenberg, 103 Pa. 587, 593. Consequently a bequest of a testator's whole estate, to be equally divided, after the termination of the life estate, "by giving an equal share to each child or its heirs," vested the legacies in the children, and the share of one dying after the testator, but before the termination of the life estate, was payable to such child's representatives. Appeal of Muhlenberg, 103 Pa. 587, 593; Miller v. Gilbert, 22 N. Y. Supp. 355, 357, 3 Misc. Rep. 43.

The word "heirs," as used in a will directing that executors should, after the decease of the testator's wife, to whom was given a life estate in a certain farm, sell the farm and divide the proceeds equally between the testator's brothers and sisters and their heirs, the children of any that may be dead to have the shares of their deceased parents, should not be construed technically, so as to vest legacies absolutely at the testator's death, so that, on the subsequent death of a legatee during the life of the widow, his legacy would pass to his administrator or other personal representative. This the testator did not intend, but rather that the children of any deceased parent who, if living at the death of the widow, would have been a legatee, should have the share of such deceased parent. Richey v. Johnson, 30 Ohio St. 288, 296. See, also, Leake v. Watson, 21 Atl. 1075, 1076, 60 Conn. 493.

Testator directed his executors to divide a certain fund into nine equal parts, and to pay over annually one-ninth of the interest of the investment of the whole to each of his nine grandchildren, or, if one of them die leaving heirs, then to such heirs. Held, that the word "heirs," as used by the testator in such connection, imported that the grandchildren were to take a vested interest



in the fund placed in trust for them; and thus, if one of the grandchildren died, his share should be paid to such person or persons as would be entitled to it as his legal representative under the law; that is, it was not to go to the survivors, but was to be construed as vested in the deceased child. *Appeal of Reed*, 11 Atl. 787, 788, 118 Pa. 215, 4 Am. St. Rep. 588.

Where grantor conveys land to the heirs of his son after the termination of life estates reserved to the grantor and his wife, the son having children living at the time of the grant, the conveyance operated to vest a present fee in the children of the son. *Heath v. Hewitt*, 127 N. Y. 166, 27 N. E. 959, 13 L. R. A. 46, 24 Am. St. Rep. 438.

#### Conflict of laws.

"Heirs at law," as used in a bequest, must be interpreted in accordance with the meaning of the word in the country of the testator's domicile, since, if at the time of making his will and of his death the testator was domiciled in England and had a reference to its laws, the designation "heirs at law" might indicate a very different person or persons from what might be the case if the testator had been domiciled in another country, and in order to interpret the term it is indispensable that the country by whose laws the will is to be construed should first be ascertained. *Harrison v. Nixon*, 34 U. S. (9 Pet.) 483, 504, 9 L. Ed. 201.

The term "heirs at law," in a Massachusetts Benefit Association certificate issued to a resident of that state, will be construed in Connecticut by the laws of Massachusetts. *Mullen v. Reed*, 29 Atl. 478, 479, 64 Conn. 240, 24 L. R. A. 664, 42 Am. St. Rep. 174.

The term "heir at law" means the person or persons on whom lands descend according to the law of the state or kingdom in which they are situated, and hence in North Carolina means the children of a deceased person. *Jones v. Jones*, 6 N. C. 150, 157.

#### Personal property.

The word "heirs" is inapplicable to a bequest of personal estate. *De La Vergne Refrigerating Machine Co. v. Featherstone*, 13 Sup. Ct. 283, 284, 147 U. S. 209, 37 L. Ed. 138; *Dukes v. Faulk*, 16 S. E. 122, 127, 87 S. C. 255, 34 Am. St. Rep. 745. Hence a bequest of personal property to a person, without adding the word "heirs," or "heirs of his body," carries an absolute estate in the property. *De La Vergne Refrigerating Machine Co. v. Featherstone*, 13 Sup. Ct. 283, 284, 147 U. S. 209, 37 L. Ed. 138.

The word "heirs" is not strictly proper to designate persons who succeed to the personal estate of an intestate. *Tillman v.*

*Davis*, 95 N. Y. 17, 24, 47 Am. Rep. 1; *Cook v. First Universalist Church*, 49 Atl. 389, 390, 23 R. I. 62.

"The word 'heirs' is used to denote the persons who are entitled by descent to the real estate of a deceased ancestor. It is appropriate to that purpose, and, when used in a pleading in reference to personal estate, it has no meaning, and must be rejected as surplusage." *Henry v. Henry*, 31 N. C. 278, 279.

"Strictly the words 'heirs' and 'heirs of his body' are inapplicable to personal property. Whereas real estate is conveyed to a man, his heirs and assigns, personal property is assigned to him, his executors, administrators, and assigns." *Glover v. Condell*, 45 N. E. 173, 179, 163 Ill. 566, 35 L. R. A. 380.

The will of B., after certain devises and bequests, contained this residuary clause: "All the rest, residue, and remainder, real and personal, I give, devise and bequeath to my heirs, in the same manner as it would be, had I died intestate." Testator at the time of the execution of the will and at the time of his death owned no other real estate save that devised to the wife. Held, that the word "heirs" in the residuary clause referred only to the testator's real estate. *Luce v. Dunham*, 69 N. Y. 36, 42.

The term "heir" has no legal significance in respect to persons entitled to succeed to the personal property of the intestate. These are now usually signified in judicial proceedings, as well as in judicial decisions, by the term "distributees." *Hopkins v. Miller*, 92 Ala. 513, 515, 8 South. 750.

In an assignment of all the right and title of and to property, personal, real, or mixed, which the assignor has or may have as heir of another person, the word "heir" is not used in any exact or technical way, and the assignment is intended to convey all the property which the assignor was entitled to receive from the estate of the designated person. *Swan v. Warren*, 138 Mass. 11, 13.

The words "heirs" and "heirs of the body," applied to personal estate, have been sometimes held to be used synonymously with "children," a construction which, of course, requires an explanatory context. In *re Towne's Estate* (Pa.) 5 Montg. Co. Rep. 103, 104 (citing 2 Jarm. Wills [5th Am. Ed.] p. 614).

He on whom the law casts an inheritance on the death of the ancestor is designated by the technical word "heir." It could not originally be used to designate on whom the law casts the goods or chattel property, for it casts them on no one. No person was appointed to succeed to the deceased ancestor. On his death they became "bona vacantia," and were seized by the king on

that account, and by him as grand almoner applied to pious uses, now considered superstitious. Hence it is that in the common-law vocabulary there could be found no technical word to designate such successor. After one was pointed out by the statute of distributions, the technical word used in regard to inheritance would not answer for that purpose; for very frequently the persons are different, the rules of distribution being very different from the canons of descent. The word "heir," therefore, retains its technical meaning, when standing alone and unexplained by the context. *May v. Lewis*, 43 S. E. 550, 551, 132 N. C. 115 (citing *Croom v. Herring*, 11 N. C. 393).

### HEIRS AND ASSIGNS.

A grant to one and his heirs and assigns is apt and appropriate to pass a fee simple absolutely, except where these words are accompanied by a collateral limitation, by which the freehold previously granted is restricted. *Jamaica Pond Aqueduct Corp. v. Chandler*, 91 Mass. (9 Allen) 159, 168.

The words "heirs and assigns," as used in the habendum clause of a deed, are not words of purchase, but limitation, and their use in place of "his successors in office," in a deed to a bishop of the Catholic Church, does not render the deed invalid. *Morgan v. Johnson* (U. S.) 106 Fed. 452, 458, 45 C. C. A. 421.

In Rev. St. U. S. § 2322 [U. S. Comp. St. 1901, p. 1424], relating to the granting of mining claims, and providing that the locators of all mining claims heretofore or which shall hereafter be made on any mineral vein, ledge, or lode set upon the public domain, their heirs and assigns, etc., shall have the exclusive right of possession and enjoyment of all the surface included within their lines of location, etc., the words "heirs and assigns" are not words of limitation, but are used to designate the estate conveyed as one of inheritance. *Black v. Elkhorn Min. Co.* (U. S.) 49 Fed. 549, 552.

"Heirs and assigns," as used in 3 Rev. St. (2d Ed.) p. 228, providing that deeds and conveyances made in pursuance of a former act, which authorized aliens to purchase and hold real estate within the state of New York, should vest the lands conveyed, so far as related to the question of alienism, in the grantees named therein and their heirs and assigns, and should not be restricted in their application to the immediate heirs or assigns of the grantees in such deeds, but would also extend to all persons who might inherit the lands or to whom they might descend or be assigned. *Augustus v. Graves* (N. Y.) 9 Barb. 595.

The phrase "heirs and assigns," as used in the treaty of 1794 with Great Britain,

which provided that neither British subjects holding land within the United States nor their heirs and assigns should be regarded as aliens, so far as in respect to said lands, is to be construed as meaning "all who would in any manner succeed to the title of the alien owner, dividing them into two classes in reference to the mode of acquiring title, to wit, those acquiring title by descent and by purchase; the latter class including devisees." *Watson v. Donnelly* (N. Y.) 28 Barb. 653, 658.

"Heirs and assigns," as used in a will by which property was left to certain persons, their heirs and assigns, forever, by virtue of 1 Rev. St. p. 729, § 22, must be construed to mean heirs or issue living at the death of the person named as ancestor. *Woodham v. Maverick* (N. Y.) 2 Liv. Law Mag. 487.

In construing a life policy payable to the legal representatives of insured, "for his heirs and assigns," the court say that the phrase "for his heirs and assigns" is obscure. Whether, in using that language, it was intended that the assured should retain to himself the power of assignment, if he should think fit to exercise it, and if not exercised the trust fund should go to his heirs, or whether the word "assigns" was intended to mean the assigns of the heirs, as if the policy read "his heirs and their assigns," is uncertain. The latter construction would seem to effect the apparent intention of the assured. *Golder v. Chandler*, 82 Atl. 784, 785, 87 Me. 63.

### HEIRS AT LAW.

See "Heirs."

An heir at law "is one who succeeds to the estate of a deceased person." *McKinney v. Stewart*, 5 Kan. 384, 394.

The phrase "heirs at law" means the same as "heirs general." They are the kindred by blood of a deceased intestate, who inherit his land; those upon whom the law of descent casts the title. Such persons take the land by operation of that law and according to it. *Forrest v. Porch*, 45 S. W. 676, 100 Tenn. 391.

The term "heirs at law," qualified by other language in a will, has a perfectly definite meaning, which cannot be changed by proof outside of the will itself. In re *Lester's Estate*, 87 N. W. 654, 115 Iowa, 1.

The term "heirs at law," as used in a will in which the testator devised all his estate, real and personal, to his heirs at law, refers to the person in whom the laws of the state vest the estate of an intestate. It does not mean heirs at the common law. In re *Aspden's Estate*, 2 Fed. Cas. 37, 42.

**HEIRS BY ADOPTION.**

The term "heir by adoption" may properly be used to designate a child by adoption, who is "in a limited sense made an heir, not by the law, but by the contract evidenced by the deed of adoption." In re Sessions' Estate, 38 N. W. 249, 254, 70 Mich. 297, 14 Am. St. Rep. 500.

**HEIRS BY OR OF THE BLOOD.**

The term "heirs by blood," in a devise to testator's niece, and after her death to her heirs by blood, meant those persons whose relationship was by some tie of consanguinity, and excluded all others, such as husband, wife, or adopted children. It included an illegitimate son. Hayden v. Barrett, 52 N. E. 530, 531, 172 Mass. 472, 70 Am. St. Rep. 295.

"Heirs of the blood of the father" means the same thing as "heirs on the part of the father," and includes heirs both in the ascending and descending line. Baltimore & O. R. Co. v. Patterson, 13 Atl. 369, 68 Md. 606.

**HEIRS BY PRESENT HUSBAND.**

A grant of land to M. and her heirs, by her present husband, H., is to be construed as conveying a life estate to M., with remainder in fee to the children of M. and H. at the time of the execution of the grant, subject only to be opened to let in after-born children. Lehnendorf v. Cope, 13 N. E. 505, 507, 122 Ill. 317.

**HEIRS FOREVER.**

The words "heirs forever" are ordinarily words of inheritance, and are descriptive of the inheritable character of the estate conveyed, and not of the persons who are to take the estate, and are therefore wholly inappropriate to describe an estate for life. Reed v. Fidelity Trust & Safety Vault Co., 19 Ky. Law Rep. 1895, 1897, 44 S. W. 957, 958.

**HEIRS GENERAL.**

The term "heirs general" has the same meaning as "heirs at law," and means the kindred by the blood of a deceased intestate, who inherit his land; those upon whom the law of descent casts his title. Forrest v. Porch, 45 S. W. 676, 100 Tenn. 391.

The term "heirs generally," in a deed to the grantor's daughter of an estate for life, with the remainder to her children or child, and in default thereof to her heirs generally, was held not limited in meaning to collateral heirs, but to be used in its commonly accepted legal sense. The term, in view of the statute providing that an adopted child shall be regarded for the purposes of inheritance as a child born in lawful wedlock,

includes an adopted child in preference to collateral heirs. Butterfield v. Sawyer, 56 N. E. 602, 604, 187 Ill. 598, 52 L. R. A. 75, 79 Am. St. Rep. 246.

**HEIRS LAWFULLY BEGOTTEN.**

"Heirs of the body lawfully begotten," as used in a will devising property to H., in case T. H. should die without heirs of his body lawfully begotten, or before they shall arrive at the age of 21 years, was synonymous with the word "issue." Ra-borg's Adm'r v. Hammond's Adm'r (Md.) 2 Har. & G. 42, 53.

A bequest and devise of personal and real property to a certain person and his "lawfully begotten heir," forever, should be construed to mean lawful issue. Hall's Lessee v. Vandegrift (Pa.) 3 Bin. 374, 386.

A will devising property to a certain person, providing that, if he left "heirs begot in lawful marriage bed," he might appoint to one or more of his sons, implies a devise to such heirs, but does not make them take as heirs in tail. The words, standing alone, would be equivalent to the word "issue." McDonald v. Dunbar (Pa.) 12 Atl. 553, 556.

The legal construction of the words "lawfully begotten heirs," in a devise, is not that they may be satisfied by a descent to any person lawfully begotten who is his heir, though not of his body. In Barret v. Beckford, 1 Ves. Sr. 521, Lord Hardwicke said: "The proper construction of legitimate heirs is 'heirs of his body, lawfully begotten.'" Dewan v. Cox, 9 N. J. Law (4 Halst.) 10, 14.

"Heirs lawfully begotten of her body," as used in the following devise: "I lend the use of the negroes K. and G. to my daughter C. during her natural life, and at her death to be equally divided between the heirs lawfully begotten of her body"—is construed to mean the daughter's children living at her death. Prescott v. Prescott's Heirs, 49 Ky. (10 B. Mon.) 56, 60.

A will contained a devise for life, and then over to the children of the tenants for life in fee simple, with a limitation that, if such tenant for life "should die without leaving any heirs, lawfully begotten of their or either of their bodies" then, etc. Held, that the heir or heirs lawfully begotten, in view of the testator, were the children of the tenant for life, who were to take on the tenant's death. Stevenson v. Evans, 10 Ohio St. 307, 315.

**HEIRS MALE.**

Lord Coke says: "If a man give lands to a man, to him and his 'heirs male,' the law rejects the word 'male,' because there is no such kind of inheritance." This was un-

doubtedly of a common-law grant or conveyance; for in another place he says: "If a man by his last will devise lands and tenements to a man and to his heirs male, this by construction of law is an estate tail, the law supplying the words 'of his body.'" *Baltimore & O. R. Co. v. Patterson*, 13 Atl. 369, 68 Md. 606. See, also, *Weart v. Cruser*, 13 Atl. 38, 37, 49 N. J. Law (20 Vroom) 475; *Crane v. Fogg*, 3 N. J. Law (2 Penning.) 819, 883.

In *Dawes v. Ferrers*, 2 P. Wms. 3, Lord Chancellor Macclesfield says: "The words 'heirs male' (in a will) mean 'heirs male of the body,' and would never extend to heirs male in any collateral line." *Dewan v. Cox*, 9 N. J. Law (4 Halst.) 10, 14.

In a devise to testator's nephews for life, with remainder to "their male heirs that they now have or may have hereafter," the expression "male heirs that they now have" is a good description of the male children of the testator's nephews who were then living. The testator meant "heirs apparent," and not "heirs," in its legal signification. The devise of the remainder, therefore, embraced all the sons of a nephew who died before the testator's death, and who were living at the death of the testator. *Conklin v. Conklin* (N. Y.) 3 Sandf. Ch. 64, 67.

#### HEIRS MALE OF HIS BODY.

The words "heirs male of his body," or "male heirs of his body," are technical words of limitation, expressing an estate, as the words "heirs of his body" express an estate in fee tail general. By an inflexible rule of law, where such words, without further explanation of their meaning, and whether with or without superadded words of limitation, are applied by the same instrument to define who of the first taker's blood shall take the estate after him, whether his estate as declared be indefinite, or an express estate for life, that estate is enlarged according to the technical meaning of such words. *Jillson v. Wilcox*, 7 R. I. 515, 518.

"Heirs male of his body," as used in a will leaving property to J. for life, and after his decease to the heirs male of his body for their natural lives, in succession, according to their respective seniorities, or in such proportion as the "said J., their father," shall by deed or will direct, meant sons. *Jordan v. Adams*, 6 C. B. (N. S.) 748, 764. On appeal the Exchequer Chamber were equally divided. See 9 C. B. (N. S.) 483.

In a devise to A. for life, without impeachment of waste, remainder to trustees to preserve contingent remainder, remainder to the "heirs male of the body of A." to be begotten severally, successively, and in remainder, one after another, according to

seniority, the elder of such sons and the heirs male of his body being always preferred before the younger of such son and sons and the heirs male of their bodies, and in default of such issue to the "daughter and daughters" of the body of A., the words "heirs male of her body" were explained, by the subsequent words, to mean "first and other sons." *Goodtitle v. Herring*, 1 East, 204, 275.

#### HEIRS OF THE BODY.

See "Lineal Heirs of the Body."

The word "heir" or "heirs" is wholly technical, meaning the person or persons who may by law inherit. The words "heirs of the body" are equally technical, meaning such of the offspring or issue as may by law inherit. *Black v. Cartmell*, 49 Ky. (10 B. Mon.) 188, 193.

The words "natural heirs" and "heirs of the body," in a will and by way of executory devise, are considered as of the same legal import. *Smith v. Pendell*, 19 Conn. 106, 112, 48 Am. Dec. 146.

The term "bodily heirs" means the class of persons who by law take property by inheritance or succession from another. *Donnell v. Mateer's Ex'rs*, 40 N. C. 8, 9.

Where the term "heirs of the body" is used in a devise, accompanied by the words "share and share alike," or "equally," or "in equal parts," or kindred words, and "their heirs, executors, administrators, and assigns," the statute of distribution must be looked to for the parties who answer that description and take the devise; but the method of distribution is fixed by the devise itself to be per capita and not per stirpes, and the estate is one of purchase, and not of descent. *Dukes v. Faulk*, 16 S. E. 122, 127, 37 S. C. 255, 34 Am. St. Rep. 745.

#### As words of limitation.

The phrase "heirs of the body" in its primary and natural sense, "is a phrase of limitation, and not of purchase." *Schoonmaker v. Sheely* (N. Y.) 3 Denio, 485, 490; *Nelson v. Davis*, 35 Ind. 474, 478; *Burns v. Weesner*, 34 N. E. 10, 134 Ind. 442; *In re Bacon's Estate*, 52 Atl. 135, 138, 202 Pa. 535.

"Heirs of the body" are proper technical words of limitation, when used in a deed. *Taylor v. Taylor*, 63 Pa. 481, 3 Am. Rep. 565.

"Heirs of the body" are strictly and technically words of limitation. Nothing can convert them into words of purchase but a clearly expressed intention of the testator to use them in an abnormal sense. *Linn v. Alexander*, 59 Pa. (9 P. F. Smith) 43; *Pearsol v. Maxwell* (U. S.) 68 Fed. 513, 514; *Lanhan v. Wilson* (Ky.) 22 S. W. 438; *Wilker-*

son v. Clark, 7 S. E. 319, 320, 80 Ga. 387, 12 Am. St. Rep. 258; Brant v. Gelston (N. Y.) 2 Johns. Cas. 384.

The term "heirs of the body," as used in a deed, can have effect only as words of limitation. Standing by themselves, they are wanting in the element of certainty which is essential in order to treat them as words of purchase. There is a familiar Latin maxim, the meaning of which may well be expressed in English to the effect that "no one is the heir of a living person." There is nothing, therefore, to justify the limitation of the phrase "heirs of her body" to make it include only children living at the date of the deed; for it is to be given effect, if at all, as a description of a class of persons at a subsequent date, when after-born children or remoter descendants would be in esse, and therefore included within the term. Slayton v. Blount, 9 South. 241, 242, 93 Ala. 575.

The words "heirs of the body," etc., are words of limitation, and not of purchase. Notwithstanding the words "and to his, her, or their heirs and assigns," etc., were added, these were to be rejected as repugnant to the estate created by the preceding words. Brant v. Gelston (N. Y.) 2 Johns. Cas. 384.

"Heirs of her body," when used in a bequest of personal property to a certain person and the heirs of her body, must be considered words of limitation, and not words of purchase. Hinson v. Pickett, 1 Hill, Ch. 35, 37; Simms v. Bulst, 30 S. E. 400, 402, 152 S. C. 554; Chewning v. Shumate, 32 S. E. 544, 106 Ga. 751; Whatley v. Barker, 4 S. E. 387, 79 Ga. 790; Ewing v. Shropshire, 80 Ga. 374, 7 S. E. 554.

The term "bodily heirs," in a conveyance to a beneficiary and her bodily heirs, is an appropriate term of limitation, and will be so construed, unless it appears from the instrument that it was used by the grantor in the sense of "children." Lanham v. Wilson (Ky.) 22 S. W. 438; Donnell v. Ma-teer's Ex'rs, 40 N. C. 7, 8, 9.

#### As words of purchase.

"It is a well-settled doctrine of all modern cases that the words 'heirs of the body' may be construed as words of purchase whenever there is anything in the instrument which shows that they were used to designate certain persons answering the description of heirs at the death of the party." Williams v. Allen, 17 Ga. 81, 83.

The words "heirs of the body" ordinarily are words of limitation, and not words of purchase; but they are frequently used in wills to denote children, or as synonymous with "children," and when used in that sense by the testator they must be construed as

words of purchase, and not of limitation. Powell v. Glenn, 21 Ala. 458, 465.

A deed to one and the heirs of her body after her death is such a grant as would at common law have fallen within the rule in Shelley's Case, and, being made subsequent to the statute (Code, § 1025) abolishing that rule, is governed by that statute, and therefore such deed operates to convey to the first taker only a life estate, at the termination of which those who are heirs of the body of the life tenant take the remainder by purchase in fee. Wilson v. Alston, 25 South. 225, 226, 122 Ala. 630. See, also, Leathers v. Gray, 2 S. E. 455, 457, 96 N. C. 548.

#### Adopted child.

The term "bodily heir," in a will, is the exact equivalent of the words "heirs of the body," and hence, while the adoption of a child gives him capacity to inherit as heir and next of kin, it does not make him a bodily heir. Balch v. Johnson, 61 S. W. 289, 290, 106 Tenn. 249.

"Bodily heir" is a well-established technical term, and is defined in And. Law Dict. 508, as "an heir begotten of the body; a lineal descendant." Such heirs are the only ones referred to and included in the term "children" in Rev. St. 1855, c. 32, § 5, providing that any conveyance or devise which would have created an estate tail under St. 13 Edw. I should vest an estate for life only in the grantee or devisee, and on his death the fee should go to his children or their issue, and, if none, then to his heirs, and under such statute the fee would not go to an adopted child of such grantee or devisee. Clarkson v. Hatton, 44 S. W. 761, 762, 143 Mo. 47, 89 L. R. A. 748, 65 Am. St. Rep. 635.

#### All descendants.

The words "heirs of the body" are held to be of larger significance than the word "children," and, like the word "issue," to include descendants of every degree. Houghton v. Kindall, 89 Mass. (7 Allen) 72, 76, 78.

The phrase "heirs of the body of the father" includes only heirs in the descending line. Baltimore & O. R. Co. v. Patterson, 13 Atl. 369, 68 Md. 606.

In its technical sense the term "heirs of the body" includes all persons who successfully answer the description of "heirs of the body," and hence it embraces the whole line of lineal descendants to the most remote generation. Technically construed, the expression is one which cannot be used to describe the children or grandchildren of a living person, for "nemo est hæres viventis." Roberts v. Ogbourne, 37 Ala. 174, 178.

A deed conveyed land to "A., to have and to hold unto the said A. during her nat-

ural life, and after her death to be equally divided between the lawful heirs of her body." Held, that the words "lawful heirs of her body" meant, not an indefinite succession of heirs, but a remainder at the particular time, absolutely as individuals. *Fields v. Watson*, 23 S. C. 42, 46.

#### Children.

The term "heirs of her body," as used in a will bequeathing to testator's daughter a certain sum and to the "heirs of her body" a certain negro girl, means "children." "In a strict sense, no person can sustain the character of heir in the lifetime of the ancestor, but it is always open to inquiry whether the testator used the word according to its strict and proper acceptation, or in a more inaccurate sense to denote children, next of kin," etc. *Bailey v. Patterson* (S. C.) 3 Rich. Eq. 156, 158; *Black v. Cartmell*, 49 Ky. (10 B. Mon.) 188, 193.

The term "heirs of the body" is sometimes used in a will in the restricted sense of "children." It is given a meaning according to the apparent intention of the testator manifest in the will. *Appeal of Elchelberger*, 19 Atl. 1006, 1007, 185 Pa. 160; *Pierce v. Ridley*, 60 Tenn. (1 Baxt.) 145, 147, 25 Am. Rep. 769; *Hickman v. Quinn*, 14 Tenn. (6 Yerg.) 96, 103.

The words "heirs of her body," while they have a well-defined technical significance, sometimes have the popular signification of children, and in a conveyance in trust for the use of H. and the heirs of her body during her life and then to her heirs, H. being alive at the time that the deed was executed, the words heirs of her body could not have been used in their technical sense, for *nemo est hæres viventis*, and hence they must have been used in the sense of children. *Shaw v. Robinson*, 20 S. E. 161, 162, 42 S. C. 342; *Gibson v. Gibson*, 49 N. C. 425, 428; *Roberts v. Ogbourne*, 37 Ala. 174, 179.

In a devise of real estate "in trust for children left by my daughter M. of her body, or the descendants of such child or children, if she leaves no child," and directing that, if the heirs of her body shall fall before arriving at the age of 21, the property shall pass to another, the words "heirs of her body" though ordinarily technical words, used to designate a whole line of descent, are here used by the testatrix merely for the purpose of describing the particular persons who, under the prior limitations, would take the estate, and hence they are synonymous with the words "children left by my said daughter." *Boutelle v. City Sav. Bank*, 26 Atl. 53, 54, 18 R. I. 177.

The term "heirs of their body," as used in a will providing that a negro willed and

devised to testator's daughters was for their support and maintenance and the support and maintenance of the heirs of their bodies, and after their death should descend directly to the heirs of their bodies, should not be construed in its technical legal sense, but as meaning "children." *Powell v. Glenn*, 21 Ala. 458, 465.

Where testator devised land to his son for life, and after death to the "heirs of his body by him begotten," with remainder over if he should have no "heirs of his body by him begotten" surviving, the modifying words of the term "heirs of his body" limiting that phrase to "children," the rule in *Shelley's Case* cannot be invoked to extend the devise to the son for life to a devise in fee simple. *Granger v. Granger*, 46 N. E. 80, 84, 147 Ind. 95, 86 L. R. A. 190; *Granger v. Granger*, 44 N. E. 189, 147 Ind. 95, 86 L. R. A. 186. See, also, *Loving v. Hunter*, 16 Tenn. (8 Yerg.) 4, 31; *Leathers v. Gray*, 2 S. E. 455, 457, 96 N. C. 548.

In a will providing that the interest on a legacy, made a charge on testator's land, be paid to the legatee for life, and directing the payment of the principal to the legatee's bodily heirs at her decease, the term "bodily heirs" is used in the popular sense of "children," and not in its technical sense; so that the legatee takes only a life estate. In re *Gerhard's Estate*, 28 Atl. 684, 160 Pa. 253; *Twelves v. Nevill*, 39 Ala. 175, 180.

Code, § 2448, provides in limitations over to heirs that the terms "heirs of the body," "lineal heirs," "lawful heirs," "issue," and like words shall mean "children." Section 2250 provides that a gift to one and the heirs of his body conveys an absolute estate. A testator left to his daughter and her bodily heirs and to his son certain real estate, to be divided when they became of age, providing that his wife have a life interest therein, unless she married or moved away. The daughter married and died after the death of the testator, leaving no children. It was held that the daughter took an absolute fee in the land of an undivided half interest, subject to the right of the widow. *Craig v. Ambrose*, 4 S. E. 1, 2, 80 Ga. 134.

The expression "bodily heirs," as used in the provision of a will that "the property herein devised to my children is to remain their own during their natural lives, and to descend to their bodily heirs, if any," is equivalent to the expression "heirs of the body" as used in the statute providing that, if a remainder be limited to the heirs of the body of a person to whom a life estate in the same premises is given, the persons who are the heirs of the body of such tenant shall take as purchasers a devise in fee on the termination of the life estate. *Stratton v. McKinnie* (Tenn.) 62 S. W. 636, 640.

The words "heirs" and "bodily heirs," as contained in a deed reciting that "it is expressly agreed and understood that said second party is to deed or will said lands to the bodily heirs of J. C. Dupoyster,—in other words, the title and possession of said lands is only invested in said second party during his natural lifetime, then to said heirs of J. C. Dupoyster; the second party has the discretion of allotting said lands between said heirs as he may see proper"—mean "children," and B. was vested with only a life estate, remainder to the children of D., which vested in the first-born child, and was subject to be opened to let in the after-born children. *Ft. Jefferson Imp. Co. v. Dupoyster*, 51 S. W. 810, 812, 108 Ky. 792, 48 L. R. A. 537.

The words "issue of his body" are more flexible than the words "heirs of his body," and courts more readily interpret the former as the synonym of "children," and a more *descriptio personarum*, than the latter. *Daniel v. Whartenby*, 84 U. S. (17 Wall.) 639, 21 L. Ed. 661. In *Carpenter v. Van Olinder*, 127 Ill. 42, 19 N. E. 868, 2 L. R. A. 455, 11 Am. St. Rep. 92, we construed the words "issue of their bodies" as meaning children. In *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 589, it was said that the words "issue" and "children" might be construed interchangeably, in order to effectuate the intention of the testator. In *Summers v. Smith*, 127 Ill. 645, 21 N. E. 191, it was said that every part of the will might be taken into consideration for the purpose of showing that the words "heirs of body," which are less flexible than the words "issue of body," are used synonymously with "children." And in the *Summers Case* it was held that the words "dying without heirs of body" meant "dying without leaving such heirs of body as the estate would have vested in in fee instantly upon the death of the first taker, as children," etc. *Strain v. Sweeny*, 45 N. E. 201, 202, 163 Ill. 603.

#### Grandchildren.

"Heirs of the body," as used in a devise of property to a certain person, remainder over to the heirs of the body of another person, who had children living at the time of the execution of the will, which fact was known to testator, was construed to mean children or descendants and to include grandchildren. *Knight v. Knight*, 56 N. C. 167, 169.

#### Heirs generally.

"Heirs of her body," as used in a conveyance of land by a father to his daughter and to the heirs of her body, is to be construed to mean heirs generally, under the rule in *Shelley's Case*, and vests in the daughter a fee-simple estate. *Lane v. Utz*, 29 N. E. 772, 130 Ind. 235.

#### Heirs living at death of life tenant.

"Heirs," as used in a will giving a life estate to one person, and at her death to be paid over to the children who should be the surviving "heirs of her body," means those children who, when the legacy became payable, were the surviving heirs of the body of the life tenant, and not those who were heirs at the testator's death, for, strictly speaking, no one could be an heir of the life tenant until her death. *Houghton v. Kendall*, 89 Mass. (7 Allen) 72, 75.

Heirs of the body must be persons not only who answer the requirements of lineal descendants of the parent stock, but also such persons who would stand at the date of the death of the life tenant as an heir under the provisions of the statute of distributions. *Dukes v. Faulk*, 16 S. E. 122, 127, 37 S. C. 255, 34 Am. St. Rep. 745.

Testator bequeathed his property to trustees to pay the income to his daughter S. for her sole use during her life, and at her death to be divided equally among all the heirs of her body, and, if she should have any, the children of any one of her children that might be dead to take collectively what their parent would have been entitled to if living, and if any died before their mother, without issue, the share of such to go to the survivor or survivors, and, in default of such heirs, equally to her brothers and sisters and their heirs. Held, that the phrase "heirs of her body" meant children alive at the daughter's death. *Clemens v. Heckscher*, 40 Atl. 80, 85, 185 Pa. 476.

#### Issue.

The term "heir of the body" is a well-established technical term, with which the words "children" or "issue" or "lawful issue" are not synonymous. *Sewall v. Roberts*, 115 Mass. 262, 276.

The words "heirs of the body" and "issue" are generally equivalent in a will, though the former are regarded as the stronger and more technical terms. *Whitworth v. Stuckey* (S. C.) 1 Rich. Eq. 404, 412; *Smith v. Greer*, 6 South. 911, 912, 88 Ala. 414; *Raborg's Adm'r v. Hammon's Adm'r* (Md.) 2 Har. & G. 42, 53.

The phrase "lawful heir of the body," as used in a will providing that the testator's estate should go to his sons, and that, if either of them should die without any lawful heirs of their body, then the share of said deceased son should go to the surviving brothers, is precisely equivalent to "lawful issue"; that is, children or descendants. *Parker v. Parker*, 46 Mass. (5 Metc.) 134, 139.

Where it appears from a will that the testator has used the terms "issue" and "heirs of the body" interchangeably, the words "heirs of the body" are not to be con-

strued technically, but as equivalent to "issue." *Gallagher v. Rhode Island Hospital Trust Co.*, 46 Atl. 451, 454, 22 R. I. 141.

In construing a grant to the grantee and the heirs of her body, the court observes that the words "heirs of her body" include all heirs descending from the grantee, and by force of the terms themselves take in the whole generation; that the word "heirs" is stronger than the word "issue"; and that subsequent words in the grant, giving an estate to the heirs and assigns of the heirs of the grantee's body, are either merged in the preceding words or are too uncertain to control them. *McGinnis v. McPeake*, 2 N. J. Law (1 Penning.) 291, 298.

#### Contingency created.

"Heirs of her body," within a conveyance of a life estate to a certain woman, with remainder to the heirs of her body surviving her, means descendants; and therefore the person to whom the remainder is to go must be a child or descendant, and the event upon which the estate takes effect is the death of the life tenant leaving some descendant her surviving. The requirement that the reversion should go to an heir of her body her surviving places a contingency upon the remainder, for it could not be determined until the death of the mother whether she would leave an heir of her body her surviving. *Hall v. La France Fire-Engine Co.*, 53 N. E. 513, 514, 158 N. Y. 570 (citing *Purdy v. Hayt*, 92 N. Y. 446).

A deed granting land to a woman and the heirs of her body, to have and to hold the same unto said woman and the heirs of her body, to her and their heirs and assigns, forever, does not use the words "heirs of her body" in the sense of "children," thereby conveying title to the woman and such children in equal shares, but in its technical sense, and it creates a conditional fee in a woman. *Miller v. Graham*, 25 S. E. 165, 167, 47 S. C. 288; *Archer v. Ellison*, 5 S. E. 713, 715, 28 S. C. 238; *Simms v. Bulst*, 80 S. E. 400, 402, 52 S. C. 554.

#### Estate tail created.

The words "heirs of the body" have by long course of legal interpretation acquired a settled meaning, whereby they impute to the grantor the intention to create an estate of inheritance restricted in the course of descent to the lineal heirs of the ancestor named. *Wilson v. Alston*, 25 South. 225, 226, 122 Ala. 630.

The words "to one of the heirs of his body and issue" are words of issue, creating an estate tail, and are not words of purchase. *Smith v. Greer*, 6 South. 911, 912, 88 Ala. 414.

Where a devise is to one and the heirs of his body, the phrase "heirs of his body"

creates an estate tail by the rule of the common law. *Henderson v. Walthour* (Pa.) 15 Atl. 803, 804; *Parker v. Parker*, 46 Mass. (5 Metc.) 134, 139; *Monroe v. Douglass*, 5 N. Y. (1 Seld.) 447, 452; *McMeekin v. Smith* (Ky.) 21 S. W. 353, 354; *Ralston v. Truesdell*, 35 Atl. 813, 814, 178 Pa. 429; *Spachius v. Spachius*, 16 N. J. Law (1 Har.) 172, 175; *Granger v. Granger*, 46 N. E. 80, 82, 147 Ind. 95, 36 L. R. A. 190. But such estate tail is by statute converted into a fee simple. *McMeekin v. Smith* (Ky.) 21 S. W. 353, 354; *Granger v. Granger*, 46 N. E. 80, 82, 147 Ind. 95, 36 L. R. A. 190; *Smith v. Greer*, 6 South. 911, 912, 88 Ala. 414; *Seaman v. Harvey* (N. Y.) 16 Hun, 71, 73.

The use of the word "children" does not show that the term "heirs of the body" was used in a sense other than its usual technical signification. *Monroe v. Douglass*, 5 N. Y. (1 Seld.) 447, 452.

The words "to her bodily heirs" are technical words of entail, and thus, when used in a gift of real property to a certain person for life, then to her bodily heirs, the words operate to give the first beneficiary a fee tail, *Jones v. Jones*, 20 Ga. 699, 700; *Middleton v. Smith*, 41 Tenn. (1 Cold.) 144, 145; which under the statute became a fee simple absolute, *Middleton v. Smith*, 41 Tenn. (1 Cold.) 144, 145; *Ford v. Cook*, 73 Ga. 215, 217.

#### Personal property.

"Strictly the term 'heirs of his body' is inapplicable to personal property. Whereas real estate is conveyed to a man, his heirs and assigns, personal property is assigned to him, his executors, administrators, and assigns." *Glover v. Condell*, 45 N. E. 173, 179, 163 Ill. 566, 35 L. R. A. 360.

#### HEIRS OF MONEY.

The term "heirs of money," used in a will, has no technical meaning. *Cook v. First Universalist Church*, 49 Atl. 389, 390, 23 R. I. 62.

#### HEIRS OF THEM.

Where a will gave a life estate to a husband and wife and the fee to the "heirs of them," a contention that the word "heirs" could not be taken in its technical sense on the theory that the heirs of them must be the heirs of both, and that nobody could be the heirs of both except the children of both, and that hence the word "heirs" was equivalent to "children," and a word, not of limitation, but of purchase, was of no merit, but "the heirs of them" was to be construed as "their heirs." *Auman v. Auman*, 21 Pa. (9 Harris) 343, 347.



**HEIRSHIP.**

"Representation" and "heirship," though they may produce the same result, are not the same thing, and it is not necessary that a person should be the heir of another in order to be his representative. "Heirship" is the result, while "representation" is but a process through which that result is produced. Representation is not predicated of the person dying seised, but of the next line of takers from him, and the very nature of the right implies that those should be considered as the representatives of the deceased person who would have inherited of him if he had died seised of the estate at the time when the descent was cast. *Gaines v. Strong's Estate*, 40 Vt. 354, 362.

**HELD.**

See "Is Being Held."  
See, also, "Hold."

"Held," as used in articles of copartnership by which each partner agreed to give all his time to partnership interests in the business except such as might be proper for fulfilling the duties of any office or agency held individually by either partner, cannot be construed as applying only to offices or agencies held by a partner when the copartnership was formed; the word "held" being the perfect participle of the word "hold," and participles have no reference to time, but simply show the action or state of the word from which they are derived as finished or unfinished. The word, whether considered grammatically or in relation to other parts of the contract, cannot legally be limited to an office or agency in the possession of one of the parties when the contract was formed, but includes any office or agency of which a partner might become possessed at any time during the continuance of the partnership. *Starr v. Case*, 13 N. W. 645, 647, 59 Iowa, 491.

**As considered to be.**

Gen. St. c. 234, § 5, declaring that every person who shall be guilty of playing faro, etc., shall be "taken and held" to be a common gambler, does not mean that the offender is a common gambler, so as to require the offense to be thrice repeated, on the ground that a man cannot be a common offender until he has offended at least three times, but only means that he shall rank as a common gambler in point of criminality. *State v. Melville*, 11 R. I. 417, 418.

**As ownership or possession.**

"Held" implies a defensive possession entirely consistent with that of a trustee. *Gutch v. Fosdick*, 48 N. J. Eq. (3 Dick.) 353, 356, 22 Atl. 590, 27 Am. St. Rep. 473.

"As a technical term, 'held' embraces two ideas—that of actual possession of some subject of dominion or property, and that of being invested with legal title or right to hold or claim such possession. We speak of lands being held in fee, or for a term of years, or by adverse possession, meaning that possession is had of these lands under claims to such possession of the nature described by these terms. So we speak of a legal title being held in respect to land; that expression not necessarily implying the actual possession of the land to which such title relates." *Witsell v. City of Charleston*, 7 S. C. 88, 99.

In Act 1803, § 8, providing that the rules of descent established by the act of 1786 should apply to and govern in all cases except where the amount specified in any of the letters patent mentioned in section 1, or any part thereof, were, on April 5, 1803, held by bona fide purchasers or devisees under any person who would have been heir at law of the patentees, "held" does not contemplate an actual possession and improvement, but the term is used in its legal sense, and is synonymous with the possession or holding of the title. *Jackson v. Mumford* (N. Y.) 9 Cow. 254.

In Const. art. 14, § 8, providing that the real and personal property of a woman held at the time of marriage shall not be subject to the husband's debts, "held" is to be construed as not used for the purpose of limiting the real and personal property affected thereby to that property to which a wife holds a legal title, but is used to give the largest effect to the terms "real and personal property" in their application to property of a married woman. The interest of a wife in property held in trust for her use is property held by her within the meaning of the Constitution. *Witsell v. City of Charleston*, 7 S. C. 88, 99.

St. 1791, c. 60, § 1, provided that all lands held in fee tail should be liable to the payment of the debts of the tenant in tail, in the same manner as other estates. Held, that the phrase "lands held in fee tail" indicated an estate in possession by reason of the word "held," and not a mere right as tenant in tail in remainder. *Holland v. Cruft*, 69 Mass. (3 Gray) 162, 184.

The word "held" in the phrase "lands held by coparceners, joint tenants, or tenants in common," in statutes relating to the partition of such lands, "has always, since Henry VIII, been construed as denoting a present possession, either actual or constructive." Such is the import of the words in P. L. 1852, p. 157, authorizing the partition of such lands. *Smith v. Gaines*, 39 N. J. Eq. (12 Stew.) 545, 547.

A devise of property "to be held and enjoyed" by the legatee does not create a

usufruct, but grants an absolute estate in the legatee. *Succession of Justus*, 12 South. 180, 45 La. Ann. 190.

As used in the statute relating to assessment of lands for taxation, and providing that when mineral, mineral water, oil, gas, or coal privileges or interests are held by a party or parties, exclusive of the surface, the same shall be assessed separately to such party or parties, the word "held" means "owned," in the sense, at least, of freehold ownership, and the party to be separately assessed must own the mineral privilege or interest, if not in fee, at least to the extent of a freehold. A mere lessee for years, paying royalty or rent in kind, has a chattel interest; but the whole corpus remains undivided in the lessor. The statute contemplates a case in which another party than the owner of the surface has become the owner of the mineral or coal and holds it as such owner. *State v. South Penn Oil Co.*, 24 S. E. 688, 695, 42 W. Va. 80.

Lands set apart by the state of Texas for the contractor as payment for the construction of the new capitol of Texas, to be conveyed to him from time to time when earned in the progress of the work, was not held by him within the meaning of the statute providing that "land held under a contract for the purchase price belonging to the state" should be taxed. *Taylor v. Robinson*, 10 S. W. 245, 247, 72 Tex. 364.

#### As retained in position.

"Held," as used in a patent on an envelope machine, reciting that there was substituted a revolving drum, with rigid fingers projecting from its rim, so arranged that an envelope may be held in the space between two consecutive fingers, and no pressure be exerted on the recently gummed parts while the gum on the seal flap is drying, signifies that the envelope is retained in position against the action of gravity as the drum revolves; and while it may also mean that the envelope is retained in position in relation to the inserting and withdrawing mechanism, this latter feature is merely incidental and subordinate to the main result contemplated. *Whitcomb Envelope Co. v. Logan, Swift & Brigham Envelope Co. (U. S.)* 63 Fed. 982, 983.

#### HELD AND FIRMLY BOUND.

The phrase "held and firmly bound," as used in a recognizance providing that the obligors were held and firmly bound in a certain sum for the release from custody and appearance of a defendant charged with passing counterfeit money, has the same force and meaning as "owe and indebted," which was the form of the common-law recognizance. "There is no difference in the condition of the obligations in a recognizance

that a party acknowledges that he is 'held and firmly bound' to pay and that he 'owes and is indebted.'" *Shattuck v. People*, 5 Ill. (4 Scam.) 477, 478.

#### HELD AS SECURITY.

Gen. St. c. 118, § 27, providing that a creditor may surrender premises held as security for his debt on the insolvency of his debtor and be admitted as a creditor for the amount of his debt, does not include property levied on under execution and set off to the creditor, and which is received by him in full satisfaction of the judgment; and hence such creditor cannot surrender such property, and be admitted as a creditor on the insolvency of his debtor. *Wareham Sav. Bank v. Vaughan*, 133 Mass. 534, 535.

#### HELD BY CONTRACT.

A party in possession of real estate under a contract of purchase, and who had paid only part of the purchase money, made application for a fire insurance, and in answer to the question, "Incumbrance—is there any on property?" he answered, "Held by contract." Held, that the answer amounted to a statement that the property was held by contract of purchase, merely subject to a lien in favor of the vendor for the purchase money. *Lorillard Fire Ins. Co. v. McCulloch*, 21 Ohio St. 176, 179, 8 Am. Rep. 52.

#### HELD IN TRUST.

The words "held in trust," applied to insured goods, mean goods with which the assured is intrusted, not goods held in trust in the strict technical sense, so held that there was only an equitable obligation in the assured enforceable by a subpoena in chancery, but goods with which the insured was intrusted in the ordinary sense of the word. *Hough v. People's Fire Ins. Co.*, 36 Md. 398, 432; *Lucas v. Liverpool & London & Globe Ins. Co.*, 23 W. Va. 258, 277, 48 Am. Rep. 383; *Waters v. Monarch Fire & Life Assur. Co.*, 5 El. & Bl. 870, 880.

A fire insurance risk taken on property held in trust by those insured refers to that property of which the insured had the care and custody intrusted to them as representatives of others, and for which they were responsible to the owner. *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606, 610, 6 Am. Rep. 146; *Roberts v. Firemen's Ins. Co.*, 30 Atl. 450, 451, 165 Pa. 55, 61, 44 Am. St. Rep. 642; *Beidelman v. Powell*, 10 Mo. App. 280, 282; *Southern Cold Storage & Produce Co. v. A. F. Dechman & Co. (Tex.)* 73 S. W. 545, 546.

The term "merchandise held in trust" in a fire policy taken out by a warehouseman on merchandise held in trust is to be under-

stood in its mercantile sense as meaning goods intrusted to the warehouseman for keeping. *Home Ins. Co. of New York v. Baltimore Warehouse Co.*, 93 U. S. 527, 543, 23 L. Ed. 868; *Lucas v. Liverpool & London & Globe Ins. Co.*, 23 W. Va. 258, 277, 48 Am. Rep. 383.

Though the phrase "held in trust," as used in a fire insurance policy to designate goods covered by the policy, does not signify a technical trust, but has a broad meaning, and will include property in the custody of a bailee or mere agent, yet its use will not render of no effect a phrase in the policy that it should be void in case the property should become incumbered with a chattel mortgage. *First Nat. Bank of Devil's Lake v. American Cent. Ins. Co. of St. Louis*, 60 N. W. 345, 346, 58 Minn. 492.

An insurance effected by a commission merchant was on goods as well as the property of the assured as held by them "in trust or on commission." Held, that the language "held by them in trust or on commission" covered the whole value of the property, and not merely the interest of the party effecting the insurance. *De Forest v. Fulton Fire Ins. Co.*, 1 N. Y. Super. Ct. (1 Hall) 94, 131; *Home Ins. Co. of New York v. Baltimore Warehouse Co.*, 93 U. S. 527, 543, 23 L. Ed. 868.

Where a commission merchant took out policies of insurance on goods held by him on commission, the phrase "held in trust or on commission" in the policies referred to goods with the care of which the commission merchant was intrusted, and not a trust in the technical sense enforceable in equity. *Ferguson v. Pekin Plow Co.*, 42 S. W. 711, 712, 141 Mo. 161.

Under a statute enacting that all personal estate held in trust by an executor, administrator, agent, or trustee shall be assessed in the town where such executor, etc., resides, it is held that the phrase "held in trust" includes all property which is situated permanently within the state under the control, management, and direction of any person to be held for the benefit and use of some other person; or, in other words, that it is not limited to cases of strict legal trusts. *Catlin v. Hull*, 21 Vt. 152, 157.

A policy of insurance taken out by a dealer in pianos and other musical instruments, describing the goods insured as "his own, or held in trust," prima facie includes and covers a piano left with him for sale; and in case of loss, where the goods owned by the dealer exceeded in value the amount of the policy, the owner of such piano was entitled to receive a pro rata share of the insurance money collected, although no request had been made to the dealer to insure such piano. *Snow v. Carr*, 61 Ala. 363, 368, 32 Am. Rep. 3.

Where an insurance policy stated that it covered cotton owned by the insured or held by it in trust or on commission, it was held that the words "held in trust" could not properly be limited to a holding in trust merely for an absolute owner, when it clearly appeared that other parties had an insurable interest in cotton placed in the hands of insured to be compressed, and that there was a standing agreement between the owners and the insured that the latter should carry insurance. *California Ins. Co. v. Union Compress Co.*, 10 Sup. Ct. 365, 369, 133 U. S. 387, 33 L. Ed. 730.

### HELD OPEN.

Under Sanb. & B. Ann. St. § 2576, providing that no court shall be held open on a legal holiday, the act of adjourning a cause to another day is an act of holding open. *Milwaukee Harvester Co. v. Teasdale*, 64 N. W. 422, 423, 91 Wis. 59.

Where a court orders that the court will be held open until a certain day, it does not constitute an adjournment to such a day, but is merely that the adjournment is to a time to be fixed in the future, according to exigencies of business. *East Tennessee Iron & Coal Co. v. Wiggin* (U. S.) 15 C. C. A. 510, 68 Fed. 446; *Harrison v. German-American Fire Ins. Co.* (U. S.) 90 Fed. 758, 762; *State v. McBain* (Wis.) 78 N. W. 602, 603.

"Held open," as used in the record of a justice of the peace that the case is held open, does not mean that the cause should stand open without any limitation, or for a longer time than the justice could have then adjourned it. *State v. Bruce*, 34 Atl. 701, 702, 68 Vt. 183.

### HELEN.

"Helen" is not commonly used as the same as "Ellen," nor is it an abbreviation or corruption of Ellen. The names have been known and generally recognized as different and distinct. *Thomas v. Desney*, 10 N. W. 315, 316, 57 Iowa, 58.

### HELP.

When the word "help" is used in a contract by which plaintiff is to help defendant to effect the sale of certain lands for a certain consideration, and plaintiff renders the services required of him, and both parties, in their pleadings, construe the agreement to mean that plaintiff should use his best efforts to bring about the sale, parol evidence is not admissible to explain the meaning of the word "help." *Hooker v. Hyde*, 21 N. W. 52, 54, 61 Wis. 204.

"Help," as used in a contract whereby one of the parties agreed "to find help" for

the removing of pianos, means only such manual labor as might be reasonably needed in order to accomplish the work of removal. It does not bind the party to pay for the use of an apparatus furnished by the other party to the agreement which considerably facilitated the work of removal. *Ladd v. Patten*, 66 Me. 97, 98.

### HELPER.

"Helper," as used to define the occupation of a person employed in the carding room of a wool factory, is a person whose duty it was to insert the ends of woollen strands in the proper feed spaces in the feed board in front of the creel, to substitute full spools on the creel for those which have been run off empty, and to take off the full spools of carded wool at the back of the machine, and replace them with empty ones. *Truntle v. North Star Woollen-Mill Co.*, 58 N. W. 832, 833, 57 Minn. 52.

The term "servants and helpers," in a statute preferring the claims of servant girls at hotels, boarding houses, restaurants, etc., or other servants and helpers in and about said house of entertainment, includes a clerk or bartender in a hotel. *Weaver v. Wheaton*, 2 Pa. Co. Ct. R. 428, 430.

### HEM.

"Hemmed handkerchiefs," as used in Customs Act March 3, 1883, c. 121, § 1, Schedule I (22 Stat. 505), assessing a duty of 40 per cent. ad valorem on "cotton laces, embroideries, insertings, trimmings, lace curtains, cotton damask, hemmed handkerchiefs, and cotton velvet," should be construed as a denominative and commercial term, meaning those having an ornamented and more extensive hem, and not as a descriptive term, so as to include hemstitched cotton handkerchiefs, known as such in trade and commerce, which merely have a plain cheap hem to prevent raveling. In re *H. P. Clafin Co.* (U. S.) 52 Fed. 121, 123, 2 C. C. A. 647.

### HEMSTITCHED.

"Hemstitched and embroidered," as used in Act Oct. 1, 1890, par. 373, relating to the duties on "hemstitched and embroidered" handkerchiefs, do not apply to hemstitched handkerchiefs composed of cotton or other vegetable fiber, and embroidered with only an initial letter. *United States v. Harden* (U. S.) 68 Fed. 182, 183, 15 C. C. A. 358.

### HEMIPLEGY.

Hemiplegy is paralysis of one-half of the body. It is a brain disease, usually caused by a tumor pressing upon the brain.

It may be produced by a blow or anything that causes an undue pressure on the brain. The disease may be either complete or incomplete. When it is complete, one-half of the body is paralyzed; when incomplete, one-half of the body is only partially paralyzed. If the disease comes on quickly, it is called "quick hemiplegy." If it comes on gradually, it is called "chronic." Quick hemiplegy is more apt to affect the mental faculties than chronic. Where, however, hemiplegy is complete, the mental faculties are generally much impaired. *Baughman v. Baughman*, 4 Pac. 1003, 1005, 32 Kan. 538.

### HEN.

The abbreviation "Hen." is universally admitted to represent Henry. Hen. is not, strictly speaking, a name, as Henry is, but the fact is that the letters Hen. are an abbreviation for Henry. *People v. Ferguson* (N. Y.) 8 Cowen, 102, 107.

### HENCE.

See "Go Hence."

"Hence" is sometimes the equivalent of "so." *Clem v. State*, 83 Ind. 418, 431.

The expression "hence in this case," in an instruction, is the equivalent of "therefore," and must have been so understood by the jury, and not as given in Webster, as "from this cause or reason; as an inference or deduction." *Alexander v. People*, 98 Ill. 93, 101.

### HENCEFORTH.

"Henceforth," as used in a bond on condition that if the receiver should henceforth faithfully discharge the duties of his trust as such receiver, the obligation should be void, is a word of futurity, and upon the face of the bond there could be based no liability for the past failure of the trustee to discharge his duties under the trust. *Thomson v. Am. Surety Co. of New York*, 62 N. E. 1073, 1074, 170 N. Y. 109.

"Henceforth," as used in a lease bearing date of the 26th of May, and reciting that the lessee is to hold for three years from henceforth, the lease not being delivered until the 20th of June, refers to the date of delivery, and not to the date of the lease, as the lease is of no effect until delivered. *United States v. Le Baron* (U. S.) 60 U. S. (10 How.) 73, 75, 15 L. Ed. 525 (citing and approving *Clayton's Case*, 5 Coke, 1).

### HENCEFORWARD.

"Henceforward," as used in a resolve providing for the taxation of tenants or land,

does not necessarily convey the idea of perpetuity. It means no more than "hereafter," which may import a permanent or a temporary arrangement, according to the general tenor of the instrument and the nature of the subject-matter about which it is used. Opinion of Chief Justice, 24 Mass. (7 Pick.) 125, 128, nota.

## HENCHMAN.

A "henchman" is not, according to the ordinary meaning of the word, a policeman. The word signifies servant, page, or hanger-on. Hence, in a newspaper article, which states: "We have been informed that it is the intention of the Democratic bosses to renew the monkey business again at the polls in Snowhill district at the next election. We have also been informed that the Democratic henchmen who participated in this business at the last election received their authority for so doing from the mayor. \* \* \* The mayor is clothed by the charter with extraordinary powers, and can, in the least outbreak of violence which may be probably provoked, appoint and arm any number of special policemen of his own selection, and prescribe their duties. These policemen, as they did at the last election, can go around the polls, and by threats and menaces intimidate and terrorize the voters, and drive them away"—does not authorize an innuendo in an indictment for libel for publishing such an article to the effect that by the word "henchmen" was meant special policemen so appointed. *Barnes v. State*, 41 Atl. 781, 783, 88 Md. 347.

## HER.

The word "her," applied to a person designated by proper names, which are universally applied to females only, indicates that the person referred to is a female. *Taylor v. Commonwealth (Va.)* 20 Grat. 825, 828.

The use of the personal pronoun "her" in an indictment charging that the defendant did against her consent carnally know J. J. is sufficient to charge that the assault was committed on a female. *Warner v. State*, 17 S. W. 6, 7, 54 Ark. 660; *Battle v. State*, 4 Tex. App. 595, 596, 30 Am. Rep. 169; *State v. Farmer*, 26 N. C. 224, 225; *State v. Goings*, 20 N. C. 289, 290.

## HER CHILDREN.

The words "her children," "our children," and "my children," used by a testator in making devises or bequests to his wife and his children, mean substantially the same, and constitute no ground for any distinction, or a different construction of the

gift than the usual acceptation of the term "children." *Vaughan v. Vaughan's Ex'x*, 33 S. E. 603, 605, 97 Va. 322.

## HER REAL ESTATE.

The phrase "her real estate," in *Rev. St. 1894*, § 1054, *Rev. St. 1881*, § 1043, which provides that "a divorce granted for misconduct of the husband shall entitle the wife to the same rights, so far as her real estate is concerned, that she would have been entitled to by his death," means the separate real estate of the wife, and has no reference to her husband's real estate. *Fletcher v. Monroe*, 43 N. E. 1053, 1054, 145 Ind. 56.

## HER USE.

A will directing the trustees to pay to a certain person such part of the net income of the trust property as she "shall desire for her use," should be interpreted literally so as to include, besides what she may desire for merely personal uses, what she may desire to maintain or help maintain her family and household and to keep up her house in a style corresponding with the means bequeathed to her. She cannot apply the income to uses foreign to herself; as, for instance, to lend or give it to another for his or her use, not likewise her own. *Greene v. Smith*, 19 Atl. 1081, 1082, 17 R. I. 28.

## HERS.

The use of "hers" in a will giving and bequeathing to testator's wife the horses and farm, with all their appurtenances, and, after such horses, cattle, and other articles were sold for the payment of debts, the balance of such stock, cattle, and all other articles should be hers, should be construed as denoting the idea of entire possession or ownership. *Elyton Land Co. v. McElrath (U. S.)* 53 Fed. 763, 766, 3 C. C. A. 649.

## HERBAGE.

Jacob, in his dictionary, says: "Herbage is the green pasture and fruit of earth provided by nature for the food or bite of cattle. It is apparent from several passages in Brocton, that the word 'herbage' in his day meant feed for cattle in fields and pastures, and nothing more. Acorns, chestnuts, beech nuts, and the like are said by him not to be herbage." A prescriptive right to enter upon land and take herbage does not justify the cutting of grass, the digging of potatoes, or the gathering of apples. *Simpson v. Coe*, 4 N. H. 301, 302.

## HERD.

"Herd" is defined by Webster as a number of beasts assembled together, and "num-

ber" as a collection of individuals. *Brim v. Jones*, 45 Pac. 352, 354, 13 Utah, 440.

"Herd," as used in a complaint that defendant unlawfully and willfully herded, and permitted to have herded, sheep on the land of plaintiff, is not commensurate with purposely driving and intentionally retaining stock upon particular premises, but rather that defendant suffered his sheep to range or graze and pasture on the land. *Fry v. Hubner*, 57 Pac. 420, 421, 35 Or. 184.

#### HERDER.

Gen. St. § 1705, provided that any farmer, ranchman, or herder of cattle, or any tavern keeper or livery stable keeper to whom any horses, cattle, etc., should be intrusted for the purpose of feeding, herding, pasturing, etc., should have a lien thereon for their services. It was held that the word "herder," being used in connection with the other words indicating occupations in which the possession and control were transferred to the party feeding, herding, etc., the cattle, did not apply to one who for wages herded cattle, the possession and control of which remained in the owner. *Hooker v. McAllister*, 40 Pac. 617, 618, 12 Wash. 46.

"Herders," as used in Rev. St. § 848, which provides that any ranchman, farmer, agistor, or herder of cattle to whom any horses, mules, cattle, etc., shall be intrusted and a contract for their keeping be entered into between the parties for the purpose of feeding, etc., shall have a lien on such horses, etc., for the amount that may be due for such feeding, etc., includes only those to whom the cattle, horses, etc., are intrusted under a contract between the parties for their keeping. It would not include persons employed by the month to drive or herd cattle. *Underwood v. Birdsell*, 9 Pac. 922, 923, 6 Mont. 142.

"Herder," as used in the article relating to domestic animals, means every person having charge or control of any herd of neat cattle, horses or mules, numbering five or more, or any flock of sheep numbering twenty-five or more, as owner, agent, or employé, while subsisting on any public or other range of land to which he has no right of possession, whether personally present with such herd or not. Rev. Codes N. D. 1899, § 1544a.

#### HERE INSERT.

The words "here insert" in a bill of exceptions do not make the matter referred to a part of the bill, though it is set out in another part of the transcript. *Midland Ry. Co. v. Trissal*, 65 N. E. 543, 545, 30 Ind. App. 77 (citing *Brown v. Langner*, 25 Ind.

App. 538, 58 N. E. 743; *Allen v. Hollingshead*, 155 Ind. 178, 57 N. E. 917).

#### HEREAFTER.

The terms "now" and "hereafter" signify time present and to come, and from the period at which they are used. *Chapman v. Holmes' Ex'rs*, 10 N. J. Law (5 Halst.) 20, 26.

From 1839 to 1879 there were statutes in Arkansas providing that suits by and against counties might be brought in the circuit court, and the manner of bringing and attacking them. The act of February 27, 1879, provided that "hereafter" a different proceeding should obtain. It was obviously the intent of the Legislature, by the use of the word "hereafter," to make the act purely prospective, and with a saving to suits pending. This being so, the county, having brought a suit in the proper court before the passage of the act, had a right to a final hearing in that court. *Nevada County v. Hicks*, 8 S. W. 524, 526, 48 Ark. 515, 520.

"Hereafter," as used in Acts 1895, p. 248, § 7, imposing new restrictions on the liquor traffic, and providing for the enforcement of the act in all towns and cities in which a saloon may hereafter be located, cannot be construed as showing that the act does not apply to saloons in existence when it took effect. *Nelson v. State*, 46 N. E. 941, 943, 17 Ind. App. 408.

The phrase "judgment hereafter rendered," in St. 1895, c. 75, providing that interest shall be included "in every judgment which shall be hereafter rendered for the amount of an abatement of taxes made under" St. 1890, c. 127, applies to every such judgment rendered after the passage of the act, though the petitions were filed before that date. *Tremont & S. Mills v. City of Lowell*, 42 N. E. 1134, 1135, 165 Mass. 265.

#### As expressive of duration.

In a contract providing that a name of a certain person could be used upon and as descriptive of any soap or blacking the other parties to the contract may hereafter make, "hereafter" cannot be construed as indicating a grant in perpetuity. The word "hereafter," used as an adverb, does not necessarily refer to unlimited time. Like the word "after," it is not used in common parlance for such purpose; it is not a synonym, for "forever"; it rather indicates the direction in time, merely, to which the context refers, and is limited by it. The duration of the hereafter is usually expressed by some other word, or is inferred from the context. In fact the mind does not rest satisfied with the use of the word "hereaft-

er" in such a case, but naturally inquires and expects to hear in addition how long the hereafter is to last. *Dobbins v. Cragin*, 23 Atl. 172, 176, 50 N. J. Eq. (5 Dick.) 640.

Const. 1877 declares that homestead exemptions, etc., which have been heretofore set apart by virtue of the Constitution, laws, etc., or which may be hereafter set apart at any time, shall be and remain valid as against all debts and liabilities existing at the time of the adoption of the Constitution to the same extent that they would have been had the Constitution of 1868 not been revised. Held, that the word "hereafter" does not mark a period ending with the actual substitution of the new Constitution for the old, but an undeterminate duration beginning with that substitution; and hence, where a widow of a debtor, who died in 1877, prior to the ratification of the Constitution of 1877, applied in 1878 for a homestead, the homestead provision in the prior Constitution was applicable to her petition. *Gerding v. Beall*, 63 Ga. 561, 562.

In Laws 1854, c. 402, § 1, giving a lien for labor and materials furnished hereafter, which is retained in the section as amended by Laws 1869, c. 558, "hereafter" continues to speak from the time of the passage of the act of 1854, and applies to and includes all labor and material after that time. *Moore v. Mausert*, 49 N. Y. 332, 335.

**As relating to adoption of Constitution.**

The word "hereafter" in a constitutional provision that no county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, etc., has reference to the time of the adoption of the Constitution. *List v. City of Wheeling*, 7 W. Va. 501, 522.

**As relating to execution of power of attorney.**

A power of attorney authorizing the entry of the appearance of the grantor of the power in term time or in vacation "at any time hereafter" to file a cognovit and confess judgment, etc., means at any time after the power was executed, confining it to no day or time except after the execution of the power; and hence such appearance could be entered on the day that the warrant of attorney was executed. *Thomas v. Mueller*, 106 Ill. 36, 43.

**As relating to taking effect of ordinance.**

"Hereafter," as used in a city ordinance passed on August 7th, expressly to take effect on August 17th, which provides that the city council may at any time hereafter by resolution direct and provide for guttering any of the streets of said city, means after the

passage of the ordinance; and hence a resolution for guttering may be passed before the ordinance goes into effect. *Kendig v. Knight*, 14 N. W. 78, 60 Iowa, 29.

**As relating to taking effect of statute.**

Rev. St. § 1210d, as amended by Laws 1882, c. 50, provides that every action or proceeding for the recovery of lands heretofore sold or which may hereafter be sold for the nonpayment of taxes heretofore levied shall be commenced within nine months after the recording of the tax deed, and not thereafter, provided that in the case of tax deeds issued prior to the 25th day of March, 1878, the action, if not then barred, must be brought within nine months from that day, and not thereafter. Held, that though the word "heretofore," where it occurs in any statute, is construed ordinarily to mean any time previous to the day such statute takes effect, and the word "hereafter" to mean the time after the statute containing the word takes effect, to construe these words in the law of 1882 would be inconsistent with the manifest intent of the Legislature in enacting it. The words "heretofore" and "hereafter" relate rather to a time prior to the taking effect of section 1210d, and not to the time prior to the taking effect of the act of 1882. It would be stupid and absurd to provide in a law which took effect in 1882 that an action to recover lands sold for taxes where the tax deed was issued prior to March 25, 1878, must be brought within nine months from that day, and not thereafter, for the nine-months limitation would have expired more than three months before the new law went into operation. *Gilkey v. Cook*, 18 N. W. 639, 641, 60 Wis. 133.

"Hereafter," as used in Act Feb. 25, 1858, which provides that hereafter no mortgage of real estate shall be foreclosed in any other manner than by a civil action in the proper courts, etc., refers to the date of the taking effect of the act, and not to the date of its passage or approval. *Thatcher v. Haun*, 12 Iowa, 303, 311.

Act 1882, relating to taxation for highway purposes, authorizes the establishment of borough commissions by townships or parts of townships at their option, which shall control and regulate highways, including assessments and disbursements therefor. Section 10 provides that the taxes which shall be hereafter assessed and collected, etc., for rents, or for the improvement or repair of the roads, etc., shall not be applied to the roads without the boundaries of the borough from which the taxes were collected, but that the assessor and collector of the township shall hereafter assess and collect upon and from the taxable inhabitants of the borough, etc., the road tax which shall have been ordered to be raised at the previous annual township election in the same

manner as the same has been heretofore assessed, levied, and collected. Held, that the words "hereafter" and "heretofore," as used in such section, did not refer to the date of the enactment of the statute, but to the time when the act became effective by the adoption of its terms in the several townships or parts of townships that elect to establish borough commissions. *Commissioners of Matawan v. Horner*, 5 Atl. 807, 810, 48 N. J. Law (19 Vroom) 441.

In Code 1851, § 1672, which was passed February 5, 1851, but did not take effect until July 1, 1851, fixing the period to be hereafter allowed for the commencement of actions, the word "hereafter" had reference to the date when the Code took effect, and not to the time of its passage. *Bennett v. Bevard*, 6 Iowa (6 Clarke) 82, 89.

The word "hereafter," as used in Act March 14, 1877, § 2 (Acts Sp. Sess. 1877, p. 59), amending section 561 of the Code, providing that appeals in all cases hereafter tried must be taken within one year from the time judgment is rendered, while it does not import the present time, has reference to the present, and denotes time after. The law must be construed to speak from the time it took effect, as a will speaks from the time of the death of the testator, and the word "hereafter" has reference to that period of time. *Evansville & C. R. Co. v. Barbee*, 59 Ind. 592, 593.

Laws 1881, c. 411, taking effect January 1, 1882, providing that every county treasurer hereafter elected or appointed should receive a certain salary, relates to a treasurer elected after that day. *Erie County Sup'rs v. Jones*, 1 N. Y. Supp. 557, 558, 49 Hun, 606.

Whenever the word "hereafter" occurs in any statute, it shall be construed to mean the time after the statute containing the term shall take effect. Civ. Code Mont. 1895, § 4670; Rev. St. Mo. 1899, § 4155; Rev. St. Wis. 1898, § 4971; Code Iowa 1897, § 54; Laws N. Y. 1892, c. 677, § 9.

In the construction of statutes the word "hereafter" shall mean any time after the day on which the statute takes effect. *Hurd's Rev. St. Ill. 1901*, p. 1720, c. 131, § 1, subd. 17.

#### HEREAFTER ACQUIRED.

"Hereafter acquired," as used in a will giving trustees power to retain all investments, legal or otherwise, and to invest and change investments whenever they shall think advisable, without being restricted to what are known as legal securities, and to sell and convey real estate now held or hereafter acquired, necessarily implies the power to purchase. In *re Ingersol's Estate*, 31 Atl. 859, 860, 167 Pa. 536, 549.

#### HEREAFTER BUILT.

Rev. Code, c. 235, § 10, declares that no person shall take any toll or other compensation for grinding grain at any mill hereafter built, unless such mill be established by order of court, pursuant to the provisions of law. Held, that the words "hereafter built" meant a mill thereafter constructed or established for the first time, and hence a mill which had been built and had gone down prior to the statute, and was rebuilt after the passage of such statute, was not within it. *Webb v. Commonwealth (Va.)* 2 Leigh, 721, 723.

#### HEREBY.

See "It is Hereby Agreed."

In a statute providing that if the grantee in a mortgage shall fail to record the defeasance he shall not be entitled to or enjoy the benefits and advantages hereby given to a mortgagee, "hereby" means not that particular section alone, but the whole act of which it is a part. *Essex County Nat Bank v. Harrison*, 40 Atl. 209, 210, 57 N. J. Eq. 91.

The use of "hereby" in Act Feb. 18, 1891, providing that the office of the Commissioner of Agriculture be hereby declared an elective office, and that all laws and parts of laws in conflict with the provision of the act be, and the same are hereby, repealed, adds no additional meaning to the statute, and means merely "by this act" or "by this statute." *Lane v. Kolb*, 9 South. 873, 877, 92 Ala. 636.

A will read, "The rest and residue of my other property to be sold and divided in four equal parts among my aforesaid children; and if any of my daughters shall die without leaving children, their property hereby given to be divided into four equal parts," etc. Held, that the words "hereby given" must be regarded as referring to that property which is directly disposed of under the residuary clause; that "property" is characterized by the word "other," which, when used in a residuary clause, naturally excludes all property the subject of prior express devises in the preceding parts of the will. *Renwick v. Smith*, 11 S. C. 294, 295, 307.

"Hereby acknowledged," as used in a receipt, constituted an acknowledgment of the receipt of the sum named as of the day when the receipt was made, and cannot be construed as merely an acknowledgment that at certain times in the past the signer had borrowed the sum named in the receipt. *Custy v. Donlan*, 34 N. E. 800, 159 Mass. 245, 38 Am. St. Rep. 419.

As indicating acts in presenti.

"Hereby," as used in Laws 1889, c. 51, providing that a tax of two-fifths of the



mill on each dollar of the taxable property in the state shall be levied, and the proceeds of the levy are hereby appropriated, etc., means an appropriation in present, and constitutes an appropriation from the date the act took effect. *Evans v. McCarthy*, 22 Pac. 631, 42 Kan. 423.

In a will reciting that upon the death of the survivor of testatrix's brother and sister, and after the sale of her real estate as directed, she hereby gave and bequeathed a certain person, "hereby" means by her presently speaking and operating gift, to be enjoyed upon the death of the brother and sister and the sale of the lands. *Chambers v. Sharp*, 48 Atl. 222, 224, 61 N. J. Eq. 253.

The words "there be and hereby is granted," as used in an act relating to a grant of lands, constitute a present grant, conveying title immediately, and do not indicate a promise or purpose to grant in futuro, *Northern Pac. R. Co. v. Majors*, 2 Pac. 322, 5 Mont. 111; *United States v. Northern Pac. R. Co.*, 12 Pac. 769, 770, 6 Mont. 351; *McNee v. Donahue*, 18 Pac. 438, 440, 76 Cal. 499; *Tubbs v. Wilhoit*, 14 Pac. 361, 362, 73 Cal. 61; *McLaughlin v. Menotti*, 26 Pac. 880, 881, 89 Cal. 354; *Tarpey v. Deseret Salt Co.*, 17 Pac. 631, 633, 5 Utah, 494; *Francoeur v. Newhouse* (U. S.) 40 Fed. 618, 620; *Northern Pac. R. Co. v. Wright* (U. S.) 54 Fed. 67, 69, 4 O. C. A. 193; *Wright v. Roseberry*, 7 Sup. Ct. 985, 987, 121 U. S. 488, 30 L. Ed. 1039; *Schulenberg v. Harriman*, 88 U. S. (21 Wall.) 44, 22 L. Ed. 551; *St. Paul & P. R. Co. v. Northern Pac. Ry. Co.*, 11 Sup. Ct. 389, 390, 139 U. S. 1, 35 Sup. Ct. 77; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 735, 23 L. Ed. 634; *Deseret Salt Co. v. Tarpey*, 12 Sup. Ct. 158, 161, 142 U. S. 241, 35 L. Ed. 999; which title became attached to the specific sections of land upon the filing of the maps of the definite location of the road, *Deseret Salt Co. v. Tarpey*, 12 Sup. Ct. 158, 161, 142 U. S. 241, 35 L. Ed. 999; *Wells v. Pennington Co.*, 48 N. W. 305, 306, 2 S. D. 1, 39 Am. St. Rep. 758.

The location of the road and a survey of the lands are necessary to give precision to the grant. When that is done, and the work of constructing is prosecuted with due diligence, the company is entitled to patents to the land granted, and these would take effect as of the date of the act of Congress granting the same. *State v. Central Pac. R. Co.*, 22 Pac. 237, 239, 20 Nev. 372; *Tarpey v. Deseret Salt Co.*, 17 Pac. 631, 633, 5 Utah, 494; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 735, 23 L. Ed. 634.

## HEREDERO.

A term used in the Spanish law. "Es-riche says that anciently the proprietor of any inheritance was so called, and it still

preserves this signification in some parts. He proceeds further to state that this signification comes to us from the Roman law; that Justinian, in his Institutes, informs us that the expression 'acto de heredero' is the same as the 'act of the proprietor,' giving as a reason that the ancients called heirs owners or masters. 'Veteres enim hæredes pro dominis appellabant.' Upon which text Cuyas observes that 'heres' comes from 'herus'—lord or owner. Further, as to this word, he says that he is the person who by a testamentary disposition or by law succeeds to the rights which a deceased person held at the time of his death." *Emeric v. Alvarado*, 2 Pac. 418, 433, 64 Cal. 529.

## HEREDITAMENT.

See "Corporeal Hereditaments"; "Incorporeal Hereditament."

The term "hereditament" includes anything capable of being inherited, be it corporeal, incorporeal, real, personal, or mixed. *McNabb v. Pond* (N. Y.) 4 Bradf. Sur. 1, 10 (citing 3 Kent, Comm. 401; Co. Litt. 6a); *Owens v. Lewis*, 46 Ind. 488, 508, 15 Am. Rep. 295; *Oskaloosa Water Co. v. Board of Equalization*, 51 N. W. 18, 19, 84 Iowa, 407, 15 L. R. A. 296; *Ex parte Leland* (S. C.) 1 Nott & McC. 460, 462; *Whitlock v. Greacen*, 21 Atl. 844, 48 N. J. Eq. (3 Dick.) 359; *Canfield v. Ford* (N. Y.) 28 Barb. 336, 338; *Canal Com'rs v. People* (N. Y.) 5 Wend. 423, 453 (citing 4 Com. Dig. 413); *City of New York v. Mable*, 13 N. Y. (3 Kern.) 151, 159, 64 Am. Dec. 538.

The word "hereditaments" is more extensive in its signification than "land" or "tenement," and signifies anything capable of being inherited, and as applied to realty is divided into corporeal and incorporeal. *Nellis v. Munson*, 15 N. H. 739, 740, 108 N. Y. 453.

A hereditament includes whatever may be inherited, and extends to a movable, such as an heirloom, and even to the condition of a bond which may descend to a man from his ancestors. *Mitchell v. Warner*, 5 Conn. 497, 509, 518.

In its ordinary acceptance it is applied to houses and other buildings; yet in its proper legal sense it signifies everything that may be holden. It not only includes land, but rents and other interests. *Musgrave v. Sherwood* (N. Y.) 23 Hun, 669, 674, 679, note.

A term for years in lands is not in law a tenement or a hereditament. *City of New York v. Mable*, 13 N. Y. (3 Kern.) 151, 159, 64 Am. Dec. 538.

The terms "tenements" and "hereditaments" seem to be comprehensive enough to include the estate conveyed in a deed by

which the owner granted and conveyed to the grantee, his heirs and assigns, forever, all the mines, ores, minerals, and metals lying and being in or upon the lands of the grantor, describing them, with the right to work and carry away said mines, ores, minerals, and metals. The estate in such mines is an estate of inheritance. *Canfield v. Ford* (N. Y.) 23 Barb. 336, 338.

The word "hereditaments" in Laws 1878, c. 415, authorizing certain corporations formed for the purpose of supplying pure and wholesome water to villages to acquire title by eminent domain to lands, tenements, and hereditaments, includes the right of a mill owner to use the waters of the stream as a propelling power for his mill, as such a right is an incorporeal hereditament, and therefore such water right may be taken on the payment of compensation therefor. *Stanford Water Co. v. Stanley* (N. Y.) 89 Hun, 424, 429.

The right of drainage, being an easement which is inheritable, is a hereditament. *Nellis v. Munson*, 15 N. E. 739, 740, 108 N. Y. 453.

In construing a charter where the title to the soil of the shore of a river was in dispute, the court said: "The term 'hereditament,' therefore, as well as the words 'commodities,' 'privileges,' and 'franchises,' was never intended to convey the soil, but something appurtenant thereto; for the thing conveyed by this term is that which was belonging to or in any way appertaining to the land granted." *Inhabitants of Town of East Haven v. Hemingway*, 7 Conn. 186, 200.

## HEREDITARY.

Under Comp. Laws N. M. 1884, § 2750, p. 1306, limiting the meaning of the words "bargained and sold" in conveyances of hereditary real estate, the term "hereditary real estate" means real estate of inheritance. *Douglass v. Lewis*, 9 Sup. Ct. 634, 635, 131 U. S. 75, 33 L. Ed. 53, 9 Pac. 377, 379, 3 N. M. 345.

## HEREDITARY DISEASES.

"Hereditary," as used in an answer in an application for a life insurance policy, that the applicant's parents and other relatives have not been affected with consumption, scrofula, insanity, etc., or other hereditary diseases, is to be construed as applying to all the designated diseases, and to be, in effect, a statement that the parents and other designated persons were not affected with hereditary diseases of the classes named, or other hereditary diseases. *Gridley v. Northwestern Mut. Life Ins. Co.* (U. S.) 11 Fed. Cas. 2, 3.

## HEREDITARY SUCCESSION.

Hereditary succession or descent "is the title whereby a man on the death of his ancestor acquires his estate by a right of representation as his heir at law." In *re Donahue's Estate*, 36 Cal. 329, 332. Descent or "hereditary succession" is the title whereby a person on the death of his ancestor acquires his estate as his heir at law. *Barclay v. Cameron*, 25 Tex. 232, 241.

## HEREIN.

"Herein," as used in legal phraseology, is a locative verb, and its meaning is to be determined by the context. It may refer to the section, the chapter, or the entire enactment in which it is used; and this rule is applicable to the construction of a document as well as of the statute. Thus, in a will which in the first clause devised certain lands to certain beneficiaries, and in the second clause devised other lands to them and directed on the death of either before testator dies all property of whatever nature 'herein' bequeathed to them should revert and vest in the survivor, etc., the word 'herein' was used in reference to the entire will, and a power of sale given in the second clause applies to all the property." In *re Pearson's Estate*, 33 Pac. 451, 453, 98 Cal. 603.

"Herein directed," as used in a will establishing a trust for "all moneys herein directed" to be paid to his son till he was 25 years old, means money both hereinbefore and hereinafter directed. *Iasigi v. Iasigi*, 86 N. E. 579, 581, 161 Mass. 75.

The authority to herein determine the cause is jurisdiction to try and decide all of the cases involved in the controversy. *Quarl v. Abbett*, 1 N. E. 476, 490, 102 Ind. 233, 52 Am. Rep. 662.

### As relating to act.

Act Cong. March 2, 1867, c. 197 (14 Stat. 561), imposes the following duties: "On woolen clothes, woolen shawls, and all manufactures of wool of every description made wholly or in part of wool, not herein otherwise provided for, 50 cents per pound, and, in addition thereto, 35 per cent. ad valorem. On flannels, blankets, hats of wools, knit goods, balmorals, woolen and worsted yarns, and all manufactures of every description composed wholly or in part of worsted, the hair of the alpaca, goat, or other like animals, except such as are composed in part of wool," different duties. Held, that the words "not otherwise herein provided for" mean not otherwise provided for in the act of which they are a part, and hence knit stockings, composed in part of wool, were dutiable under the first clause. *Miller v. Vie-*

tor, 8 Sup. Ct. 1225, 1227, 127 U. S. 572, 82 L. Ed. 201.

The tariff act of 1870, as amended by an act of 1871, providing a duty on all certain manufactures of hair and on "all other manufactures of hair not otherwise herein provided for," means not otherwise provided for in the act. *Arthur's Ex'rs v. Butterfield*, 8 Sup. Ct. 714, 717, 125 U. S. 70, 81 L. Ed. 643.

The expression "not herein otherwise provided for," as used in Act June 6, 1872 (17 Stat. 230), providing that on and after a certain date, in lieu of certain duties imposed on certain articles enumerated, there shall be levied on all leather not herein otherwise provided for a certain duty, means provided for by the act in which the words occur, and not by some previous act. *Movius v. Arthur*, 95 U. S. 144, 147, 24 L. Ed. 420 (citing *Smythe v. Fiske*, 90 U. S. [23 Wall.] 374, 23 L. Ed. 47).

The words "herein provided," as used in Act May 1, 1854, amending section 4 of Act March 14, 1853, in regard to the jurisdictions of justices of the peace in civil cases, which provides that under the restrictions and limitations herein provided justices of the peace shall have concurrent jurisdiction with the court of common pleas, etc., refer to the restrictions and limitations provided in the original act as it stands after all the amendments made thereto are introduced into their proper places therein. *McKibben v. Lester*, 9 Ohio St. 627, 628.

#### As relating to article, title, or chapter.

The phrase "herein provided for," as used in the Revised Statutes, generally, if not always, refers to the act, chapter, or title, but not to the section of the act in which it is found. *May v. Simmons* (U. S.) 4 Fed. 499, 501.

The word "herein" in a statute providing that when a vacancy occurs in any of the offices herein named the Governor shall order an election, etc., was construed, in view of the fact that there were no offices named in the particular section, to mean the offices named in the article in which the section was found. *State v. Smiley*, 54 Tenn. (7 Heisk.) 772, 775.

Code, § 8516, provides that "all proceedings prescribed for the circuit court, so far as the same are applicable and not hereafter changed, shall be pursued in justice courts." The powers of the court are "only as herein enumerated." Held, that "only as herein enumerated" refers only to the "title" of the code of which it forms a part, and not to the code as a whole. *Fitzgerald v. Gim-mell*, 20 N. W. 179, 180, 64 Iowa, 261.

#### As relating to other provisions.

Where the section of a revised statute was amended by an act which declared that

such section shall be amended so as to read as follows: "Every person who shall hereafter be convicted \* \* \* shall be punished as herein provided," the words "herein provided" must be construed as applying to the provisions for punishment contained in the act, and not to the one mentioned in the revised statute. *Hartung v. People*, 26 N. Y. 167, 172. Though, if the section as thus amended, kept its place in the title of the Revised Statutes to which it belongs according to the system of amendments made in that form, the reference would be to those statutes. *Hartung v. People*, 28 N. Y. 400, 404.

The provision in Code, § 162, that the time of the absence of one from the state against whom there is cause of action shall not be taken as a part of the time herein limited for the commencement of such action, refers to the time described elsewhere in the Code, or in statutes amendatory thereto, within which such actions must be commenced. *Williams v. Iron Belt Building & Loan Ass'n*, 42 S. E. 607, 131 N. C. 267.

#### HEREINAFTER.

"Hereinafter," as used in a general denial of every allegation of the complaint not hereinafter specifically admitted, is to be construed as embracing "all that follows, and authorizes the plaintiffs to avail themselves of any admissions therein contained." *Dugan v. Davey*, 26 N. W. 887, 893, 4 Dak. 110.

"Hereinafter," as used in Amend. Code Proc. § 11, conferring on the Court of Appeals the exclusive jurisdiction to review on appeal every actual determination hereinafter made at a general term, which was the same as the original section, does not limit the effect of the amended portions or the newly introduced provisions to cases in which the judgments appealed from were rendered after the amendment took effect. When it was first enacted it was thought expedient to confine the review by the Court of Appeals to future judgments and orders, but the incorporation of amendments into a section which was originally thus limited does not prove that the new provisions are to be confined to determinations future in relation to the time the amendment took effect. *Ely v. Holton*, 15 N. Y. 595, 597.

"Hereinafter named," as used in a will to describe executors as hereinafter named, refers to those finally named by operative words. *Appeal of Shey*, 46 Atl. 832, 73 Conn. 122 (citing *Colt v. Colt*, 83 Conn. 270, 280).

#### Construed as hereinbefore.

The charter of a railroad company requires the owner to make application for an assessment of its value as hereinafter directed, etc., and no directions follow. Ample directions are given in previous sections.

Held, that the use of the word "hereinafter" will be held to be a mistake, and will be construed to mean "hereinbefore." *Waring v. Cheraw & D. R. Co.*, 16 S. C. 416, 425.

The word "hereinafter" in a deed of marriage settlement, which, after declaring the uses, trusts, and limitations of the settlement, contains a clause empowering the trustee to sell, etc., the proceeds to be held subject to the same uses, etc., as hereinafter set forth, should be read as "hereinbefore" when it is not followed by any specifications or uses. *Creighton v. Pringle*, 3 S. C. (3 Rich.) 77, 79-94.

#### HEREINBEFORE.

"Hereinbefore," as used in the residuary clause of a will bequeathing "to the persons, societies, and corporations to whom I have hereinbefore made bequests," etc., should be construed to mean "as it now exists." The word should be regarded as one of identity and description, and should not be considered in the construction of the will to give the residuary estate to those only who had unpaid or unrevoked specific bequests at the testator's death. The word includes all the legatees before mentioned in the will. *Wetmore v. Parker*, 52 N. Y. 450, 564.

Gen. Laws, p. 605, § 14, after certain sections which provide for the fees of those persons who are generally required to travel in performing public duties, provides that every officer or person whose fees are prescribed in this chapter, who shall be required to travel in order to execute or perform any public duty in addition to the fees "hereinbefore" prescribed, shall be entitled to mileage at the rate of ten cents per mile. The word "hereinbefore" confines the grant of mileage to those officers whose fees are prescribed in the prescribing sections. It is a word of limitation, and such words, when of unequivocal meaning, and clearly expressed, will prevail to limit what goes before, to which such words refer. *Taylor v. Umatilla County*, 6 Or. 401, 404.

"Hereinbefore set forth," as used in a claim for an improvement in packing for steam joints stating it to be for a packing composed of strands of asbestos, with a saturated central core, as "hereinbefore set forth" are words of limitation, and refer back to the descriptive specification for qualification of such general statement by what is therein specifically described. *H. W. Johns Mfg. Co. v. Robertson* (U. S.) 60 Fed. 900, 905 (citing *Edison Electric Light Co. v. Westinghouse* [U. S.] 55 Fed. 498; *Van Marter v. Miller* [U. S.] 28 Fed. Cas. 1035; *Snow v. Lake Shore & M. S. R. Co.*, 121 U. S. 617, 7 Sup. Ct. 1343, 30 L. Ed. 1004).

A clause of a will devising and bequeathing certain property to testator's daughter as long as she remains a widow, but direct-

ing that in case of her marriage the property shall pass to the son of said daughter, but that in case the daughter outlives her son all the bequests and gifts "hereinbefore granted" to her shall revert to the daughter, will be limited to the preceding gifts or devises created by the particular clause of the will, when such appears from the entire will to have been the intention of the testator. *Wood v. Conrey*, 62 Md. 542, 548.

#### HERETOFORE.

See "As Heretofore."

"Heretofore," as used in an allegation in the declaration in an action of trespass de bonis asportatis that "the defendant heretofore did seize," etc., simply denotes time past, in distinction from time present or time future, and hence is insufficient as an allegation of the time when the acts were done, since such allegation should specifically allege such time. *Andrews v. Thayer*, 40 Conn. 156, 157.

The use of the word "heretofore" in a lease of a pier with a covenant that the lease should not affect any pending suit or demand which the lessors had against the lessee for the use heretofore of the pier by the lessee, was construed as indicating that it was not intended to reserve the right to damages suffered thereafter. *Dumois v. City of New York*, 76 N. Y. Supp. 161, 163, 37 Misc. Rep. 614.

Wag. St. Mo. 595, § 35; Rev. Code 1855, p. 731, § 46—providing that "the records heretofore made by the recorder of the proper county, by copying from any deed of conveyance," etc., "shall, from and after the passage of this act, impart notice of the contents of such instruments," etc., means that the act was intended to apply exclusively and solely to prior conveyances. *Bishop v. Schneider*, 46 Mo. 472, 481, 2 Am. Rep. 533.

The restrictive clause in the residuary bequest to one of property not "heretofore disposed of" should be construed as though the testator had said that "all of my estate which shall not pass by the preceding bequests in my will to the legatees therein named, I give to the residuary legatee," for "heretofore," has relation to the several preceding paragraphs in the will, and "disposed of" means an effectual transfer or disposition by the will, which could not be until the death of the testator. In *re Crane* (Conn.) 2 Root, 487, 488.

#### Day excluded.

"Heretofore," as used in a bond describing the matters submitted to arbitration as all debts, dues, and demands heretofore subsisting between the parties, does not include a note payable in specific articles at a remote day, given by one of the parties to the other

on the same day as the execution of the bond, as by intendment of law it would be construed that such note was given after execution of the bond. *Bixby v. Whitney*, 5 Me. (5 Greenl.) 192, 195.

#### **As hereinbefore.**

In a will devising all testator's real estate to a certain beneficiary, and bequeathing other property to other beneficiaries to equalize what "he has heretofore" given the first beneficiary, "heretofore" should be construed to mean "hereinbefore." *Allison v. Chaney*, 63 Mo. 279, 283.

#### **Remote time excluded.**

Laws 1883, c. 435, creates an exception to the general power vested in the dock department under Laws 1875, c. 249, by providing that it shall not be lawful to interfere with the free public use of any pier in the East river which has heretofore been used for the loading of sailing vessels regularly employed in foreign commerce, etc. Held, that the word "heretofore" should be taken in its usual and ordinary sense and signification as meaning "heretofore," "down to this time," and does not convey the idea of comprehending any remote time; and hence the exception does not include a pier which, before 1864, was much used by this class of sailing vessels, but which since 1870 has only occasionally been used by them, and not at all in the fourth and fifth years preceding the commencement of an action to remove sheds therefrom. *People v. Baltimore & Ohio R. R. Co.*, 22 N. E. 1026, 1028, 117 N. Y. 150.

Comp. Laws 1857, § 5384, amending a certain act providing that every action on a judgment or decree heretofore rendered or hereafter to be rendered in a court of record shall be brought within 10 years after the entry of the judgment or decree, and not afterwards, will not include a judgment rendered before the passage of the original act 22 years prior. *Parsons v. Wayne County Circuit Judge*, 37 Mich. 287, 289.

The words "heretofore contracted," in a treaty, referring to debts, meant entered into at any period of time before the date of the treaty, without regard to the length or distance of time. These words are descriptive of the particular debts that might be recovered, and relate back to the time such debts were contracted. The aim of the contract was plainly to designate the particular debts that might be recovered. A debt entered into during the war would not have been recoverable unless under this description of a debt contracted at any time before the treaty. *Ware v. Hylton*, 3 U. S. (3 Dall.) 190, 242, 244, 1 L. Ed. 586.

#### **Statute rendered retrospective.**

The use of "heretofore" in a statute which expressly declares that it shall apply

to proceedings heretofore had, will be construed to give the statute a retrospective effect, it being used in contrast with the word "hereafter." *People v. Crennan* (N. Y.) 36 N. E. 187, 189.

#### **As to right of trial by jury.**

The word "heretofore" is defined to mean, in times before the present, "formerly." As used in a constitutional provision that the right of trial by jury as heretofore enjoyed shall remain inviolate, the word "heretofore" evidently related to the past. Such provision as to the right of trial by jury refers to the right as it existed at common law, and not as it was enjoyed at the time of the adoption of the Constitution, or of a prior Constitution. *State v. Hamer*, 67 S. W. 620, 625, 168 Mo. 167, 57 L. R. A. 846.

Heretofore used, as the language is used in Const. art. 1, § 2, providing that the trial by jury in all cases in which it has been "heretofore used" shall remain inviolate forever means "in use at the time of the adoption of the constitution." *People v. Kennedy*, (N. Y.) 2 Parker Cr. R. 312, 317.

"Heretofore," as used in the Bill of Rights, art. 20, providing that in all controversies concerning property and all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practiced, the parties have a right to a trial by jury, means before the year 1784. *State v. Saunders*, 25 Atl. 588, 66 N. H. 39, 18 L. R. A. 648.

The word "heretofore," as used in the Constitution in the provision guarantying the right of trial by jury as heretofore enjoyed, relates to the past and to the common law of England. *George v. People*, 167 Ill. 447, 47 N. E. 741; *Brewster v. People*, 55 N. E. 640, 641, 183 Ill. 143. Hence Rev. St. 1845, p. 182, § 168 (Starr & C. Ann. St. c. 33, § 504), conferring on the jury on trial for felony the right to fix the term of imprisonment, did not become a part of the Criminal Code because of such provision of the Constitution as in force when the Constitution was adopted. *George v. People*, 47 N. E. 741, 743, 167 Ill. 447.

Inasmuch as justices have had jurisdiction of a class of cases known as "trespass" or "trover" for a limited amount since the organization of the government, an increase of their jurisdiction is not violative of the constitutional provision that trial by jury in all cases in which it has been heretofore used shall remain inviolate. *Crouse v. Walrath* (N. Y.) 41 How. Prac. 86, 88.

#### **Subject-matter of statute related to.**

In *Nix*, Dig. 829, which forbids the pulling down or removal of any dwelling house, market house, or other public building heretofore erected, and which may encroach upon any highway, "heretofore" refers to the

time of the laying out of the road, and not to the time of the passage of the act. *Pan-coast v. Troth*, 34 N. J. Law (5 Vroom) 377, 382.

In Comp. Laws 1857, § 3445, providing that a suit pending in a court the judge in which has heretofore been consulted or employed as counsel in the subject-matter to be litigated in such suit shall be transferred to another circuit, "heretofore" refers to the time of the application for transfer, and not to the time of the passage of the act. *People v. Judge of Saginaw Circuit Court*, 26 Mich. 342, 344.

"Heretofore," as used in Act 1794, providing that when any person shall shut up or otherwise prevent the use of any road heretofore accustomed to be used, though not laid out agreeable to the directions of this or the before-recited act, refers to the time of opening the road, and not to the time of the passage of the act, because at that time no road could by any possibility have been laid out agreeable to the directions of the act. *Perrine v. Farr*, 22 N. J. Law (3 Zab.) 356, 365.

In Laws 1875, c. 249, as amended by Laws 1883, c. 435, and in the consolidation act (Laws 1882, c. 410, § 773, as amended by Laws 1889, c. 509), providing that any pier of the city of New York, which has "heretofore been used" for the loading of vessels engaged in foreign commerce shall be used as a dumping ground, does not mean any pier which was used as a dumping ground prior to the amendment. *Hill v. City of New York*, 18 N. Y. Supp. 399, 402, 63 Hun, 633.

#### Taking effect of statute related to.

Act 1882, relating to taxation for highway purposes, authorizes the establishment of borough commissions by townships or parts of townships, at their option, which shall control and regulate highways, including assessments and disbursements therefor. Section 10 provides that the taxes which shall be hereafter assessed and collected, etc., for rents or for the improvement or repair of the roads, etc., shall not be applied to the roads without the boundaries of the borough from which the taxes were collected, but that the assessor and collector of the township shall hereafter assess and collect upon and from the taxable inhabitants of the borough, etc., the road tax which shall have been ordered to be raised at the previous annual township election, in the same manner as the same has been heretofore assessed, levied, and collected. Held, that the words "hereafter" and "heretofore," as used in such section, did not refer to the date of the enactment of the statute, but to the time when the act became effective by the adoption of its terms in the several townships or parts of townships that elect to establish

borough commissions. *Commissioners of Matawan v. Horner*, 5 Atl. 807, 810, 48 N. J. Law (19 Vroom) 441.

Rev. St. § 1210d, as amended by Laws 1882, c. 50, provides that every action or proceeding for the recovery of lands heretofore sold or which may hereafter be sold for the nonpayment of taxes heretofore levied shall be commenced within nine months after the recording of the tax deed, and not thereafter, provided that in the case of tax deeds issued prior to the 25th day of March, 1878, the action, if not then barred, must be brought within nine months from that day and not thereafter. Held, that though the word "heretofore," where it occurs in any statute, is construed ordinarily to mean any time previous to the day such statute takes effect, and the word "hereafter" to mean the time after the statute containing the word takes effect, to so construe these words in the law of 1882 would be inconsistent with the manifest intent of the Legislature in enacting it. The words "heretofore" and "hereafter" relate rather to a time prior to the taking effect of section 1210d. and not to the time prior to the taking effect of the act of 1882. It would be stupid and absurd to provide in a law which took effect in 1882 that an action to recover lands sold for taxes where the tax deed was issued prior to March 25, 1878, must be brought within nine months from that day, and not thereafter, for the nine-months limitation would have expired more than three months before the new law went into operation. *Gilkey v. Cook*, 18 N. W. 639, 641, 60 Wis. 133.

"Heretofore," as used in Act March 14, 1877, § 2, amending section 561 of the Code, providing that appeals in all cases heretofore tried must be taken within one year from the time this act takes effect, has reference to the time the act took effect. *Evansville & C. R. Co. v. Barbee*, 59 Ind. 592, 593.

The term "heretofore," when used in a statute, has relation to the time when the same takes effect. *Code Iowa 1897, § 54; Laws N. Y. 1892, c. 677, § 9.*

Whenever the term "heretofore" occurs in any statute, it shall be construed to mean any time previous to the day when such statute shall take effect. *Rev. St. Mo. 1899, § 4155; Civ. Code Mont. 1895, § 4670; Hurd's Rev. St. Ill. 1901, p. 1720, c. 131, § 1, subd. 17; Rev. St. Wis. 1898, § 4971.*

#### HERIOT.

A "heriot" goes with the reversion, as well as rent, and the grantee of the reversion shall have it. *Jacob's Law Dict.* The beast thus becomes attached to the freehold. So the reservation of the best beast of the tenant in possession for the time being rests on

the old feudal law in relation to heriots. *Adams v. Morse*, 51 Me. 497, 501.

## HERITAGE.

The term "heritage" was used in the Norman law to designate real estate. *Dowdel v. Hamm* (Pa.) 2 Watts, 61, 65.

## HERPES ZOSTER CAPITAS.

To the intelligence of the ordinary layman, herpes zoster capitis is a disease with a high-sounding name, but there is no evidence in the record as to what it is; and a reference to the standard dictionaries discloses the fact that herpes is a cutaneous affection which appears in several forms, and which is known among the initiated as "shingles"; that the use of the word "capitis" locates the disease upon the scalp, while the Greek word "zoster," meaning a belt or girdle, would seem to locate it in the region of the waist. In the evidence the ailment is sometimes called "herpes zoster capitis" and sometimes "herpes capitis," as if there were no distinction. It is therefore difficult to discover from the evidence what was the real ailment. *Tooker v. Security Trust Co.*, 26 N. Y. App. Div. 372, 377, 49 N. Y. Supp. 814, 817.

## HERRING.

See "Pickled Herring."

## HIDE.

The idea of hiding and harboring a negro, within the meaning of an indictment charging that defendant did conceal, harbor, hide, and employ a negro, is included within the meaning of the word "conceal," and therefore a verdict that defendant concealed the negro is sufficient to show that he did hide and harbor him. *Cook v. State*, 26 Ga. 593-603.

"Hiding and concealing" may be construed as an act, and the statement that the defendant in attachment is hiding and concealing certain goods may be construed as a statement of the fact, but it is too general a statement thereof in an attachment suit based upon the concealment of property by defendant to comply with the statute requiring the plaintiff to state the material facts upon which the attachment is founded. *Sandheger v. Hosey*, 26 W. Va. 221, 224.

## HIDES.

The word "hide" is defined by Webster to be the "skin of an animal, either raw or dressed, more generally applied to the un-

dressed skins of the larger domestic animals, as oxen, horses," etc. Expert evidence is not admissible to show that the word "hides" was used in a contract for the sale of hides with a more restricted meaning than the word "skins," when it is admitted that the articles delivered under the contract were skins, and no custom or usage has been pleaded in the complaint. *Healy v. Brandon*, 21 N. Y. Supp. 390, 395, 66 Hun, 515.

"Hides and skins," as used in Tariff Act July 30, 1846 (9 Stat. 42) Schedule H, prescribing a certain rate of duty on "raw hides and skins" of all kinds, whether dried, salted, or pickled, are a class of articles well known in the trade, and used extensively by manufacturers of leather, and cannot be construed to include Buenos Ayres sheep skins imported with the wool on, and dried, but not dressed, usually invoiced as sheep skins, and known in commerce by that name. *Coggill v. Lawrence* (U. S.) 6 Fed. Cas. 6, 7.

## HIDES OF CATTLE.

Hides of East India buffalo, a domesticated animal, are assessable as hides of cattle, under paragraph 437 of the tariff act of July, 1897. *Rosbach v. United States* (U. S.) 116 Fed. 781.

## HIGH.

High is a relative term. A thing is said to be high when compared to other structures. A structure is said to be high according to the uses to which it is to be put. As used with relation to a bridge over a railroad track, the bridge is high or low according to the height of cars to pass under it. *Louisville & N. R. Co. v. Tucker's Adm'r* (Ky.) 65 S. W. 453, 454.

High, in one of its significations, is used to denote that which is common, open, and public. Thus every road or way or navigable river which is used freely by the public is a highway. *United States v. Rodgers*, 14 Sup. Ct. 109, 113, 150 U. S. 249, 37 L. Ed. 1071.

In *Barton v. McKelway*, 22 N. J. Law (2 Zab.) 165, which was an action on a contract to deliver a number of trees of not less than one foot high, it was held that it might be shown by the universal usage and custom of dealers in that article that the length was measured from the top of the ripe wood, rejecting the green immature top. *Dalton v. Daniels* (N. Y.) 2 Hilt. 472, 475.

## HIGH CRIMES AND MISDEMEANORS.

"High crimes and misdemeanors are such immoral and unlawful acts as are nearly allied and equal in guilt to felony, yet, owing to some technical circumstance, did

not fall within the definition of felony." *State v. Knapp*, 6 Conn. 415, 417, 16 Am. Dec. 68 (quoting 1 Russ. Crimes, 61).

### HIGH DILIGENCE.

High or great diligence is that with which prudent persons take care of their own concerns. It differs from common or ordinary diligence, which is that which men in general exert with respect to their own concerns, or slight diligence, which is that with which persons of less than common diligence, or, indeed, of any prudence at all, take care of their own concerns. *Litchfield v. White*, 7 N. Y. (3 Seld.) 438, 442, 57 Am. Dec. 534.

### HIGH-LIVED.

"High-lived," when used in reference to a horse, does not necessarily imply that it was vicious and dangerous for persons accustomed to handling horses. It is a term frequently applied to horses which are just the opposite. When a horse is high-spirited it does not necessarily follow that he has vicious propensities, and hence its use in the information given by a foreman to an employé, who was to use the horse, is not sufficient to warn him of the vicious and dangerous habits of the horse. *Wilson v. Sioux Consol. Min. Co.*, 52 Pac. 626, 627, 16 Utah, 392.

### HIGH RIGHT.

"High right," as used in an instruction that a mere assault not directed at life or chastity, or other high right, cannot excuse a homicide, includes "the right of a person to enjoy his physical organization and all the powers thereof, and an assault aimed to produce a serious bodily injury must be regarded as directed at a high right." *People v. Olson*, 11 Pac. 577, 578, 4 Utah, 413.

### HIGH SCHOOL.

As common school, see "Common School."

As included in term "college," see "College."

"High school" may be defined as a school where the higher branches of a common-school education are taught. *Whitlock v. State*, 47 N. W. 284, 286, 30 Neb. 815.

A testator bequeathed a certain sum to the trustees of the high school in D., or their successors in office, to be applied by said trustees to the advancement of education in said high school. Held, that the words "high school" meant public school in which higher branches of learning are taught than in the common schools. The meaning

of the words is well settled in the laws and usages of the commonwealth. *Attorney General v. Butler*, 123 Mass. 304, 306.

A high school is a school "which is designed for scholars who have passed through the primary grades, and are supposed to be able to read, write, and spell correctly, and to be familiar with other branches which need not be noticed. Many, if not most, of the high schools of this state, are in fact preparatory schools for the university, and the course of study determined with regard to that object." *State v. School Dist. No. 1*, 48 N. W. 393, 394, 31 Neb. 552.

A high school is a school of higher grade than an elementary school, in which instruction and training are given in approved courses in the history of the United States and other countries, composition, rhetoric, English and American literature, algebra and geometry, natural science, political or mental science, ancient or modern foreign languages, or both, commercial and industrial branches, or such of the above-named branches as the length of its curriculum may make possible, and such other branches of higher grade than those to be taught in the elementary schools, and such advanced studies and advanced reviews of the common branches as the board of education may direct. *Bates' Ann. St. Ohio 1904*, § 4007-2.

### HIGH SEAS.

The term "high seas," in the ordinary acceptance thereof, means the seas outside of low-water mark on the coast. *United States v. Seagrist* (U. S.) 27 Fed. Cas. 1002, 1003. "The term 'high seas' includes waters on the seacoast without the boundaries of low-water mark." *Ross v. McIntyre*, 11 Sup. Ct. 897, 902, 140 U. S. 453, 35 L. Ed. 581; *Ex parte Byers* (U. S.) 32 Fed. 404, 405.

"Mr. Justice Blackstone in his Commentaries (1 Comm. 110), uses the words 'high sea' and 'main sea' as synonymous, and adds that the main sea begins at the low-water mark.' But though this may be one sense of the terms to distinguish the divided empire which the admiralty possesses between high-water and low-water mark when it is full sea from that which the common law possesses when it is ebb sea, yet the more common sense is to express the open uninclosed ocean, or that part of the sea which is without the fauces terræ on the seacoast, in contradistinction to that which is surrounded or inclosed between narrow headlands or promontories. Both Lord Hale and Lord Coke constantly limit the high seas to those waters of the ocean which are without the boundary of any county at the common law, and narrow arms of the sea are deemed to be within the boundary of some county of the realm; but the waters of



the ocean upon the open seacoast are admitted on all sides to be without the limits of any county, and are within the exclusive jurisdiction of the admiralty up to high-water mark, when the tide is full, and are deemed by the crown writers, generally, as the high sea or main sea." As used in 4 Stat. 121, making it criminal to make an assault with a dangerous weapon on the high seas, it is in contradistinction to arms of the sea, and bays, creeks, etc., within the narrow headlands of the coast, and comprehends only the open ocean, which washes the seacoast, or is not included within the body of any county in any particular state. Therefore where an arm of the sea is so narrow that a person standing on one shore can reasonably discern and distinctly see by the naked eye what is going on on the opposite shore, the bodies of water are within the body of the county. *United States v. Grush* (U. S.) 26 Fed. Cas. 48, 50. See, also, *Johnson v. Twenty-One Bales, etc.* (U. S.) 13 Fed. Cas. 855, 861; *Waring v. Clarke*, 46 U. S. (5 How.) 441, 452, 12 L. Ed. 226.

The term "high seas" does not indicate any separate and distinct body of water, but only the open waters of the sea or ocean, as distinguished from ports and havens, and waters within narrow headlands on the coast. This distinction was observed by Latin writers between the ports and havens of the Mediterranean and its open waters, the latter being termed the high seas. The *Æneid*, lib. 1. *United States v. Rodgers*, 14 Sup. Ct. 106, 110, 150 U. S. 249, 37 L. Ed. 1071.

#### Bay, inlets, rivers, etc.

The term "high sea" cannot be construed to include any portion of an inlet which is well surrounded by islands and can only be entered by coming in near some of those islands or by way of certain straits. The *Kodiak* (U. S.) 53 Fed. 126, 128.

1 Stat. 113, authorizing the punishment of piracy committed on the high seas, means "any waters on the seacoast which are without the boundaries of low-water mark, although such waters may be in a roadstead or bay within the jurisdictional limits of a foreign government; and such is the meaning attached to the phrase by the common law and supported by the authority of the admiralty perhaps to a more enlarged extent." *United States v. Ross* (U. S.) 27 Fed. Cas. 899, 900.

"High seas," as used in Act April 30, 1790, providing for the punishment of manslaughter committed on the high seas, should not be construed to include a river half a mile wide, 35 miles above its mouth, and in the interior of a country. *United States v. Wiltberger*, 18 U. S. (5 Wheat.) 76, 94, 5 L. Ed. 37.

"High seas mean that portion of the sea which washes the open coast, and do not include the combined salt and fresh waters which at high tide flood the banks of an adjacent bay." *Morgan v. Nagodish*, 3 South. 636, 637, 40 La. Ann. 246.

The term "high seas," as used in the act of Congress giving the United States jurisdiction of defenses on the high seas, means the open ocean, as distinguished from a river, haven, basin, or bay. *Emory v. Collings* (Del.) 1 Har. 325, 326.

A basin or haven is not a part of the high seas. *United States v. Morel* (U. S.) 26 Fed. Cas. 1310, 1311.

#### Great lakes.

"High," in one of its significations, is used to denote that which is common, open, and public. Thus every road or way or navigable river which is used freely by the public is a highway. So a large body of navigable water other than a river, which is of an extent beyond the measurement of one's unaided vision, and is open and unconfined, and not under the exclusive control of any one nation or people, but is the free highway of all adjoining nations or people, must fall under the definition of "high seas." *United States v. Rodgers*, 14 Sup. Ct. 109, 113, 150 U. S. 249, 37 L. Ed. 1071; *The North Star* (U. S.) 62 Fed. 71, 75, 10 C. C. A. 262; *The Robert Holland* (U. S.) 59 Fed. 200, 202; contra, see *Ex parte Byers* (U. S.) 32 Fed. 404, 405.

Within the meaning of the United States Constitution, which gives to Congress the power to define and punish felonies committed on the high seas, the high seas are the uninclosed waters of the ocean outside the projecting capes, and not the Great Lakes. *Miller's Case* (U. S.) 17 Fed. Cas. 300.

But as used in Act March 3, 1885, providing that certain revised rules should be followed in the navigation upon the "high seas," and that all laws and parts of laws inconsistent with such rules are thereby repealed, except as to the navigation of such vessels within the harbors, lakes, and inland waters of the United States, does not have the same meaning. *The North Star* (U. S.) 62 Fed. 71, 75, 10 C. C. A. 262.

#### Harbor.

Within Act April 30, 1790, c. 9, § 16, prohibiting larceny on the high seas, the high seas does not include the waters of havens where the tide ebbs and flows, unless those waters are without low-water mark, and hence larceny committed on board an American ship in an inclosed dock in a foreign port is not committed on the high seas within the meaning of the statute. *United States v. Hamilton* (U. S.) 26 Fed. Cas. 93.

The high sea or main sea properly begins at low-water mark. What is the high sea has nothing to do with the bounds of counties, but is ascertained by low-water mark on the seacoast, and by parity of reason it should be the same in ports and havens. *De Lovio v. Bolt* (U. S.) 7 Fed. Cas. 418, 428.

#### As high-water mark.

The term includes all the waters of the ocean which are not included within any bays, etc., below the line of low-water mark; and when the tide flows it also includes the waters to high-water mark. *The Abby* (U. S.) 1 Fed. Cas. 2627; *United States v. Grush* (U. S.) 26 Fed. Cas. 48, 50.

#### Long Island Sound.

The term includes all those parts of the main ocean which are not within the fauces terre—the mouth or chops of a channel. It includes all indentations in the mainland in which the headlands at the entrance of the same are so far apart that a person with the naked eye cannot see from one side what is doing on the other. Long Island Sound, except where so narrow as to be seen across, is a part of the high seas. *Manley v. People*, 7 N. Y. 295, 300.

#### As main sea or sea.

"In other matters than crimes connected with admiralty jurisdiction it may be important at times to discriminate between the sea and the high sea, but I apprehend that in crimes the seas or the high seas or the ocean means much the same." *United States v. New Bedford Bridge* (U. S.) 27 Fed. Cas. 91, 120.

The term "high sea" is the same as the ocean or main sea. It means that part of the sea which lies without the body of the county, and is distinguished from the term "sea," which includes arms or branches of the sea which may lie within the body of the county. *De Lovio v. Bolt* (U. S.) 7 Fed. Cas. 418, 428.

#### Within three-mile limit.

The term "high seas" is used to designate the seas outside low-water mark, and includes such portions of the sea as are outside such point, though lying within the three-mile line. *United States v. Smith* (U. S.) 27 Fed. Cas. 1166, 1167.

#### HIGH-WATER LINE.

A person acquiring title to land abutting on a navigable stream takes title only to the high-water line, and that line is limited by the outflow of the medium high tides between the spring and neap tides. *New Jersey Zinc & Iron Co. v. Morris Canal & Banking Co.*, 15 Atl. 227, 228, 44 N. J. Eq. (17 Stew.) 398, 1 L. R. A. 133.

#### HIGH-WATER MARK.

See "Usual High-Water Mark."

A deed conveying a strip of land by accepted boundaries, one of which was "high-water mark" on a certain day, should be construed to mean that the line thus given was a fixed and permanent one, the line of high water at the date of the deed, and which does not follow the changes of the high-water mark; so that where the land is submerged and lost by encroachment of the waters of the bay the loss falls not on the adjoining owners, but on those who own the land submerged. *Nixon v. Walter*, 3 Atl. 385, 387, 41 N. J. Eq. (14 Stew.) 103.

The upland boundary of tide and shore lands is the line of ordinary high-water mark. *Washougal & L. Transp. Co. v. Dalles, P. & A. Nav. Co.*, 68 Pac. 74, 75, 77, 27 Wash. 490.

"High-water mark," within the meaning of a deed fixing the boundary of the conveyed premises at the high-water mark of a pond, was construed to fix the permanent boundary at the line of high-water mark existing at the time of the execution of the conveyance, and therefore it was held that the grantee could not claim accretions or land left dry in consequence of the water receding, although the gradual and imperceptible result of natural causes. *Cook v. McClure*, 58 N. Y. 437, 444, 17 Am. Rep. 270.

In a deed describing land as beginning at a stake on the west bank of the river running north eleven rods to a stake, thence to a stake and stones, thence south nine rods to a stake and stones on the bank of the same river, thence running on the west bank of said river to high-water mark, 16 rods, to the first-mentioned bounds, the limitations throughout being by the bank of the river, the words "to high-water mark" have no other rational meaning in such connection than as indicating the front line of the bank itself. *Dunlap v. Stetson* (U. S.) 8 Fed. Cas. 75, 81.

#### Of mill pond.

The high-water mark of a mill pond is the highest point to which the dam will raise the water in the ordinary state of the stream. *Brady v. Blackinton*, 118 Mass. 238, 245.

#### Of rivers.

High-water mark in a river or stream is the point to which the water usually rises in an ordinary season of high water. *Johnson v. Knott*, 10 Pac. 418, 420, 13 Or. 308.

In the case of fresh-water rivers and lakes in which there is no ebb and flow of the tide, but which are subject to irregular and occasional changes of height without fixed quantity or time, except that they are periodical, recurring with the wet or dry

seasons of the year, high-water mark, as a line, between a riparian owner and the public, is to be determined by examining the bed and banks, and ascertaining where the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark on the soil of the bed a character distinct from that of the banks in respect to vegetation, as well as respects the nature of the soil itself. High-water mark is co-ordinate with the limit of the bed of the water; and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation and destroy its value for agricultural purposes. *Carpenter v. Board of Com'rs of Hennepin Co.*, 58 N. W. 295, 297, 56 Minn. 513; *State v. District Court of Hennepin Co.*, 86 N. W. 455, 457, 83 Minn. 464; *Paine Lumber Co. v. United States (U. S.)* 55 Fed. 854, 864; *Bennett v. National Starch Mfg. Co.*, 72 N. W. 507, 508, 103 Iowa, 207; *Houghton v. Chicago, D. & M. R. Co.*, 47 Iowa, 370, 372; *St. Louis, I. M. & S. Ry. Co. v. Ramsey*, 13 S. W. 931, 933, 53 Ark. 314, 8 L. R. A. 559, 22 Am. St. Rep. 195; *Dow v. Electric Co.*, 45 Atl. 350, 351, 69 N. H. 498, 76 Am. St. Rep. 189.

High-water mark does not mean the height reached by unusual floods, for these usually soon disappear. Neither does it mean the line ordinarily reached by the great annual rises of the river, which cover in places lands that are valuable for agricultural purposes, nor yet does it mean meadow land adjacent to the river, which, when the water leaves it, is adapted to and can be used for grazing or pasturing purposes. The line, then, which fixes the high-water mark is that which separates what properly belongs to the river bed from that which belongs to the rightful owners. Soil which is submerged so long or so frequently, in ordinary seasons, that vegetation will not grow on it, may be regarded as a part of the bed of the river which overflows it. *Welch v. Browning*, 87 N. W. 430, 431, 115 Iowa, 690.

The term "high-water mark," as used in a deed describing land as extending to a certain river to high-water mark, although sometimes used, is inappropriate when applied to a fresh-water stream where the tide does not flow and ebb, but it should be construed as meaning the line on the river bank reached by the water when the river is ordinarily full and the water ordinarily high. Not the highest point touched by the water in a freshet, nor when the water is the lowest in seasons of drought, but the highest limit reached when the river is unaffected by freshets, and contains its natural and usual flow—the highest limit at the ordinary state of the river. The high-water mark does not mean the top of the bank many feet distant from the bed of the river in its ordi-

nary state, and only reached by the water on rare occasions of extreme freshet. *Morrison v. First Nat. Bank of Skowhegan*, 83 Atl. 782, 783, 88 Me. 155. See, also, *Hamilton v. Pittock*, 27 Atl. 1079, 1080, 158 Pa. 457; *Dow v. Electric Co.*, 45 Atl. 350, 351, 69 N. H. 498, 76 Am. St. Rep. 189.

High-water mark is to be determined not from human records, but from the record which the river makes for itself, and the true line is that which the river impressed upon the soil as the limit of its dominion. *Houghton v. Chicago, D. & M. R. Co.*, 47 Iowa, 370, 373.

#### In tide waters.

High-water mark is the line reached by the tide at its highest flow. *Mobile Transp. Co. v. City of Mobile*, 30 South. 645, 648, 128 Ala. 335, 64 L. R. A. 333, 86 Am. St. Rep. 143.

"High-water mark," as used in reference to tide waters, is the margin of the sea at high tide. *Storer v. Freeman*, 6 Mass. 435, 437, 4 Am. Dec. 155.

"High-water mark," as used in reference to the sea or a river in which the tide ebbs and flows, should be construed to mean the line reached by the periodical flow of the tide, and not the line marked by the advance of waters caused by winds and storms, freshets or floods. *Howard v. Ingersoll*, 54 U. S. (8 How.) 381, 423, 14 L. Ed. 189.

#### HIGHER.

The use of the word "higher" in a bequest of \$1,500 currency per year if gold was at par, and directing that 10 per cent. should be added to the gold price, payable in currency, if the gold should go higher than 10 per cent., was construed to mean above par. *In re Stutzer (N. Y.)* 26 Hun, 481, 484.

"Higher," as used in an instruction that, if the jury entertain a reasonable doubt as to which of the grades of crime, murder in the first degree, or murder in the second degree, or manslaughter, the defendant may be guilty of, they will give defendant the benefit of a doubt, and acquit him of a higher offense, means grammatically higher of one of two things, so that the instruction was not erroneous in telling the jury to acquit the defendant of only the highest of the three degrees, rather than the higher of any two degrees. *People v. Newcomer*, 50 Pac. 405, 408, 118 Cal. 263.

#### HIGHER OFFENSE.

Under Cr. Laws Code 1887 it is provided that, if a verdict be set aside, and a new trial granted the accused, he shall not be tried for any higher offense than that of which he was convicted on the last trial.

the question arose as to what was meant by "higher offense," what was to be the line of demarcation between offenses so as to determine the offense or offenses of which the accused may be tried when a new trial was ordered. It was said all offenses are divided by law into two classes: felonies and misdemeanors. Between them there is no trouble in applying the statute. As between the various felonies themselves, as a general rule, it is to be determined by the maximum of the penalty affixed to the offense. The obvious intent of the statute is that the accused person shall not on a new trial be subject to the risk of greater punishment than that which the offense of which he was convicted on his last trial was punishable. *Benton v. Commonwealth*, 21 S. E. 495, 497, 91 Va. 782.

### HIGHEST BIDDER.

The highest bidder in a trustee's sale of property to be sold to the highest bidder must be understood to mean the "person who makes the highest bid in good faith. The trustee is not bound to accept every bid. He is necessarily clothed with a prudent and sound discretion, and the court will always sustain him in refusing bids which would manifestly defeat and frustrate the very object and purpose of the sale." *Gray v. Veira*, 33 Md. 18, 22.

"Highest bidder," as used with reference to the sale of real estate under a judicial order of sale, means the highest bona fide bidder, and, unless there be at a sale more than one such bidder, the sale cannot be made to the highest bidder, because there is only one, with whom there can be no comparison. The word "highest" is used in order that there should be no sale unless there should be a real competition. *Fairfax v. Hopkins* (U. S.) 8 Fed. Cas. 955, 956.

In St. 1844, c. 123, § 16, relating to tax sales, and authorizing a collector to sell to the highest bidder so much of the real estate as may be necessary to pay the tax then due, the highest bidder is the one who will pay the tax for the least quantity of the land. *Lovejoy v. Lunt*, 48 Me. 377, 378.

Laws La. 1888, Act No. 135, requiring that a sale of a street railway franchise should be made to the highest bidder, means the highest bidder in money, so that a sale is invalid where the specifications call for and the adjudication is made to the highest bidder in square yards of gravel pavement. *Hart v. Buckner* (U. S.) 54 Fed. 925; *Buckner v. Hart* (U. S.) 52 Fed. 835, 837.

The person who offers to pay the amount due on any parcel of lands or the smallest portion of the same shall be construed the highest bidder. *Mills' Ann. St. Colo.* 1891, § 3894.

### As best or most responsible bidder.

The Pennsylvania statute requiring a sheriff at a sheriff's sale to sell the property to the highest bidder, etc., means not merely to the highest bidder, but to the best bidder; and hence, if the highest bidder was unable to pay, the sheriff was authorized to make an offer to the next highest. *Zantinger v. Pole* (Pa.) 1 Dallas, 419, 1 L. Ed. 204.

The term "highest bidder" in Code Civ. Proc. § 1678, requiring property judicially sold at an auction sale to be sold to the highest bidder, means the highest responsible bidder, one ready as well as able to carry out the terms of the sale. The term "highest bidder" necessarily carries with it the idea of financial ability of an amount sufficient to successfully carry on the undertaking in which the party has offered to engage; and therefore a judicial sale will not be set aside at the application of one claiming to have made a higher bid, unless it is shown that he was in a position to carry out his contract. *Irving Savings Institute v. Robinson*, 71 N. Y. Supp. 193, 194, 35 Misc. Rep. 449.

### HIGHEST DEGREE OF CARE AND DILIGENCE.

In holding that the words "highest degree of care and diligence" were properly used in instructions to characterize the care which a street railway company owed its passengers, the courts say that the "highest degree of care and diligence" is an expression to measure the care and diligence which a prudent man would exert in that business under all the circumstances. *Heucke v. Milwaukee City Ry. Co.*, 84 N. W. 243, 245, 69 Wis. 401.

### HIGHEST OFFICE.

The term "highest office" in Acts 1895, p. 248, § 9, requiring remonstrances against granting liquor licenses in any township or ward in any city to be signed by a majority of the voters casting votes in said township or city ward for candidates for the highest office at the last election preceding the filing of such remonstrance, means, in a popular and political sense, the most prominent official upon the election ballot at the last preceding election, and, as regards city elections, means the office of mayor, and, in case a mayor is not elected, the office of councilman. *Massey v. Dunlap*, 44 N. E. 641, 643, 146 Ind. 350.

### HIGHWAY.

See "Common Highway"; "Defective Highway"; "Necessary Highway."  
See, also, "Road"; "Street."

A highway is defined by Webster as a public road, a way open to all passengers; and such is substantially the definition given in the other standard dictionaries. Such also is the natural signification of the word when used in ordinary speech. *State v. Paine Lumber Co.*, 54 N. W. 503, 84 Wis. 205.

"A highway, as defined by Kent in his commentaries, is every thoroughfare which is used by the public, whether it be a carriageway, a horseway, a footway, or a navigable river." *Arkansas River Packet Co. v. Sorrels*, 8 S. W. 683, 684, 50 Ark. 466. See, also, *Morgan v. Reading*, 11 Miss. (3 Smedes & M.) 366, 406.

The word "highway" embraces every kind of public ways common to all citizens, whether a footway, horseway, cartway, or a way by water. *Heyward v. Chisolm* (S. C.) 11 Rich. Law, 253, 263.

A highway is a passage open to all citizens of the state to go and return, pass and repass, at their pleasure. *Morse v. Sweenie*, 15 Ill. App. 486, 492; *Bailey v. Commonwealth*, 78 Va. 19, 21; *Starr v. Camden & A. R. Co.*, 24 N. J. Law (4 Zab.) 592, 597; *State v. Stroud* (Tenn.) 52 S. W. 697, 698; *Carli v. Stillwater St. Ry. & Tr. Co.*, 10 N. W. 205, 28 Minn. 373, 41 Am. Rep. 290; *Walamet Iron Bridge Co. v. Hatch* (U. S.) 19 Fed. 347, 355; *In re Opinion of Justices*, 33 Atl. 1076, 1099, 66 N. H. 629; *People v. Jackson*, 7 Mich. 432, 446, 74 Am. Dec. 729.

A highway is a public way, open and free to any one who has occasion to pass along it on foot or with any kind of a vehicle. In every highway the king and his subjects may pass and repass at pleasure. *Lanfer v. Bridgeport Traction Co.*, 37 Atl. 379, 381, 68 Conn. 475, 37 L. R. A. 533 (citing 3 Bac. Abr. 494; *Reg. v. Saintiff*, 6 Mod. 255; 4 Vin. Abr. tit. "Chimin Common"; 1 Swift, Dig. p. 106; 3 Kent, Comm. 432; *Ang. Highw.* §§ 1, 2; *Harding v. Inhabitants of Medway*, 51 Mass. [10 Metc.] 469; *State v. Harden*, 11 S. C. 360, 368; *State v. Stroud* (Tenn.) 52 S. W. 697, 698.

A highway is a public road leading to a market town or some place of general resort, and is commonly traveled by all kinds of people. *State v. Mobley* (S. C.) 1 McMul. 43, 44.

In England a highway was the via or road over which the public passed on foot, on horseback, and on wheels. *Boyden v. Achenbach*, 79 N. C. 539, 541.

"A highway is a public road, which every citizen of the state has a right to use for the purpose of travel thereon. They are of many kinds, varying with the state of civilization and the wealth of the country through which they are constructed, and according to the extent of the traffic to be carried on

on them." *Shelby County Com'rs v. Castetter*, 33 N. E. 986, 987, 7 Ind. App. 309.

A highway is defined as a public road or passage, a way open to all passengers by either land or water. The approved legal definition of highway is a passage through the country for the use of the people. It is a generic name for all kinds of public ways, and includes city streets. *Northwestern Tel. Exch. Co. v. City of Minneapolis*, 86 N. W. 69, 71, 81 Minn. 140, 53 L. R. A. 17; *Abbott v. City of Duluth* (U. S.) 104 Fed. 833, 837.

The term "highway" is a generic term for all kinds of public ways, including county and township roads, streets and alleys, turnpikes and plank roads, railroads and tramways, bridges and ferries, canals and navigable rivers. In short, every public thoroughfare is a highway. *Southern Kansas Ry. Co. v. Oklahoma City*, 69 Pac. 1050, 1054, 12 Okl. 82; *Union Pac. R. R. v. Colfax County Com'rs*, 4 Neb. 450, 456; *Shelby County Com'rs v. Castetter*, 33 N. E. 986, 987, 7 Ind. App. 309.

The word "highway" is derived from the Saxon, and means a right of use for passengers. It may be private or public. Highways are public roads which every citizen has a right to use. *Wild v. Deig*, 43 Ind. 455, 458, 13 Am. Rep. 399 (quoting *Ang. Highways*, §§ 1-3); *Westfield Gas & Milling Co. v. Abernathy*, 35 N. E. 399, 400, 8 Ind. App. 73.

A highway is a public road or street over which all citizens may go at will on foot or horseback or in carts or carriages; thoroughfares over which people travel from one part of the country to another. *State v. Cowan*, 29 N. C. 239, 248.

A highway is a public way leading from town to town or place to place, in contradistinction to private ways for the use of the inhabitants of a particular town. *Commonwealth v. Inhabitants of Newbury*, 19 Mass. (2 Pick.) 51, 56; *Commonwealth v. Inhabitants of Charlestown*, 18 Mass. (1 Pick.) 180, 188, 11 Am. Dec. 161; *Harding v. Inhabitants of Medway*, 51 Mass. (10 Metc.) 465, 469; *Inhabitants of Waterford v. Oxford County Com'rs*, 59 Me. 450, 452. But though it is thus specifically applied, yet, when used in a popular sense, it includes all traveled ways whether country or town. *Harding v. Inhabitants of Medway*, 51 Mass. (10 Metc.) 465, 469.

A public highway, as distinguished from a private road, is one which is open to the travel of the public. It is the right to travel upon it by all the world, and not the exercise of the right, which makes it a public highway. *In re City of New York*, 31 N. E. 1043, 1044, 135 N. Y. 253, 31 Am. St. Rep. 825.

"Highway," as used in Act April 16, 1846 (Rev. St. p. 515), which directs the overseers of the highways of a town to work the highways within the limits of the town, and makes provision for defraying the charges of maintaining the highways, is synonymous with "lawful public road." *Vantilburgh v. Shann*, 24 N. J. Law (4 Zab.) 740, 744.

A highway is a passage, road, or street which every citizen has a right to use, and is, therefore, necessarily public; and the phrase a "public highway" is a tautological expression. *Jenkins v. Chicago & A. R. Co.*, 27 Mo. App. 578, 583 (citing *Walton v. St. Louis, I. M. & S. Ry. Co.*, 67 Mo. 56, 57).

A highway, in its ordinary conception, is a strip of land bounded by approximately parallel boundaries for the purpose of direct travel. It does not include the idea of bays or excrescences on either side of it, not within the direct course of travel, and not adapted thereto, such as a triangle between a traveled highway and the shore of a lake lying near the highway. *Town of Randall v. Rovelstad*, 81 N. W. 819, 825, 105 Wis. 410.

"Highway" is the genus of all public ways, whether cart, horse, or foot ways. *Reg. v. Saintiff*, 6 Mod. 255, Colt, C. J., 4 Vin. 502. And whether a road shall be deemed a highway from mere user depends on the nature of the user. It is doubted in some of the books whether a road can be a highway unless it be a thoroughfare. *Wood-year v. Hadden*, 5 Taunt. 125; *Wood v. Veal*, 5 B. & Ald. 454; *Rex v. Great Dover St. Trustees*, 5 Adol. & El. 698. The judges have been divided in opinion, but there is now perhaps a leaning to the opinion that it may be. *British Museum Trustees v. Finnis*, 5 Car. & P. 460."

A highway mentioned in a deed as a boundary must be understood to mean the highway as it practically exists, the apparent and traveled highway, and not the highway as it exists of record merely. *Falls Village Water Co. v. Tibbetts*, 31 Conn. 165, 167.

An Alabama statute prohibits gaming at any tavern, inn, etc., or any public house or highway, or any other public place, etc. Held, that the term "highway," as used in the statute, means a public road; that is, a road dedicated to and kept up by the public, as contradistinguished from private ways or neighborhood roads which are not so kept up. *Mills v. State*, 20 Ala. 86, 88.

A highway or road is an open way or public passage. It is ground appropriated for forming a communication between one city or town and another. *Hutson v. City of New York*, 7 N. Y. Super. Ct. (5 Sandf.) 289, 312.

The term "public highway" includes all kinds of thoroughfares in which the public

has a right of way or passage. It clearly includes graded and ungraded or finished and unfinished streets. *Parsons v. City and County of San Francisco*, 23 Cal. 462, 464.

The word "highway," as used in an act relating to municipal liens, means the whole or any part of any public street, public road, public lane, public alley, or other public highway. *P. & L. Dig. Laws Pa.* 1897, vol. 4, col. 1289, § 55.

In all counties of this state all roads, streets, alleys, lanes, courts, places, trails, and bridges laid out or erected as such by the public, or dedicated or abandoned to the public, or made such in actions for the partition of real property, are public highways. *Rev. St. Utah* 1898, § 1114; *Pol. Code Cal.* 1903, § 2618.

#### When used as boundary.

It is well settled that a grant of land in a state bounded by a highway or river carries the fee by implication to the center of the highway or river, subject to the right of passage of the public. *Mariner v. Schulte*, 13 Wis. 692, 706; *Healeg v. Babbitt*, 14 R. I. 533, 538; *Hoboken Land & Imp. Co. v. Kerrigan*, 31 N. J. Law (2 Vroom) 13, 16; *Morrow v. Willard*, 30 Vt. 118, 120. But where the grantor owns the entire highway, the north line of which is the boundary of his land, a conveyance of the land as bounded by the highway passes the fee in the entire highway. *Healey v. Babbitt*, 14 R. I. 533, 538.

"Whether a grant of land bounded by a street, highway, or running stream extends to the center of such street, highway, or stream, or is limited to the exterior line or margin of the same, depends upon the intent of the parties to the grant, as manifested by its terms; so that the question as to the true boundary is in all cases only the interpretation of the deed or grant. Learned judges have contended, and in some of the states it has been substantially held, that in such cases the question of boundary is rather to be determined by reasons of public policy than intent, determined by the ordinary rules of construction; although in no instance is it claimed that a grantor may not restrict his grant so as to exclude the soil of the street, highway, or stream. The most that can be claimed by any one is that nothing short of the intention expressed in ipsissimis verbis to exclude the soil in such cases would exclude it. The rule, however, in this state, is well settled that no particular words or form of expression is necessary to restrict the grant to the exterior line of the street or margin of the stream and exclude the soil of each, but, while the presumption is in every case that the grantor does not intend to retain the fee of the soil within the line of the street or under the water, such presumption may be overcome by the use of any terms in describing the premises granted

which clearly indicate an intent not to convey the soil of the street or stream. *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65, 70.

### Bridges.

A public bridge is a part of a highway. *Cascade County v. City of Great Falls*, 46 Pac. 437, 438, 18 Mont. 537; *Union Pac. R. R. v. Colfax County Com'rs*, 4 Neb. 342; *State v. Street*, 23 South. 807, 808, 117 Ala. 203; *People v. Buffalo County Com'rs*, 4 Neb. 150, 158; *Bank of Idaho v. Malheur County*, 45 Pac. 781, 782, 30 Or. 420, 35 L. R. A. 141. The word "highway," as used in Rev. St. c. 49, § 10, includes all bridges thereon. *State v. Canterbury*, 28 N. H. 195, 225. The word "highway" includes a public bridge, within the meaning of a statute relative to the building of highways. *Dubuque County v. Dubuque & Pac. R. Co. (Iowa)* 4 G. Greene, 1, 14, 15.

As a general proposition, bridges are treated as portions of the highways which cross them, and are to be maintained by the same persons to whom the duty of repairing the highway is committed. *Rapho & W. H. Tps. v. Moore*, 68 Pa. (18 P. F. Smith) 404, 406, 8 Am. Rep. 202; *Dodge County Com'rs v. Chandler*, 96 U. S. 205, 208, 24 L. Ed. 625; *State v. Wood County*, 72 Wis. 629, 637, 40 N. W. 381; *Washer v. Bullitt County*, 110 U. S. 558, 564, 4 Sup. Ct. 249, 28 L. Ed. 249; *Commonwealth v. Montgomery County Com'rs (Pa.)* 4 Montg. Co. Law Rep. 41, 42.

If a bridge spans a stream at the crossing of a highway, and within the limits of the highway, it is to be regarded as a part of the highway; and a legislative charter for the erection of such a bridge imposes no new servitude on the land of the riparian owners, and entitles them to no new compensation. *Jones v. Keith*, 37 Tex. 394, 400, 14 Am. Rep. 382.

A bridge, by the concurrent testimony of all past time, in every possible shape and form, is but the ordinary road carried across the river. *Mahnken v. Board of Chosen Freeholders*, 41 Atl. 921, 923, 62 N. J. Law, 404 (citing *Proprietors of Bridges v. Hoboken Land & Imp. Co.*, 13 N. J. Eq. 518).

A bridge which is constantly traveled by pedestrians and used by families and others, and crossed by 25 or 30 people daily, is a public highway. *McDonald v. City of Ashland*, 78 Wis. 251, 47 N. W. 434, 78 Wis. 251.

Bridges are but streets or highways over water; and the fee of all such portions of the Chicago river as are crossed by bridges within the city of Chicago is in the corporation, subject to the public easement for navigation. *Chicago v. McGinn*, 51 Ill. 266, 272, 2 Am. Rep. 295.

A public bridge is a common highway. A private bridge is similar in its nature to a private right of way, and is subject to most of its incidents. The character of the bridge depends more upon the use that is made of it than upon the means by which it is erected. If individuals, for the right to take toll, will make a public highway, the mode of remuneration authorized will not deprive it of the character stamped upon it by the purpose to which it is applied. *McPheeters v. Merimac Bridge Co.*, 28 Mo. 465, 467.

Bridges are usually constructed across water courses or deep depressions across the roadway as a means of safe and convenient passage, and while, in one sense, they are a part of the road, they differ from the road, strictly so called, and are generally much more expensive to construct and maintain, and often require a greater outlay than can be provided for from the road and bridge tax. It is evident that the General Assembly regarded them as a distinct and expensive work on the road, and as being apart in their character and cost from the road itself, in *Hurd's Rev. St.* 1899, p. 1472, § 20, providing that commissioners desiring to expend "on any bridge or other distinct and expensive work on the road" a greater sum of money than is available, may petition for the issuance of bonds. *St. Louis, A. & T. R. Co. v. People*, 65 N. E. 715, 716, 200 Ill. 365.

Under the charter of the New Haven and Northampton Company, requiring it to restore highways crossed by its railroad to their former condition of usefulness, and to construct and use that part of its railroad within the corporate limits of New Haven in such manner and subject to such rules and regulations as the common council should prescribe, it was the duty of such company to construct a bridge over its railroad at a street crossing, when directed by the city council, including the approach to such bridge, and the company was liable for damages to adjoining property caused by the construction of the approach to the bridge, though such approach was in fact constructed by the city. *Burritt v. City of New Haven*, 42 Conn. 174, 202.

A bridge over a stream crossing a street is a part of the street. It is as much so as the cover placed over a drain or sewer crossing a street. Persons travel over it as they do over other portions of the street, subject, it may be, to any delay that may be occasioned in opening and closing a draw. It is under the control of the city, and kept in repair and attended under the city authorities, and we have no doubt that it is as much their duty to light the bridge as any other portion of the street. *City of Chicago v. Powers*, 42 Ill. 169, 172, 89 Am. Dec. 418.

Public bridges, within the limits of the cities of the state, located on the streets and

public highways of the cities, constitute a part of such streets and highways, and such cities, where they take charge of the same, are liable to persons suffering injury without fault for the neglect to keep them in repair. *City of Goshen v. Myers*, 119 Ind. 196, 21 N. E. 657, 658 (citing *Lowrey v. City of Delphi*, 55 Ind. 250).

According to the common use of language there is a sense in which a bridge may be spoken of as a highway, but the word "highway" does not import a bridge, and in any case where there is an occasion to notice any of the conditions which exist between highways generally and bridges it is indispensable that the difference should be marked by the use of the terms appropriate to each. By ordinary rules of language the words "highway" and "bridge" are not equivalent or convertible, and if a party is to be charged with the neglect to build or repair a bridge it must be by the term "bridge," which alone describes such a structure. *State v. Canterbury*, 28 N. H. (8 Fost.) 195, 231.

The word "highway," as used in *Gross' St.* 1868, §§ 86-88, relating to the duty of highway commissioners with respect to highways laid out upon the line between any two towns, does not include a bridge on the line between two towns. *Union Drainage Dist. Com'rs v. Highway Com'rs*, 87 Ill. App. 93, 98.

"Highway" is a broader term than "street." All streets are highways, but not all highways are streets; and, being a broader term, it should be held to include streets. So that under a statute providing that the word "highway," when used in a Code, includes public bridges, the term "highway" will include a bridge on a city street. *Sachs v. City of Sioux City*, 80 N. W. 336, 337, 109 Iowa, 224.

The word "highway" includes bridges thereon. *V. S.* 1894, 24; *Pub. St. N. H.* 1901, p. 64, c. 2, § 26; *Pen. Code Ga.* 1895, § 2; *Gen. St. Conn.* 1902, § 3861; *Shannon's Code Tenn.* 1896, § 70; *Rev. St. Utah* 1898, § 2498; *Horner's Rev. St. Ind.* 1901, § 240, subd. 3; *Rev. St. Me.* 1883, p. 59, c. 1, § 6, subd. 6; *Rev. Laws Mass.* 1902, p. 88, c. 8, § 5, subd. 4; *Code Iowa* 1897, § 48, subd. 5; *Gen. St. Kan.* 1901, § 7342, subd. 5; *Gen. St. Minn.* 1894, § 255, subd. 5; *Hurd's Rev. St. Ill.* 1901, p. 1720, c. 163, § 1; *Rev. St. Wis.* 1898, § 4971.

#### As a common.

See "Common"; "Public Common."

#### Common and equal right to use.

A highway is a way which is common to all people without distinction, and which they may travel over on foot or horseback,

or in carriages. *Burlington, K. & S. W. R. Co. v. Johnson*, 16 Pac. 125, 128, 38 Kan. 142.

The term "highway" is a generic name for all kinds of public ways; ways common to all the people in the state having occasion to pass over it. To constitute a highway, it must be one to which all the people of the state have a common and equal right to travel, and in which they have a common, and at least general, interest to keep unobstructed. *Talbot v. Richmond & D. R. Co.* (Va.) 31 Grat. 685, 692.

A highway is a public way for the use of the public in general for passage and traffic, without distinction. *Bogue v. Bennett*, 60 N. E. 143, 145, 156 Ind. 478, 83 Am. St. Rep. 200 (citing *Starr v. Camden & A. R. Co.*, 24 N. J. Law, 592).

#### Control and repair by public.

A public highway is one either established by the public authorities in proceedings regularly brought for that purpose, or one generally used by the public, over which the public authorities have exercised control for the period of 20 years, or one dedicated to the public by the owner of the soil with the sanction of the authorities, and for the maintenance and reparation of which they are responsible. *State v. Purify*, 86 N. C. 681, 682; *State v. McDaniel*, 53 N. C. 284, 285; *Boyden v. Achenbach*, 79 N. C. 539; *Stewart v. Frink*, 94 N. C. 487, 488, 55 Am. Rep. 619.

To constitute a road a public highway, however originating, it must be a public charge, and must of necessity have an overseer and hands to work it, bridges erected when needed, and kept in repair at the public expense; and hence the law, in order to avoid an intolerable burden being thrown on the public, will not permit every citizen of his own head and according to his own ideas of necessity to establish a highway by mere act of private dedication. *Kennedy v. Williams*, 87 N. C. 6, 8.

A highway is commonly understood to be a turnpike road, gravel road, or plank road, or the common thoroughfare established and maintained by public authority for travel by the public generally. Its establishment is by the dedication of the land to the use of the public as a highway, and its acceptance and use by the public for that purpose. *Riley v. Buchanan*, 76 S. W. 527, 528, 25 Ky. Law Rep. 863, 63 L. R. A. 642.

A highway is what the name signifies, a way for public travel; that is, a public road. Highways are under the control and superintendence of the proper public authorities. The use of the highways is regulated by the criminal law and such statutes as the Legislature may have enacted for that pur-



pose. *People v. Meyer*, 56 N. Y. Supp. 1097, 1099, 28 Misc. Rep. 117.

Highways and streets are for the public use. They are not alone for the people of the municipality in which they are located, and such ways cannot be considered in any sense the easement or property of the town; but the municipality in which a public way is located has been vested by the Legislature with the supervision and control of such ways for the public use, and is charged with the responsibility of keeping them in repair. *State v. Boardman*, 44 Atl. 118, 120, 93 Me. 73.

#### **As county purpose.**

See "County Purpose."

#### **County way or road.**

The word "highway" may be held equivalent to the words "county way," "county road," or "common road." *Shannon's Code Tenn.* 1896, § 70; *Rev. St. Utah* 1898, § 2498; *Horner's Rev. St. Ind.* 1901, § 240, subd. 3; *Rev. St. Me.* 1883, p. 59, c. 1, § 6, subd. 6; *Rev. Laws Mass.* 1902, p. 88, c. 8, § 5, subd. 4; *Code Iowa* 1897, § 48, subd. 5; *Gen. St. Kan.* 1901, § 7842, subd. 5; *Gen. St. Minn.* 1894, § 255, subd. 5; *Hurd's Rev. St. Ill.* 1901, p. 1720, c. 131, § 1, subd. 16; *Rev. St. Wis.* 1898, § 4971.

#### **As created by user or dedication.**

A highway is a thoroughfare used by the public, or, in the language of the English books, a way common to all the king's subjects. Where a street car company purchases a strip of land and lays its tracks in the center thereof, and throws the strip open for the public, a driveway being provided on either side, the entire strip becomes a public highway, though it is not formally dedicated, and therefore the company is liable for an injury to a passenger in a stage coach which gets on the track, though the negligence causing the action is not wanton, willful, or intentional. *Liekens v. Staten Island Midland R. Co.*, 72 N. Y. Supp. 162, 164, 64 App. Div. 327.

A highway established by user merely is not necessarily limited to the traveled path; that is, that part actually used so as to have been worn by feet or wheel. If the traveled track of a highway, where a person was at the time of an injury, had been traveled in the same place for 15 years before the accident, and such track, though not the traveled track of the former highway, was within the limits of the former highway as fenced out, and had been within the limits of such highway as thus fenced out for 5 years and more before the commencement of said 15 years, there would be a public highway there. *Coffin v. Town of Plymouth*, 49 N. H. 173, 175.

"The early statute, defining what are highways by user, declares (*Laws* 1817, c. 43, § 3) that when any roads have been used as public highways for 20 years or more, the same shall be taken and deemed as public highways." The user which creates the easement must be that which the ordinary highway is subject to. The location of a lamp post, the passing of a resolution regulating the repair of a wharf, or the declaration by the common council that certain land is a street, does not, after the lapse of 20 years, imply a grant to the city, where the owner has uninterruptedly possessed and controlled the land, and there has been no travel over it as a highway. In *Speir v. Town of Utrecht*, 24 N. E. 692, 694, 121 N. Y. 420, the court says the user must be like that of highways generally. The road must not only be traveled upon, but it must be kept in repair or taken in charge and adopted by the public authorities. *City of Buffalo v. Delaware, L. & W. R. Co.*, 74 N. Y. Supp. 343, 352, 68 App. Div. 488.

A road used as a public highway for 20 years or more, but which had never been petitioned for or laid out or located as a public highway by any judicial proceeding, and had never been ascertained, described, and entered of record as a highway, is a highway within a provision authorizing the board of commissioners to change the location of a highway. *Houlton v. Carpenter*, 64 N. E. 939, 940, 29 Ind. App. 643.

The word "highway" is equivalent to the words "public highway," as a highway is not a highway unless it is public. Where the railroad company has invited the public to use a crossing as a part of a public highway, such crossing is as to it in all respects the same as a strictly legal highway, and proof of such use was competent under an allegation that it was a highway. *Coulter v. Great Northern Ry. Co.*, 67 N. W. 1046, 1050, 5 N. D. 568.

As used in *Rev. St.* §§ 1294, 1296, providing that every "highway which shall have been abandoned for five years shall revert to the owners of the adjoining land," the word "highway" will be construed to include only roads laid out by the authority of the United States, the state, or any county, town, city, or village, and does not include the highways dedicated to the public by a private owner. *Paine Lumber Co. v. City of Oshkosh*, 61 N. W. 1108, 1111, 89 Wis. 449.

"Highway," as used in *Act Va. Nov. 27, 1789*, § 1, p. 46, providing that the benefit of clergy shall be taken away from persons committing robbery in or near a highway, means something more than a common way. It should be construed as a road on which a man has a right to travel, and the obstruction of which may be prosecuted as a

nuisance. It cannot be a road opened only by private agreement. *United States v. King* (U. S.) 26 Fed. Cas. 786, 787.

#### **Cul-de-sac or pent road.**

The term "highway" may properly be applied to a mere cul-de-sac. *People v. Van Alstyne* (N. Y.) 3 Keyes, 85, 87; *Saunders v. Townsend* (N. Y.) 26 Hun, 308, 309. Contra, see *People v. Jackson*, 7 Mich. 432, 446, 74 Am. Dec. 729.

A "street," as the term is used in the law of streets and highways, includes a mere cul-de-sac; that is, a street open at one end only. True, in *Holdane v. Cold Spring Trustees* (N. Y.) 23 Barb. 103, two of the three judges held that such a street could not be a highway. They based their decisions upon what they supposed to be the common law. It has been laid down by Lord Kenyon in *Rugby Charity v. Merryweather*, 11 East, 376, that a mere cul-de-sac might be a highway; that otherwise such places would be traps to catch trespassers. And in *Bateman v. Bluck*, 14 Eng. Law & Eq. 69, the question was fully considered, and the court held that it was no objection to a highway that it was a mere cul-de-sac, and not a thoroughfare; and in *People v. Kingman*, 24 N. Y. 559, the Court of Appeals very pointedly condemned the decision in *Holdane v. Cold Spring Trustees* (N. Y.) 23 Barb. 103, and held that upon principle as well as authority it is no objection to the highway or public street that it is a cul-de-sac; that public ways with an outlet at one end may, and often do, exist. *Bartlett v. City of Bangor*, 67 Me. 460, 467.

The term "highway," in Rev. St. §§ 3178, 3179, relieving owners of land from the duty of maintaining fences on the sides of highways, does not include pent roads. *Carpenter v. Cook*, 30 Atl. 998, 999, 67 Vt. 102; *French v. Holt*, 53 Vt. 364; *Wolcott v. Whitcomb*, 40 Vt. 40, 41; *Bridgman v. Town of Hardwick*, 31 Atl. 33, 34, 67 Vt. 132. Contra, see *Town of Whillingham v. Bowen*, 22 Vt. 317.

#### **As an easement.**

A public highway is a perpetual easement and a freehold estate. *Chaplin v. Commissioners*, 126 Ill. 264, 18 N. E. 765; *Village of Crete v. Hewes*, 168 Ill. 330, 48 N. E. 36; *Taylor v. Pierce*, 50 N. E. 1109, 1110, 174 Ill. 9.

A highway is nothing but an easement comprehending merely the right of all the individuals in the community to pass and re-pass, with the incidental right in the public to do all the acts necessary to keep it in repair. This easement does not comprehend any interest in the soil, nor give the public the legal possession of it. *Adams v. Rivers* (N. Y.) 11 Barb. 390, 399; *Kelsey v. King*

(N. Y.) 33 How. Prac. 39, 44; *Peck v. Smith*, 1 Conn. 103, 132, 6 Am. Dec. 216; *In re Road from Fitzwater St. to Shippen St.* (Pa.) 4 Serg. & R. 106; *Starr v. Camden & A. R. Co.*, 24 N. J. Law (4 Zab.) 592, 597; *Smith v. City of San Luis Obispo*, 30 Pac. 591. 593, 95 Cal. 463; *Newton v. New York, N. H. & H. R. Co.*, 44 Atl. 813, 815, 72 Conn. 420; *Lynch v. Town of Rutland*, 29 Atl. 1015. 1016, 66 Vt. 570.

Every landowner whose land abuts on a highway is supposed to be the owner of the soil to the center of the highway in fee, subject to the easement of the public travel, and may do in the highway on his side of the center line anything which the owner in fee of land may do, if he does not interfere with that easement. *Newton v. New York, N. H. & H. R. Co.*, 44 Atl. 813, 815, 72 Conn. 420.

The right of freehold is not affected by establishing a highway, but the freehold continues in the original owner of the land in the same manner it was before the highway was established subject to the easement *Peck v. Smith*, 1 Conn. 103, 132, 6 Am. Dec. 216.

Highways are regarded as easements in the land over which they are laid out; hence the owner of the land is not divested of his title, but it is merely made subject to the easement. When a highway is laid out the public acquires no more than a right of way with the powers and privileges incident to that right, such as digging the soil, cutting timber and other materials within the space of the road in a reasonable manner for the purpose of making and repairing the road and its bridges. *Jackson v. Hathaway* (N. Y.) 15 Johns. 447, 452, 8 Am. Dec. 263 (cited and approved in *Whitbeck v. Cook* [N. Y.] 15 Johns. 483, 490, 8 Am. Dec. 272).

A grant of a highway, without any other words indicating an intent to enlarge the import of the word, conveys only an easement. *Jamaica Pond Aqueduct Corp. v. Chandler*, 91 Mass. (9 Allen) 159, 165.

A highway taken by the power of eminent domain is merely a public way, the fee remaining in the landowner. The grass is a part of the land, and, with the soil and rocks, remains the property of the landowner, subject to the public right of way, and although a traveler, making a reasonable use of the way as a way, is not liable for grass smatchingly taken, as he is not for mud or dust accidentally carried off by his horse, he commits a tort by grazing his horse on another's land on which he has only a right of way. But mere stopping is not necessarily a tort. *Varney v. Manchester*, 58 N. H. 430, 432, 40 Am. Rep. 592.

A public highway is a way in which the public are entitled to a right of passage.

The title to the soil, stone, etc., in such a way continues in the owners of the lands over which the way passes. The land is merely dedicated to the public for particular purposes. *Chambers v. Furry* (Pa.) 1 Yeates 167, 169.

#### **Ferry.**

See "Ferry."

#### **Ferry boat.**

A highway is a passage that is open to all the public. Thus, public rivers, considered as highways, need not necessarily be thoroughfares; but the term would not include a ferry boat operated by a county. *Chick v. Newberry County*, 3 S. E. 787, 789, 27 S. C. 419.

#### **As highway properly laid out.**

Act Md. 1795, c. 44, § 2, requiring the location of public highways to be recorded among the records of the territory of Columbia, should be construed to include only those roads which have been so recorded, such recording being a condition precedent to the constitution of the road as a public highway. *United States v. Emery* (U. S.) 25 Fed. Cas. 1014.

The North Carolina statute prohibiting the obstruction of a public highway includes a road laid off by commissioners under an order of a township board of trustees, which has appointed an overseer for the road. *State v. Davis*, 68 N. C. 297, 299.

"Highway," as used in Gen. St. c. 43, § 1, which authorizes the county commissioners to lay out a highway from place to place within the same town, as well as from town to town, means a way originally laid out by the county commissioners. *Inhabitants of Blackstone v. Worcester County Com'rs*, 108 Mass. 68.

#### **Impassable or unopened road.**

The term "highway," within the meaning of Rev. St. § 1326, prescribing a penalty for obstructing a highway, does not include a platted street designated and dedicated to the public use, but which has not been opened for actual public use. *City of Racine v. Chicago & N. W. Ry. Co.*, 65 N. W. 857, 858, 92 Wis. 118; *State v. Paine Lumber Co.*, 54 N. W. 503, 504, 84 Wis. 205.

The word "highway" imports a practicable passage. It is a contradiction in terms to speak of an impassable public highway. We might as well speak of an uninhabitable dwelling house or an invisible illumination. *Armstrong v. City of St. Louis*, 3 Mo. App. 151, 157.

#### **As improved part of way.**

Code, § 466, which provides for the improvement of highways within cities and

towns, and that an assessment may be made upon the lots fronting on such highway, means simply the improved part of the highway. *Morgan v. Des Moines & St. L. Ry. Co.*, 21 N. W. 96, 98, 64 Iowa, 589, 52 Am. Rep. 462.

#### **As an incumbrance.**

See "Incumbrance (On Title)."

#### **As land.**

See "Land."

#### **Landings and levees.**

The term "highway" in the constitutional prohibition relative to roads, highways, streets, or alleys cannot be held to embrace landings and levees, or include a river and its banks. *Duffy v. City of New Orleans*, 21 South. 179, 182, 49 La. Ann. 114.

A wharf, simply as such, and not being part of a street, is not a public highway. *State v. Cowan*, 29 N. C. 239, 248.

#### **Lane.**

See "Lane."

#### **Nature of use.**

In *Cater v. Northwestern Telephone Exch. Co.*, 63 N. W. 111, 60 Minn. 539, 28 L. R. A. 310, 51 Am. St. Rep. 543, the adaptability of the public easement in highways to the requirements of improvement an invention was well expressed by Judge Mitchell as follows: "If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and next a way for vehicles drawn by animals; constituting respectively the iter, the actus, and the via of the Romans. And thus the methods of using public highways expanded with the growth of civilization until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the public easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterward be discovered and developed in aid of the general purpose for which highways are designed." A statute authorizing the construction of bicycle sidepaths on highways is not invalid, and is a proper highway use. *Ryar v. Preston*, 69 N. Y. Supp. 100, 102, 59 App. Div. 97.

The easement of a highway embraces all travel not prohibited by law on foot, in carriages, omnibuses, stages, sleighs, or other vehicles, as the wants and habits of the public demand. The right of the public in a highway consists in the privilege of passage and such privileges as are annexed as incidents by usage or custom, as the right to make sewers and drains and lay gas and water pipes. It can hardly be questioned that the primary and fundamental purpose of a public highway, street, or alley is to accommodate the public travel, to afford citizens and strangers an opportunity to pass and repass on foot or in vehicles with such movable property as they may have occasion to transport, and every man has a right to use on the road a conveyance of his own at will, subject to such proper regulations as may be prescribed by authority. The easement for public travel is not to be limited to the particular modes of travel in use at the time the easement was acquired, but extends to and includes all such new and improved methods of travel, the utility and general convenience of which may be afterwards discovered or developed, as are in aid of the identical use for which the street was acquired. The construction and operation of an ordinary railroad in a public street is a new use of the street, and an additional burden on the soil. *Carli v. Stillwater St. Ry. & Transfer Co.*, 10 N. W. 205, 23 Minn. 373, 41 Am. Rep. 290.

"A public highway, while primarily intended for the accommodation of travelers employing the ordinary means of locomotion, such as vehicles drawn by animals, is nevertheless, in another and broader sense, a public convenience. It is appropriated for that purpose, and, when thus taken or dedicated, nothing remains in the original proprietor but the naked fee; for, as has been well said, lands thus appropriated are acquired for the purpose of providing a means of free passage common to all the people, and consequently may be rightfully used in any way that will subserve that purpose. By the taking the public acquires a right of free passage over every part of the land, not only by the means in use when the lands were taken, but by such other means as the improvements of the age and new wants arising out of an increase of population or an enlargement of business may render necessary. It is perfectly consistent with the purposes for which streets are acquired that the public authorities should adapt them, in their uses, to the conveniences and improvements of the age." A street may be used for the laying of an underground telephone conduit without entitling abutting owners to damages, though their fee extends to the center of the street. *Castle v. Bell Telephone Co.*, 63 N. Y. Supp. 482, 484, 49 App. Div. 437.

#### Neighborhood road.

A neighborhood road, although a public way, is not a public highway, and hence the obstruction of the same is not ground for a prosecution for obstructing a highway. *State v. Harden*, 11 S. C. 360, 368, 369.

#### Part of highway.

Within Rev. St. § 1294, as amended by Laws 1882, c. 253, providing that any highway which shall be entirely abandoned as a route of travel, and on which no highway tax has been expended for five years, shall be considered legally discontinued. The term "highway" does not mean that any part of a highway, however small, that has not been traveled or worked for five years, shall be considered legally discontinued. It is a highway *eo nomine*, as a generic term, to which the statute relates; at least enough of any public road or thoroughfare to be called in ordinary parlance a highway, or as is meant by the statute when it provides for laying out a highway; and hence the statute does not apply where, to avoid a hill, which was at the crossing of two roads, the road had been made around the foot of the hill, and that part going over the hill had not been worked. *Maire v. Kruse*, 55 N. W. 389, 390, 85 Wis. 302, 26 L. R. A. 449.

The term "highway" in a statute providing that any highway abandoned as a route of travel, and on which no highway tax had been expended for five years, shall be considered discontinued, was construed to include a country road more than half a mile in length connecting two other highways. *Herrick v. Town of Geneva*, 65 N. W. 1024, 1025, 92 Wis. 114.

Gen. Laws, c. 71, § 1, provides that "highways in a town" may be discontinued by vote of the town. Held, that "highways in a town," within the meaning of the statute, includes one wholly within the town, though it is part of a continuous thoroughfare extending to other towns. *Drew v. Cotton*, 42 Atl. 239, 240, 68 N. H. 22.

#### Plank road.

See "Plank Roads."

#### Private way.

The term "highway" includes not only public roads, but also private roads. *Sherman v. Bulck*, 32 Cal. 241, 242, 252, 91 Am. Dec. 577.

"Public highway," as used in *Wagner's St. p. 520*, § 5, providing that a railway company shall not be liable for killing animals in a crossing of any public highway, includes a private road, for a private road is a highway. The phrase "public highway" is a tautological expression. A highway is a passage, road, or street which every citizen has

a right to use, and is therefore necessarily public; private roads being so termed by the statute to distinguish them from public roads, which are maintained by public expense. *Walton v. St. Louis, I. M. & S. Ry. Co.*, 67 Mo. 56, 57.

#### **As public place or work.**

See "Public Place"; "Public Works."

#### **Public square.**

The term "highway" is properly applied to so much of a public square as is around and about the courthouse, and devoted to the purpose of a highway. Parts of it may, and not infrequently are, devoted to the use of pedestrians, while other parts are used for and devoted to the purpose of passing and repassing and going to and from with carriages, wagons, carts, horses, etc. The purpose is to enable all persons and people going to and from the courthouse to have a convenient public way and means to do so. This is a material part of the purpose of what is commonly and not inaptly called the "public square" of the county. It belongs to the county, and the courthouse is erected on it, and so much as is used for the moving about of people constitutes and is a highway recognized, allowed, and protected by the law. It belongs to the public, and they use it of right until public authority shall abolish it, though there be no overseer of it, for an overseer is not essential to the existence of a highway. *State v. Eastman*, 13 S. E. 1019, 1020, 109 N. C. 785.

#### **Railroad.**

A railroad is a public highway, not in the sense of public wagon roads upon which every one may transact his own business with his own means of conveyance, but only in the sense of being compelled to accept of each and all and take and carry away to the extent of their ability. *Toledo, P. & W. Ry. Co. v. Pence*, 68 Ill. 524, 529; *Clark v. Chicago & A. R. Co.*, 29 S. W. 1013, 1016, 127 Mo. 197.

A railroad is a public highway affording facilities for easy and rapid travel to the public, and aiding or developing the resources of a country, and making the markets for its production easy of access. *Gibson v. Mason*, 5 Nev. 283, 307.

A railroad is a public way for the public benefit, and the right of a corporation to exact a uniform, reasonable, and stipulated toll from those who pass over it does not make its main use a private one. The public have an interest in such a railroad when it belongs to a corporation as clearly as they would if it were free, or as if the tolls were payable to the state, because travel and transportation are cheapened by it to a degree far exceeding all the tolls and charges

of every kind; and this advantage the public has over and above those of rapidity, comfort, convenience, increase of trade, opening of markets, and other means of rewarding labor or promoting wealth. The purpose of constructing a railroad is public in its nature, for a donation to which taxes may be levied. *Davidson v. Ramsey County Com'rs*, 18 Minn. 482, 488 (Gil. 432, 436).

A railroad is for some purposes and in a certain sense a highway; not, however, in the sense that a street or road is a public highway. It is quasi public in character. The right of eminent domain may be invoked in aid of its construction; and when fully equipped and in operation it becomes a common carrier, and is liable alike to all persons for the transportation of themselves and their property, and as a common carrier it may be controlled and governed by the state, and, within well-defined limits, by the United States. A street or road is a public highway in a much broader sense than a railroad. It is laid out and opened by the public authorities for the general use of the public, built and kept in repair at public expense, and all persons have the right of free access thereto with the right to travel thereon. To obstruct it is made a criminal offense. By necessity, one who owns property abutting on or locates his buildings adjacent to a street or road enjoys not alone the right of access thereto with the right to travel thereon, but, in addition thereto, the light, air, and view which come to his property over the same. To deprive him of such right would be to destroy the thing itself out of which the right grows. Therefore, of necessity, the right exists. A railroad company, when invested with the fee title, except in the discharge of its duties as a common carrier, is the owner of and entitled to the exclusive use, possession, and control of its right of way, the same as a private person, and holds and owns its property disencumbered of any right therein of its abutting or adjoining neighbors as fully and completely as does the individual owner of property. The public do not have the right of access to its right of way except at designated places, and abutting owners do not hold adjacent to its right of way with a view of access thereto and the enjoyment of light, air, and view therefrom. *Kotz v. Illinois Cent. Ry. Co.*, 59 N. E. 240, 241, 188 Ill. 578.

A railroad is not a public highway in the sense that it belongs to the people, so as to preclude a party from acquiring title to land owned by a railway company by adverse possession, since such company holds and uses its property for the benefit of its stockholders, and not for the public. *Pittsburgh, C., C. & St. L. Ry. Co. v. Stickley*, 58 N. E. 192, 193, 155 Ind. 312.

"A railroad is a public highway for the public benefit, and the right of the corporation to exact a uniform, reasonable, stipulated toll from those who pass over it does not make its main use a private one. The public has an interest in such a road when it belongs to a corporation as clearly as they would have if it were free, or as if the tolls were payable to the state, because travel and transportation are cheapened by it to a degree far exceeding all the tolls and charges of every kind; and this advantage the public has over and above those of rapidity, comfort, and convenience, increase of trade, opening of markets, and other means of regarding labor and promoting wealth." Thus the assessment of a local tax to aid in the construction of a railroad is a legitimate exercise of a taxing power, as the road is a public benefit. *Sharpless v. City of Philadelphia*, 21 Pa. (9 Harris) 147, 164, 169, 59 Am. Dec. 759.

Under the provisions of section 4, art. 11, of the Constitution, a railroad constructed and operated in the state is a public highway. *McLucas v. St. Joseph & G. I. R. Co.* (Neb.) 93 N. W. 928.

A highway does not include a railroad in the fullest sense of the term, though the public has an interest in it, and the right to use it, and although there is a necessity that the company should keep the road in a condition to enable it to perform its duty to the public. It is not a common public highway on which all citizens are free to pass, since it is the subject of private property. A railroad is not a highway in the sense that it is exempt from execution as such. *State v. Rieves*, 27 N. C. 297, 310.

Rev. St. U. S. § 2477 [U. S. Comp. St. 1901, p. 1567], declares that the right of way for the construction of highways over public lands not reserved for public uses is hereby granted. Held, that the term "highway," as used in the section, did not, either in its ordinary or strict sense, include railroads. And while it was true in a certain sense that a railroad was a public highway, to be constructed and operated according to law and subject to public control, it can only be used in a particular manner, and is not open to common use for foot passengers, horse passengers, animals, and carriages, as an ordinary highway may be used. In the usual acceptance of the term, a highway is one which is common to all people without distinction, and which they may travel over on foot, horseback, or in carriages. *Burlington, K. & S. W. R. Co. v. Johnson*, 16 Pac. 125, 128, 38 Kan. 142. Contra, see *Flint & P. M. Ry. Co. v. Gordon*, 2 N. W. 648, 653, 41 Mich. 420; *Tennessee & C. R. Co. v. Taylor*, 14 South. 379, 102 Ala. 224.

"Public highway," as used in legislative declarations to the effect that particu-

lar railroads shall be public highways, means that such road shall be open to the use of the public for their own vehicles. As used in Act Cong. May 5, 1864, 13 Stat. 64, granting land to the state of Minnesota to aid in the construction of a certain railroad, and providing that the said railroad shall be and remain a public highway for the use of the government of the United States free from all toll or other charge for the transportation of any property or troops of the United States, only means that the government shall have the right to use the road, and not that it shall have the right to require its transportation to be performed by the railroad company. *Lake Superior & M. R. R. Co. v. United States*, 98 U. S. 442, 451, 23 L. Ed. 965.

"Public highway," as used in Act March 22, 1871, providing that whenever any public highway of any company shall have been out of repair for five years it shall be deemed abandoned, does not seem to apply to railroads. It is true that railroads are public highways belonging to corporations, but at the time of the passage of the act they constituted by far the most important class of such highways, and it is not to be supposed that the Legislature intended to include them under this general name after mentioning in the act by name turnpikes and canals. *Pittsburgh, V. & C. Ry. Co. v. Pittsburgh, O. & S. L. R. Co.*, 28 Atl. 155, 157, 159 Pa. 331.

"A railroad is a public highway (Const. Tex. art. 10, § 2; *Beekman v. Saratoga & S. R. Co.* [N. Y.] 3 Paige, 45, 74, 22 Am. Dec. 679; Ang. Highw. § 370), and especially is this true so far as acquisition of the right of way is concerned, for upon no other theory could the right of eminent domain be conferred upon a railroad corporation." *Texas & N. O. Ry. Co. v. Sutor*, 56 Tex. 496, 499.

A railroad is not a public highway within Code 1876, § 4203, prohibiting the use of abusive, insulting, or vulgar language on the public highway near the dwelling house or curtilage of another, in the presence of the family or any member of the family of the owner. *Comer v. State*, 62 Ala. 320.

A railroad is not a public highway within Rev. Code, c. 84, § 2, punishing with death robbery in or near a public highway. *State v. Johnson*, 61 N. C. 140, 143.

A railroad is not a highway within Rev. Code, § 3622, prohibiting the betting at a game of cards played in a highway. *Napier v. State*, 50 Ala. 168, 170.

A railroad is not a highway within 1 Rev. St. 341, § 5, subd. 11, which declares that the electors of each town shall have power at their annual town meeting to make rules and regulations for ascertaining the sufficiency of all fences of such town, for determining the time and manner in which cattle, horses, or sheep shall be permitted to go

at large on highways. *Tonawanda R. Co. v. Munger* (N. Y.) 5 Denio, 255, 268, 49 Am. Dec. 239.

#### **Railroad platform.**

The platform of a railway company at its station or stopping place is in no sense a public highway. There is no dedication to public use as such. It is a structure erected expressly for the accommodation of passengers arriving and departing in the train. Being uninclosed, persons are allowed the privilege of walking over it for other purposes, but they have no legal right to do so. The servants of the company, after requesting them to leave, can remove them by whatever force may be necessary. *Gillis v. Pennsylvania R. Co.*, 59 Pa. (9 P. F. Smith) 129, 141, 98 Am. Dec. 317.

#### **Road synonymous.**

See "Road."

#### **Sidewalk as part of.**

A sidewalk is as much a part of the highway as the traveled wagon road is. *People v. Meyer*, 56 N. Y. Supp. 1097, 1099, 28 Misc. Rep. 117. See, also, *Marini v. Graham*, 7 Pac. 442, 443, 67 Cal. 130; *Bonnet v. City & County of San Francisco*, 65 Cal. 230, 231, 3 Pac. 815; *Ex parte Taylor*, 87 Cal. 91, 94, 25 Pac. 258; *Martinovich v. Wooley*, 60 Pac. 760, 128 Cal. 141; *City of Frankfort v. Coleman*, 49 N. E. 474, 475, 19 Ind. App. 368, 65 Am. St. Rep. 412; *Board of Public Works of City of Denver v. Hayden*, 56 Pac. 201, 204, 13 Colo. App. 36; *Challiss v. Parker*, 11 Kan. 384, 391.

#### **Street or town way.**

A street in a city is a highway. *Laufer v. Bridgeport Traction Co.*, 37 Atl. 379, 381, 68 Conn. 475; *In re Road from Fitzwater St. to Shippen St. in Moyamensing Tp. (Pa.)* 4 Serg. & R. 106; *Lehigh Val. R. Co. v. Dover & R. R. Co.*, 43 N. J. Law (14 Vroom) 526; *White v. Chicago, St. L. & P. R. Co.*, 122 Ind. 317, 326, 23 N. E. 782, 784, 7 L. R. A. 257; *Laufer v. Bridgeport Traction Co.*, 37 Atl. 379, 381, 68 Conn. 475.

The word "highway" may or may not include a street. A public highway is a thoroughfare for public use, including country roads; while a street is a public highway of a city, town, or village. *State v. Moriarty*, 74 Ind. 103, 104.

A street is a road or public way in a city, town, or village. As the way is common, free to all the people, it is a highway, and it is proper to affirm that all streets are highways, though not all highways are streets. "Streets" is a generic term, and includes all urban ways which can be and are generally used for ordinary purposes of travel. *Sachs v. Sioux City*, 109 Iowa, 224, 228, 80 N. W. 336.

A street is a highway. *Bouvier*, in his *Law Dictionary*, defines a street as a public thoroughfare or highway in a city or village. The grant of a street or highway over one's land is but the grant of an incorporeal hereditament. By its very terms it signifies that the party to whom the grant is made acquires an easement on the land, and nothing more. *Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178, 182.

A street is a highway, but all highways are not streets. As distinguished from the word "highway," which means a public thoroughfare over and on which all the citizens of the land have a right to pass and re-pass at pleasure, it means a public highway of a city, town, or village merely. *State v. Moriarty*, 74 Ind. 103, 104.

The meaning of the term "street" is not sufficiently broad to include all highways, though all streets are embraced within the generic term "highways." *Duval County Com'rs v. City of Jacksonville*, 18 South. 339, 344, 36 Fla. 196, 29 L. R. A. 416; *Gray v. Dallas Terminal Ry. & Union Depot Co.*, 36 S. W. 352, 357, 13 Tex. Civ. App. 158.

That the Legislature, in enacting laws governing highways, intended to include streets in towns and cities, is to be determined from the sense of the statute itself, and not from a general definition of the term "highway." It will not be presumed that the Legislature, in employing the general term "highways," meant to include the streets of a municipal corporation. There is no such presumption. See *Elllott on Roads & Streets*, p. 16. *Kerney v. Barber Asphalt Pav. Co.*, 86 Mo. App. 573, 578.

"The word 'highway' in popular language means a public way, and includes a town way." *Cleaves v. Jordan*, 34 Me. 9, 12.

A highway is a passage or road through the country, or some part of it, for the use of the people. It is a generic name for all kinds of public ways. "Public road" and "highways" are usually understood to mean the same thing, and include all ways which of right are common to the whole public, and therefore differ from private roads or byways. They therefore include streets, avenues, lanes, and alleys in cities and villages, unless there is something in the subject-matter of the enactment showing that it is inapplicable to those urban highways. The terms "public roads" and "highways" in *Laws Minn. 1860, c. 12, § 1*, which grants to any telegraph company incorporated under the laws of the state full power and right to use public roads and highways in this state, includes streets, avenues, and alleys in cities and villages. *Abbott v. City of Duluth* (U. S.) 104 Fed. 833, 837. So, also, under statutes giving telephone companies a right to erect poles and wires in highways. *Northwestern Tel. Exch. Co. v. City of Minneapolis*.

lla, 86 N. W. 69, 71, 81 Minn. 140, 53 L. R. A. 175; State v. City of Sheboygan, 86 N. W. 657, 659, 111 Wis. 23; Chamberlain v. Iowa Tel. Co., 93 N. W. 596, 597, 119 Iowa, 619.

The term "highway," as used in Rev. St. c. 1, § 6, cl. 6, providing that a highway may include a county bridge, county road, or county way, cannot be construed to ever mean a town way. Wells v. York County Com'rs, 11 Atl. 417, 418, 79 Me. 522.

The word "street" imports a highway (Rap. Law Dict. p. 1226), and in the absence of proof to the contrary it will be assumed that the term "street" in the return of the public road by surveyors designating a street as the place of beginning or ending of a city road, is a public highway. Lord v. Gifford, 50 Atl. 903, 904, 67 N. J. Law, 193.

Rev. St. 1843, p. 332, § 54, providing that every highway which shall not be opened and worked within six years from the time of its being laid out shall cease to be a highway, does not apply to streets. Common Council of Indianapolis v. Croas, 7 Ind. 9, 12.

In 2 Rev. St. (7th Ed.) p. 1249, providing that all highways that have ceased to be traveled or used as highways for six years shall cease to be a highway for any purpose, the term "highway" applies to a street in a village incorporated under the general act for the incorporation of villages. Excelsior Brick Co. v. Village of Haverstraw, 86 N. E. 819, 820, 142 N. Y. 146.

"In our system of public ways the distinction between highways, technically so called, and town or private ways, consists in the fact that the former are laid out and may be altered or discontinued by the authorities having jurisdiction throughout the county, such as the county court, the court of general sessions, and in modern times the county commissioner; while the latter are laid out and may be altered or discontinued by the selectmen, with the approval of the town. In other respects they are like as equal parts of the system of public ways." Butchers' Slaughtering & Melting Ass'n v. City of Boston, 30 N. E. 94, 139 Mass. 290 (citing Denham v. Bristol County Com'rs, 108 Mass. 202; Flagg v. Flagg, 82 Mass. [16 Gray] 175; Valentine v. City of Boston, 39 Mass. [22 Pick.] 75, 33 Am. Dec. 711).

The term "highways" in St. 1896, c. 417, providing a board of survey for the town of R. to lay out and establish highways, includes all ways which the public interest requires to be laid out, relocated, altered, or widened by the town authorities, and includes an avenue in the town. Janvrin v. Poole, 63 N. E. 1066, 181 Mass. 463.

"Highway," as used in St. 1834, c. 184, prohibiting allowing cattle to go at large in

a highway without a keeper, is synonymous with a town way, so that an indictment charging that cattle had been taken up in a town way, they not being under the care of a keeper, was a sufficient charge under the act. Commonwealth v. Hubbard, 41 Mass. (24 Pick.) 98, 101.

"Highway," as used in St. 1786, c. 81, § 7, which provides that the party injured may recover double damages for an injury received through a defect in any highway, includes both town ways and county roads, although it is sometimes used in the Statutes as designating only a county road. Jones v. Inhabitants of Andover, 23 Mass. (6 Pick.) 59, 61. The term includes both town ways and public footways, and, as used in Pub. St. c. 112, § 125, which provides that a highway or town way may be laid across a railroad previously constructed, when the county commissioners think that the public convenience and necessity so require, means a public way, the original jurisdiction to lay out which is in the county commissioners. Boston & A. R. Co. v. City of Boston, 2 N. E. 943, 140 Mass. 87.

"Streets," as used in St. 1803, c. 11, annexing Southern Boston to Boston, and providing that the selectmen of Boston were authorized to lay out such streets and lanes in Southern Boston as, in their judgment, would be for the common benefit of the proprietors of the land and of the town of Boston, etc., should be construed as synonymous with "public ways" or "highways." Commonwealth v. City of Boston, 83 Mass. (16 Pick.) 442, 445.

The words "street" and "highway" have the same meaning, respectively, in the constitutional provision requiring a railroad to obtain the consent in writing of the owners of one-half in value of the property bounded on that portion of the street or highway upon which it is proposed to construct or operate the railroad, that the former has in innumerable laws relating to cities and incorporated villages, and that the latter has in the laws of this state known as the "Highway Acts." Hilton v. Thirty-Fourth St. R. Co., 1 How. Prac. (N. S.) 453, 456.

The word "highway," in a statute requiring railroads to erect sign boards at highway crossings, means a public road in the country, and not a street in a town or city. Mobile & O. R. Co. v. State, 51 Miss. 137, 140.

The term "highway," as used in Code 1802, § 3555, requiring every railroad company to make easy grades over a highway which its road crosses, and to keep such crossing in good order, applies to city streets as well as roads in the country. Hamline v. Southern Ry. Co., 25 South. 295, 296, 76 Miss. 410.



Under Code, § 3551, subjecting a railroad company to fine for obstructing travel on a highway for more than five minutes, or of a street longer than shall be prescribed by the ordinances of the city, town, or village, the railroad cannot be fined for the obstruction of a street in a town having no ordinance on the subject, the term "highway" relating only to roads in the country. *Illinois Cent. R. Co. v. State*, 14 South. 459, 71 Miss. 253.

A statute prohibiting the obstruction of a highway applies equally to the obstruction of a street, although towns and cities may have been given exclusive control of the streets. *Bybee v. State*, 94 Ind. 443, 48 Am. Rep. 175; *City of Indianapolis v. Higgins*, 40 N. E. 671, 673, 141 Ind. 1.

The word "highway," as used in Rev. St. Ill. c. 114, §§ 77, 78, relating to railroads and warehouses, and providing that railroad corporations shall not obstruct public highways by trains or cars except to receive or discharge passengers or to take fuel and water, and in no case longer than ten minutes, and prescribing a forfeiture for a violation of the provision, includes all kinds of public ways, and embraces a street. The fact that the statutes confer power upon the municipal authorities to regulate the use of the streets of a city and to prevent and remove obstructions to the same, does not render inapplicable the general statute relating to obstructions of highways. *Ohio, I. & W. Ry. Co. v. People*, 39 Ill. App. 473, 474, 475.

Where authority was granted to a city to lay out and extend roads and highways over and across the right of way of a railroad, streets are included; since a street is a road or public way in a city, town, or village. *Southern Kansas Ry. Co. v. Oklahoma City*, 69 Pac. 1050, 1054, 12 Okl. 82.

Rev. St. 1889, c. 114, § 68, providing that railroad companies must furnish their locomotives with bells, which must be sounded 80 rods from where the railroad crosses "any public highway," is not limited to the common public roads in the county, but is broad enough to include streets and roads in incorporated cities and towns. *Mobile & O. R. Co. v. Davis*, 22 N. E. 850, 851, 130 Ill. 146.

Rev. St. 1881, § 1964, providing for the punishment of any one placing a wrongful obstruction in a public highway, should be construed to include a public street in a city. *Bybee v. State*, 94 Ind. 443, 446, 48 Am. Rep. 175.

The expression "public highway," as used in City Charter of Lewiston, § 7, giving the city council exclusive power and authority to lay out any new street or public highway, is synonymous with "street," and means public way or street, and nothing else. *Dorman v. City Council of Lewiston*, 17 Atl. 316, 317, 81 Me. 411.

The term "highway" may include a county bridge, county road, or county way; but in the statute it never means a town way. *Wells v. York County Com'rs*, 11 Atl. 417, 418, 79 Me. 522.

The term "highway" is frequently used in a very broad sense. The sea is said to be the great public highway of nations. The canals and all public rivers and the Great Lakes are certainly highways. So are all the railroads. The term, in its ordinary and popular sense, refers to the country roads under the management and control of the local authorities of the several towns or counties of the state. It does not include streets or avenues in cities, as expressly held in *Re Woolsey*, 95 N. Y. 135, though it cannot be denied that such streets or avenues are highways in the broad sense. In Const. art. 3, § 18, prohibiting the passage of private or local bills for the purpose of "laying out, opening, altering, working, or discontinuing roads, highways, or alleys," the term is used in its ordinary and popular sense, comprehending only the ordinary roads and highways under the care of local authorities. In *re Burns*, 49 N. E. 246, 247, 155 N. Y. 23.

The term "highway," as used in the chapter relating to street railway companies, includes and covers the term "street." *Gen. St. Conn. 1902*, § 3861.

#### Turnpike.

See, also, "Turnpike."

A turnpike road laid out and constructed under the authority of the charter of a turnpike company is a public highway. *Pittsburgh, M. & Y. R. R. Co. v. Commonwealth*, 104 Pa. 583, 586; *Northern Cent. Ry. Co. v. Commonwealth*, 90 Pa. 300, 302; *Rodgers v. Bradshaw* (N. Y.) 20 Johns. 735, 742; *Fox v. Union Turnpike Co.*, 69 N. Y. Supp. 551, 553, 59 App. Div. 363; *Dodge County Com'rs v. Chandler*, 96 U. S. 205, 208, 24 L. Ed. 625.

A public highway or road is a highway or road open and public for the passage of every person without any toll or other imposition. *Bradshaw v. Rodgers* (N. Y.) 20 Johns. 103, 105.

"A road or canal constructed by the public or a corporation is a public highway for the public benefit. If the public have a right to passage thereon by paying a reasonable stipulated uniform toll, its exaction does not make its use private." *Bonaparte v. Camden & A. R. Co.* (U. S.) 3 Fed. Cas. 821, 829.

Public highways include turnpikes, railroads, and bridges used as thoroughfares, and the charge of a toll over them in no way affects their character as public highways. They are public because of the right of the public to use them. *Dodge County Com'rs v. Chandler*, 96 U. S. 205, 208, 24 L. Ed. 625.

Plank roads constructed by individuals or corporations under the general law or by special charter are public highways, the material difference between them and other public highways being in the manner and mode of construction and repairing, and the fact that the traveling public pay a toll for their use; travelers having as much right to the use of one as the other on paying the specified tolls. *Craig v. People*, 47 Ill. 487, 493.

A turnpike road is a public highway established by public authority, and is to be regarded as a public easement. The only difference between this and the common highway is that, instead of being made at the public expense in the first instance, it is authorized and laid out by the public authority, and made at the expense of individuals in the first instance, and the cost of construction and maintenance is reimbursed by a toll levied by public authority for that purpose. *Commonwealth v. Wilkinson*, 83 Mass. (16 Pick.) 175, 26 Am. Dec. 654. It is also said in *Murray v. Berkshire County Com'rs*, 53 Mass. (12 Metc.) 455, 458, that a turnpike road is a public highway, which all people have a right to use, and which no one has a right to obstruct, not even the corporation that built it, except so far as it is expressly authorized to do so in order to secure the tolls granted by law. *State v. Maine*, 27 Conn. 641, 648, 71 Am. Dec. 89.

A turnpike road is a public highway, and abatement will lie as for a public nuisance against any person placing obstructions thereon. The only difference between a turnpike road and a common highway is that, instead of being made at the public expense in the first instance, it is authorized and laid out by public authority, and made at the expense of individuals, and the cost of construction and maintenance is reimbursed by a toll levied by public authority for the purpose. Every traveler has the same right to use it on paying the toll established by law, as he would have to use any other public highway. *Northern Cent. Ry. Co. v. Commonwealth*, 90 Pa. 300, 302.

The expression "public highway," as used in Rev. St. 1881, § 4274, providing for the drainage of wet and overflowed lands at the expense of those benefited by the work, if it benefits a public highway should be construed in its ordinary sense, and includes the gravel road of a turnpike company *Neff v. Reed*, 98 Ind. 341, 346.

Rev. St. c. 19, § 22, which requires field drivers to take up and impound cattle going at large in the public highways, includes a turnpike. *Pickard v. Howe*, 58 Mass. (12 Metc.) 198, 208.

#### **Viaduct or wharf.**

See "Viaduct"; "Wharf."

#### **Waterway.**

The term "highway" includes a navigable river. *Wallamet Iron Bridge Co. v. Hatch* (U. S.) 19 Fed. 347, 355; *Kean v. Stetson*, 22 Mass. (5 Pick.) 492, 495.

"Public highway" includes a navigable river. *State v. Wabash Paper Co.*, 51 N. E. 949, 951, 21 Ind. App. 167.

A navigable river is of common right a public highway. *Commonwealth v. Coombs*, 2 Mass. 489, 492; *Farmers' Co-operative Mfg. Co. v. Albemarle & R. R. Co.*, 23 S. E. 43, 44, 117 N. C. 579, 29 L. R. A. 700, 53 Am. St. Rep. 606; *Attorney General v. Stevens*, 1 N. J. Eq. (Sart.) 369, 382, 22 Am. Dec. 526; *State v. Narrows Island Club*, 5 S. E. 411, 413, 100 N. C. 477, 6 Am. St. Rep. 618. So that an owner of land bordering on such a stream has a right to free access thereto, of which he cannot be deprived without compensation. *Shirley v. Bishop*, 8 Pac. 82, 83, 67 Cal. 543.

A stream which, in its natural condition, is capable of being used for immediate purpose of navigation, must be regarded as a public highway. *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184.

A river within the limits of a city, though a highway for the passage of vessels engaged in foreign or interstate commerce and domestic traffic, is not a highway in the sense that the streets and alleys of a city are, so as to charge the city with the duty of keeping it safe for navigation by removing obstructions therein. *Faust v. City of Cleveland* (U. S.) 121 Fed. 810, 811, 58 C. C. A. 194.

Rev. St. c. 176, § 16, providing that if the life of any person crossing a highway with reasonable care shall be lost by reason of the negligence of common carriers by means of railroads, steamboats, or by the unfitness or negligence of their servants or agents, said common carriers, proprietor, or proprietors shall be liable in damages for the same, is not restricted to a highway on land, but applies also to navigable waters, the same being a public highway. *Chase v. American Steamboat Co.*, 10 R. I. 79, 85.

The term "highway," as ordinarily used and understood, does not include streams of water or water highways, though the high seas are often spoken of as "the highways of nations," and the Great Lakes, public rivers, and canals are treated as public water highways; the term, as ordinarily used and understood, especially when used in connection with the conveyance of land, referring to the roads open through the country upon land for the travel of persons with their animals and vehicles. Therefore, where a patent reserved for highways a certain number of acres, it did not authorize an appropria-

tion by the state of a small stream as a highway for the purpose of floating logs and for other purposes. *De Camp v. Dix*, 54 N. E. 63, 64, 159 N. Y. 436.

The word "highway" is defined as a public highway or road; a way or passage open to all; a way over which the public at large have a right of passage. Streams which have been used for navigation or for floating logs or other purposes have for many years been known as highways. In the ordinance of 1787 the following language is found: "The navigable waters leading into the Mississippi and St. Lawrence shall be common highways and forever free." In *Scott v. Willison*, 3 N. H. 321, it was held the river Muskegon is a common highway. In 3 Kent, Comm. p. 557, subd. 3, it is said: "Every thoroughfare which is used by the public, and is, in the language of the English books, common to all the king's subjects, is a highway, whether it be a carriageway, a horseway, a footway, or a navigable river." The law with respect to public highways and to fresh water rivers is the same. So that an act making a stream known as "Roaring Brook" a public highway is not valid under the Constitution forbidding any local act for laying out or opening highways. In *re Burns*, 44 N. Y. Supp. 930, 934, 16 App. Div. 507 (reversed in 49 N. E. 246, 247, 155 N. Y. 23).

The term "highway" is sufficiently broad to include canals. *Lehigh Val. R. Co. v. Dover & R. R. Co.*, 43 N. J. Law (14 Vroom) 528, 531; *Bonaparte v. Camden & A. R. Co.* (U. S.) 3 Fed. Cas. 821, 829.

A canal is a "public highway," and is not the less so because of the tolls charged, or by reason of its being subject to the regulations of the company operating it. *Barnett v. Johnson*, 15 N. J. Eq. (2 McCart.) 481, 485.

The term "public highway" in statutes concerning eminent domain has a limited import. Although a navigable river or canal is, in some sense, a public highway, yet an easement assumed under the name of highway would not enable the public to convert a street into a canal. *Perkins v. Colebrook*, 68 Conn. 113, 125, 35 Atl. 772.

Lake Michigan is not a "highway" in the sense that it is open and uninclosed, and not under the exclusive control of any one nation or people, but is the free highway of adjoining nations or people. This lake lies wholly within the territory of, and, as respects foreign nations, is under the exclusive dominion of, the government of the United States. If we may indulge the expression, it is not "no man's land." It is not by nature free to the commerce of the world. It is so free solely by the grace of the government. *Bigelow v. Nickerson* (U. S.) 70 Fed. 113, 117, 17 C. C. A. 1, 30 L. R. A. 336.

From the earliest history of the state, the commissioners of water passages or cuts have been treated under the general description of "commissioners of roads," for by legislative use highways may include water passages or cuts, and the term "highways" has been disused in modern legislation, and "roads" substituted. *Commissioners of New Town Cut v. Seabrook* (S. C.) 3 Strob. 380, 384.

#### HIGHWAY BY WATER.

The term "highways by water" has been given to that class of navigable streams, fresh as well as salt, which are of common or public use for the carriage of boats and lighters, without regard to whether the streams flow or reflow. *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40, 59, 42 Am. Dec. 716.

#### HIGHWAY COMMISSIONER.

As an officer, see "Officer."

#### HIGHWAY EASEMENT.

Whether it be travel or transportation of persons and property or the transmission of intelligence, and whether accomplished by old methods or new ones, all such functions are included within the public "highway easement," and imposed no additional servitude on the land. *Cater v. Northwestern Tel. Exch. Co.*, 63 N. W. 111, 113, 60 Minn. 539, 28 L. R. A. 310, 51 Am. St. Rep. 543.

#### HIGHWAY ROBBERY.

Robbery being the forcibly and feloniously taking from the person of another of goods or money to any value by violence or putting him in fear, to make it highway robbery it is only necessary further to charge and prove that it was committed on or near a highway. *State v. Brown*, 18 S. E. 51, 52, 113 N. C. 645.

#### HIGHWAY SURVEYOR.

Highway surveyors are not agents of a town. They are public officers, whose duties are prescribed by law. Their authority is not derived from the town, but from the statute. They are not under the control of the town. Their powers cannot be enlarged or abridged by any action of the town, and what they do or omit to do in the proper exercise of their authority is done or omitted because the law enjoins and prescribes their duties independent entirely of municipal control or authority. *Eaton v. Burke*, 66 N. H. 306, 310, 22 Atl. 452, 454 (citing *Hardy v. Town of Keene*, 52 N. H. 370, 377).

#### HIGHWAY TAX.

As city tax, see "City Tax."

Taxes assessed by a city for roads and bridges are highway taxes, and governed by

the statutory provisions applicable thereto. *Stone v. Bean*, 81 Mass. (15 Gray) 42, 44.

## HIM.

The use of the word "him" in a contract of partition, in which it is stipulated that one of the parties shall have the privilege of a road through the land of the other, so as to enable "him" to take the nearest and best road to D., though construed in connection with the word "privilege," does not show that the agreement only creates a mere personal privilege limited to the original party, instead of an easement. Per *Dillon, J.*, in *Karmuller v. Krotz*, 18 Iowa, 352, 357.

In *Comp. St. Mont. 1887, c. 25, § 697*, providing that in every case the liability of a corporation to a servant or employé acting under the orders of his superior shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employé not appointed or controlled by him, as if such servant or employé were a passenger, the word "him" refers to the employé's superior, so that the liability of the company for the negligence of superior servants is extended for the benefit of two classes of employées, viz., those injured by default or wrongful act of a superior employé under whose orders they were acting, and injured by the default or wrongful act of a superior servant who did not appoint and who had no control over them. *Northern Pac. R. Co. v. Mase* (U. S.) 63 Fed. 114, 116, 11 C. C. A. 63.

### Construed them.

The use of the word "him" for "them" in a petition by a partnership for a lien on logs for supplies used in cutting, hauling, and driving them, does not vitiate the petition, but should be regarded as a mere clerical error. *Garland v. Hickey*, 43 N. W. 832, 75 Wis. 178.

The word "him" in Act 1869-70, c. 225, § 35, which, in the case of a defaulting sheriff, authorizes a summary judgment on motion against him without other notice than is given by the delinquency of the officer, is to be construed to mean "them," in order to authorize the judgment to be taken against both the sheriff and his sureties. *Jenkins v. Howell*, 65 N. C. 61, 62.

## HIMSELF.

"Himself," within the meaning of a statute prohibiting the mailing of obscene letters, and providing that the act shall not authorize any person to open any letter or sealed matter not addressed to himself, includes a person in a fictitious character, and therefore a witness receiving such a letter is not prohibited from testifying in

a prosecution for violation of a statute by reason of the letter having been received and opened by him under a fictitious name. *Andrews v. United States*, 16 Sup. Ct. 798, 799, 162 U. S. 420, 40 L. Ed. 1023.

## HINDER.

"Hinder," as used in *Gen. St. Conn. c. 71, art. 6, § 5*, providing that, if a surety obstruct or hinder his being sued, the time of such obstruction shall not be computed as part of the time of limitation, imports resistance and obstruction of rights, and unless acts complained of by a creditor are in point of fact such as would hinder and prevent him bringing suit notwithstanding his desire to do so, they cannot be properly said to obstruct or hinder him in the meaning of the statute. *Reid v. Hamilton*, 18 S. W. 770, 771, 92 Ky. 619.

"Hinder," as used in 2 *Stanton's Rev. St. p. 401, c. 97, § 15*, declaring that, if any surety shall abscond, conceal himself, or by removal from the state hinder his being sued, the time of such hindrance shall not be computed as part of the time of limitation, means to interpose obstacles or impediments. *Walker v. Sayer*, 68 Ky. (5 Bush) 579, 582.

"Hinder," as used in *Act Cong. Feb. 12, 1793, § 4*, providing that any person who shall knowingly and willingly obstruct or hinder one claiming the services of a fugitive from labor in seizing or arresting such fugitive, means an act of interference tending to impair the right of recapture. It does not apply to one who is merely passive in the attempt of the owner or agent to reclaim and arrest an alleged fugitive from labor; nor does it apply to a mere inquiry, made in good faith, by what authority an arrest is sought to be made; nor does it apply to the act of insisting that the alleged fugitive shall have a fair trial on the question whether he or she owes labor and services to the claimant. To obstruct or hinder does not require a resort to violence. Any act done with the intention of defeating the arrest, and which tends to that result, is an obstructing or hindering within the statute. The withdrawal or removal of the person of an alleged fugitive by the order or direction of another, so as to prevent an arrest, is a hindrance and obstruction within the meaning of the statute. *Driskell v. Parish* (U. S.) 7 Fed. Cas. 1095, 1098.

Resisting a person deputized by a justice to serve process is not "hindering an officer," within the meaning of that phrase as used in the act for the punishment of inferior crimes, since the statute giving the justice authority to so deputize does not empower the justice to make a sheriff, deputy, or constable. *State v. McOmber*, 6 Vt. 215

**Actual contact.**

"Hindered and obstructed," as used in Gen. St. 1878, c. 32, § 78, authorizing a person who is hindered and obstructed in driving logs by the logs of another to drive such obstructing logs to a point where they will no longer be an obstacle, does not mean that the logs hindered and obstructed must come into actual contact with the logs hindering and obstructing, but such hindrance and obstruction exists if the hindering and obstructing logs are so situated that the logs hindered and obstructed cannot be driven until the hindering and obstructing logs are out of the way. *Anderson v. Maloy*, 19 N. W. 387, 32 Minn. 76.

**Delay and defraud synonymous.**

The word "hinder," as used in a statute declaring that every conveyance or assignment of any estate or interest in lands, goods, or things in action made to hinder, delay, or defraud creditors, is substantially synonymous with the terms "delay" and "defraud" as there used. *Burdick v. Post* (N. Y.) 12 Barb. 168, 186.

Any act done by a debtor with intention to hinder and delay his creditor, and which has that effect, is a fraud on the creditor within the meaning of the attachment law. The terms "hinder" and "delay" are regarded as synonymous with the expression "to defraud." *Armstrong v. Ames & Frost Co.*, 43 S. W. 302, 305, 17 Tex. Civ. App. 46.

Delay is defined as meaning to detain, keep back or retard, so that it is synonymous with hinder; and an affidavit that a mortgage was made without any design to delay or defraud the creditors of the mortgagor is sufficient without the use of the word "hinder," as provided by statute. *Petrovitzky v. Brigham*, 47 Pac. 666, 667, 14 Utah, 472.

As used in statutes relating to conveyances of a debtor to hinder and delay his creditors, delay is said by Mr. Burroughs in his work on Assignments, § 355, to have "an obvious reference to time, and hindrance to the interposition of obstacles in the way of a creditor, but to a certain extent the one involves and includes the other. In point of fact, and as actually applied by the courts, they are always taken together." *Torlina v. Trorlicht*, 21 Pac. 68, 69, 5 N. M. 148.

The words "hinder," "delay," and "defraud," as used in a statute declaring that conveyances made with the intent to "hinder, delay or defraud" creditors shall be void, are not synonymous. "A conveyance may be made with intent to hinder or delay, without an intent to defraud. Either intent is sufficient." *Crow v. Beardsley*, 68 Mo. 435, 439; *Edgell v. Smith*, 40 S. E. 402, 404, 50

W. Va. 349. Hence an instruction declaring a conveyance good unless made with the intent to hinder, delay, and defraud, is erroneous. *Crow v. Beardsley*, 68 Mo. 435, 439.

A conveyance made by an embarrassed debtor with a view, which was known to the purchaser, to secure the property from attachment, is void, though honestly made, the debtor intending that all creditors should be paid in full. The debtor's property is, in theory of law, subject to immediate process issued at the instance of his creditors, and the debtor will not be permitted to hinder or delay them by any device which leaves it, or the avails of it, subject to his control and disposition; and it makes no difference that the debtor intends to apply the avails of it to the payment of his debts. *Edgell v. Smith*, 40 S. E. 402, 404, 50 W. Va. 349.

**Obstruct and prevent synonymous.**

The words "obstruct," "hinder," and "prevent" are synonymous as used in the fugitive slave law. *United States v. Williams* (U. S.) 28 Fed. Cas. 631, 633.

**Omission to act.**

"Hindered," as used in a pleading in an action on a contract for the erection of a city hall, wherein the plaintiff alleged that he was hindered from performing the same by the delay of the defendant to select the site for the building, means an unreasonable omission of the city to select a site, as well as if the city had expressly refused to select a site, or had done any other affirmative act to interrupt the performance of the agreement. *Blanchard v. Inhabitants of Blackstone*, 102 Mass. 343, 347.

**HINDER AND DELAY.**

"Hindering and delaying," as used in Gen. St. § 1528, declaring that conveyances and assignments made with intent to hinder and delay or defer creditors shall be void, means a hindering and delaying which is intended to be produced by the assignor in making the assignment through motives of covin and malice, or for the assignor's own benefit and advantage. *Burr v. Clement*, 9 Pac. 633, 638, 9 Colo. 1.

The delay contemplated by a statute providing that a conveyance with intent to hinder and delay creditors shall be fraudulent has in it an element of fraud, and, if the delay be found in any case to be free from such element, then it is not of that character which, under the statute, vitiates conveyances. *Ellis v. Valentine*, 65 Tex. 532, 547.

"Hinder and delay," as used in a statute relating to conveyances to hinder and delay creditors, is to do something which is an attempt to defraud, rather than a successful fraud; to put some obstacle in the path or

interpose some time unjustifiably before the creditor can realize on the debtor's property. *Burnham v. Brennan*, 42 N. Y. Super. Ct. (10 Jones & S.) 49, 63.

A conveyance to hinder and delay creditors is a conveyance by the debtor or his voluntary assignee, which delays creditors in the exercise of their right to have the debtor's property converted into money for their own benefit, or which necessarily tends in that direction, without the creditor's consent, and which puts the property out of which the creditor has a right to seek satisfaction for his debt beyond the reach of ordinary process. *Meyer & Sons Co. v. Black*, 16 Pac. 620, 4 N. M. (Johns.) 190.

#### **Assignment reserving use of property.**

A general assignment for the benefit of all the grantor's creditors, in which he undertakes to stipulate with them for the use of his property for four years, thereby delaying them for that length of time in the collection of their debts, is an assignment to hinder and delay creditors, and cannot be sustained. *Young v. Hall*, 74 Tenn. (6 Lea) 175, 178.

#### **Mortgage requiring sale at retail.**

A mortgage given by an insolvent to a preferred creditor, by which the creditor is required to dispose of a stock of goods covered by the mortgage in due course of trade and at customary retail prices, is one to hinder and delay creditors, in that the surplus left after paying the creditor is placed beyond the reach of other creditors for an indefinite time. *Gallagher v. Goldfrank*, 12 S. W. 964, 965, 75 Tex. 562. See, also, *Gregg v. Cleveland*, 17 S. W. 777, 778, 82 Tex. 187.

#### **Preferential payment.**

No creditor without a lien has the right to have the debt due him paid out of any particular property of the debtor. All creditors have the same right to have their debts paid out of the property of the debtor, unless by a contract with the debtor, or by legal process, one or more acquire a right to be paid out of the proceeds of some particular property, or to have some particular thing, by way of sale, in satisfaction of his or their debt. Every payment of a debt by a person unable to pay all his debts, whether the payment be made in money or property, tends, in a popular sense, to hinder or delay, or it may be even to defeat, other creditors in the collection of their debts; the extent of the effect depending on the amount of indebtedness and the value of the debtor's property. But it has never been held that a payment, either with money or property, by an insolvent debtor, in the absence of a law declaring preferences invalid, was within the meaning of the law to hinder, delay, or defraud

other creditors. *Ellis v. Valentine*, 65 Tex. 532, 547.

"Hinder and delay," as used in a statute relating to assignments by debtors, are to be taken in their legal or technical and not their literal sense. A conveyance preferring creditors will not fail because a reasonable delay is taken to sell and apply. The debtor may thus interpose obstacles in the way of others; that is, hinder them as well as delay them. The statute only refers to an improper or illegal hindrance or delay. *Hefner v. Metcalf*, 38 Tenn. (1 Head) 577, 579.

#### **HINDRANCE.**

Where defendant sold iron ore by a contract stipulating that it was not liable in damages if delivery was prevented or obstructed by strikes, hindrances, accidents, or delays at the mine, he was not excused by mere difficulty in procuring labor if it could have been obtained by a reasonable effort or prices not prohibitive. The condition with which the word "hindrance" is connected—combinations, strikes, turnouts, etc.—imports the same thing. *Thomas Iron Co. v. Jackson Iron Co.*, 91 N. W. 187, 188, 131 Mich. 130.

#### **HINGE.**

A "hinge" is defined to be an artificial movable joint—a device for joining two pieces together in such manner that one may turn upon the other. Cent. Dict. A device in a waffle iron, operating to hold the two halves together when rotated, and in such manner as that one half may, when desired, be turned upon the other, is a hinge. *Griswold v. Wagner* (U. S.) 68 Fed. 494, 497, 15 C. C. A. 525.

#### **HIPPED ROOF.**

See "Peaked Roof."

#### **HIRE.**

See "Carriage Hire": "Contract of Hiring."

Hire is a reward or compensation paid for the possession or use of personalty. *Learned-Letcher Lumber Co. v. Fowler*, 19 South. 396, 398, 109 Ala. 169; *Bledsoe v. Nixon*, 69 N. C. 89, 91, 12 Am. Rep. 642.

"Hire" signifies a reward or recompense for the use of a thing, and is so used in an indictment charging that persons were permitted to play and bet on the result of games—"the hire of said billiard table." *Carr v. State*, 50 Ind. 178, 180.

The word "hiring" implies a request and a contract for a compensation, and has but this one meaning when used in the ordinary affairs and business of life. *McCluskey v. Cromwell*, 11 N. Y. (1 Kern.) 593, 599.

The terms "hiring" and "letting" are used to designate the lending of property other than money for a compensation. *Kinny v. Hynds* (Wyo.) 49 Pac. 403, 404.

Hiring is a species of bailment, and one of its distinguishing characteristics is that it is never gratuitous. *Learned-Letcher Lumber Co. v. Fowler*, 19 South. 396, 398, 109 Ala. 169.

Hiring is a contract by which one gives to another the temporary possession and use of property other than money for reward, and the latter agrees to return the same to the former at a future time. *Rev. St. Okl. 1903, § 852; Rev. Codes N. D. 1899, § 4069; Civ. Code S. D. 1903, § 1422; Civ. Code Cal. 1903, § 1925; Civ. Code Mont. 1895, § 2600.*

Hiring is a contract by which one person grants to another the enjoyment of a thing, or the use of the labor and industry either of himself or his servant, during a certain time, for a stipulated compensation, or where one contracts for the labor or services of another about a thing bailed to him for a specified purpose. *Civ. Code Ga. 1895, § 2903.*

A person is hired or salaried by the corporation of which he is a stockholder where he subscribes for one share of stock, and agrees to devote his entire time to the management of the corporation's affairs, within the French extradition treaty, authorizing extradition for embezzlement by any person, hired or salaried, to the detriment of their employers, etc. *In re Balensl* (U. S.) 120 Fed. 864.

#### **Borrow distinguished.**

Contracts of hiring are divided by Sir William Jones into two kinds: First, where the hirer gains a temporary use of a thing; and, second, where something is to be done to the thing delivered. He gives another bailment as commodatum, or loan for use without pay. This is borrowing, which is always a mere gratuitous loan. Blackstone gives the distinction between hiring and borrowing thus: Hiring and borrowing are contracts by which a qualified property may be transferred to the hirer or borrower, in which there is only this difference: that hiring is always for a price, a stipend, or additional recompense; borrowing is merely gratuitous. *Neel v. State*, 26 S. W. 726, 33 Tex. Cr. R. 408 (citing 2 Bl. Comm. p. 453).

#### **Commission.**

Acts 1854, c. 23, exempting from attachment the wages or hire of a laborer or oth-

er employé, includes a consideration of 5 per cent. on the entire amount of the cost of a building, for which a contractor agrees to erect, superintend, and otherwise direct the erection of the building. *Moore v. Heaney*, 14 Md. 558, 562.

#### **Division of profits.**

A contract that one shall provide a shop, loom, and tackle, and another shall perform the labor of weaving, and each shall receive one-half of the profits, constitutes a partnership, and not a hiring, within the statute, such as will charge the township with the maintenance of the laborer as a pauper when he becomes chargeable. *Gregg Tp. v. Half Moon Tp.* (Pa.) 2 Watts, 342, 343.

#### **Employment on salary.**

Employment distinguished, see "Employment."

7 & 8 Geo. IV, c. 75, enacting that if any person not a freeman of the company of watermen and lightermen of the Thames, or an apprentice to a freeman or freeman's widow, shall act as a waterman or lighterman, or work or navigate any wherry, lighter, or other craft from or to any place within the limits of the act, for hire or gain, he shall forfeit not exceeding £10, would include one who was paid by the owner of a barge for its navigation, not for the particular job, but by a fixed weekly salary. *Reg. v. Tibble*, 4 El. & Bl. 888, 900.

#### **As engage in service.**

To hire is to engage in service for a stipulated reward, as to hire a servant for a year, or laborers by the day or month; to engage a man for temporary service for wages. *McCluskey v. Cromwell*, 11 N. Y. (1 Kern.) 593, 605.

#### **As lease.**

Where the charter of a corporation organized for the transportation of passengers in railroad cars constructed and to be owned by such company authorized it to lease or hire its cars, or any of them, and other personal property, to railroad companies, the terms "lease" and "hire" are equivalent words, but, as the duties of such corporation are of a public nature, a lease of its entire property to another corporation, engaged in the same business, for the term of 99 years, including a contract that such lessor will not engage in such business during the term of the lease, is a violation of its duty to the public and ultra vires. *Central Transp. Co. v. Pullman's Palace Car Co.*, 11 Sup. Ct. 478, 484, 139 U. S. 24, 35 L. Ed. 55.

A lease for one year, with the privilege of another year if the tenant wants it, is a hiring for more than one year, and void, under the statute of frauds, if not in writing.

**Hess v. Martin**, 73 N. Y. Supp. 946, 86 Misc. Rep. 541.

#### Public officers.

The word "hire," as used in Laws 1897, c. 415, § 3, declaring that eight hours shall constitute a day's work for all classes of employes, and that the word "employé" means a mechanic or laboring man who works for another for hire, does not relate to public officers or others holding positions under the city, who are included in the classified lists of the civil service law, such as the uniformed members of the fire department, who are appointed to position after rigid examination and from competitive lists. **People v. Sturgia**, 79 N. Y. Supp. 969, 970, 78 App. Div. 460.

#### Unenforceable contract.

"Hire," as used in Elliott's Supp. § 1396 (Burns' Rev. St. 1894, § 6325; Horner's Rev. St. 1896, § 4768), providing that whoever hires any person to vote or refrain from voting any ticket or for any candidate for office at any election, etc., shall become liable to the person hired in a certain sum, is not limited in its application to enforceable contracts, but is used in its plainest and broadest sense; and, where a voter is hired to go away from the polls and refrain from voting at the time he goes there for that purpose, the offense denounced by the statute is complete, though the voter subsequently returns and casts his vote. **Thompson v. State**, 44 N. E. 763, 765, 16 Ind. App. 84.

#### HIRED PERSONS.

A firm operating a steam wood factory, taking contracts for all kinds of light wood-work, under which an assignor furnished rough planks to be sawed and worked up according to their directions, and to be paid therefor a certain sum per thousand feet at the rate of a certain sum per month, are not "hired persons," within the ordinary sense of these words, but were manufacturers and doing business for themselves. **Lang v. Simons**, 25 N. W. 650, 652, 64 Wis. 525.

#### HIRER.

As used in Rev. Civ. St. art. 2899, providing that a proprietor, owner, charterer or hirer of a railroad shall be liable for the death of any person, caused by their negligence or that of their servants or agents, should not be construed to include a receiver of a railroad. By "hirer" we understand to be meant one who by contract acquires the right to use a thing belonging to another, while a receiver is an officer of the court that appoints him, and at all times he is an agency of the court, subject to its orders, and having no personal interest in the property

in his hands, resulting from the existence of the receivership. **Turner v. Cross**, 18 S. W. 578, 579, 83 Tex. 218, 15 L. R. A. 262, 263; **Houston & T. C. Ry. Co. v. Roberts (Tex.)** 19 S. W. 512; **Yoakum v. Selph**, 19 S. W. 145, 83 Tex. 607; **Bonner v. Thomas (Tex.)** 20 S. W. 722.

#### HIS.

"His," as used in a demise from A. to B., "his executors and administrators," for the term of his natural life, and the lease containing a covenant by A. for quiet enjoyment of the premises by B., "his executors," etc., during the natural life of A., refers to A., the grantor, and not to B., as his name was the last antecedent. **Pritchard v. Dodd**, 5 Barn. & Adol. 689, 691.

A deed was made "between W. and N., his wife, of the first part, and J. H. and E., his wife, of the second part," and "grants, bargains, and sells to the said party of the second part, his heirs and assigns," the lands, etc., in controversy. Held, that the term "party" embraces both grantees, and is used for that purpose with strict grammatical accuracy, and the word "his" is as definite in its reference to only one of them. More formally expressed, this grant would read, "To the said J. H. and E., his wife, and to the heirs and assigns of the said J. H." **Hardenbergh v. Hardenbergh**, 10 N. J. Law (4 Halst.) 42, 48, 18 Am. Dec. 371.

Defendant and one H. entered into a contract whereby the latter was to sell to defendant "all the sound grapes he might raise for a period of ten years on the vines he now has growing on his place," at a certain price per ton, to be delivered in boxes. The vineyard was purchased by plaintiff, the contract was assigned to him, and a crop of grapes in boxes was tendered to defendant. Held, that the personal pronouns "he" and "his" were used merely as equivalents of the proper name, and merely to save repetition of such name. They do not import a desire for the personal services or attention of the owner, as contradistinguished from his assignee, and hence the contract was assignable. **Larue v. Groezinger**, 24 Pac. 42, 43, 44, 84 Cal. 281, 18 Am. St. Rep. 179.

A contract for the purchase of hemp of a person, "of his own raising," means that the hemp was to be raised by the seller, or under his personal superintendence and direction, and could not be raised by his administrator. **Larue v. Groezinger**, 24 Pac. 42, 43, 84 Cal. 281 (citing **Shultz v. Johnson's Adm'r**, 44 Ky. [5 B. Mon.] 497).

#### Ownership implied.

"His house," as used in Rev. St. c. 47, § 2, providing that if any person shall sell



any spirituous liquor, to be used in or about his house or other buildings, without being duly licensed, he shall forfeit, etc., when construed with reference to the subject-matter, seems to designate the place where he sells or carries on the business of selling liquor. *Commonwealth v. Hadley*, 52 Mass. (11 Metc.) 66, 72.

A declaration in an action in trespass for killing cattle, etc., in which the plaintiff declared that the cattle were his, conveys a clear idea of property in the plaintiff. As used in such connection, the word should be construed to mean that the property belonged to, and was owned by, the plaintiff. *Heath v. Conway*, 4 Ky. (1 Bibb) 398, 399.

A statement in a fire insurance policy describing the insured's buildings as "his buildings" is not equivalent to a warranty on the part of the assured that he is the owner of the same; and it does not constitute a misrepresentation of the fact, when his only interest in the buildings is as tenant for a year. *Mascott v. First Nat. Fire Ins. Co.*, 37 Atl. 255, 256, 69 Vt. 116; *Niblo v. North America Ins. Co.*, 3 N. Y. Super. Ct. (1 Sandf.) 551.

An applicant for insurance described the property in a written application as his house, and it was so described in the policy. The legal title to the property was in another party, with whom the insured had, at the time of the application, made a parol contract for its purchase, for a price agreed upon, which the insured had agreed absolutely to pay, and a part of which he had paid; and the insured had entered into possession as purchaser, and had made valuable improvements on the property. Held, that there was no misdescription of the plaintiff's interest, or misrepresentation regarding it, in calling it his. An individual may properly regard property as his, and so denominate it, when he has a right to it, and the power by law to enforce and protect that right. *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 19, 76 Am. Dec. 581.

"His" or "their," as used by parties seeking insurance, representing that the building or property to be insured is his or their property, is not to be construed as a representation that they have an absolute property interest in the thing insured. If the insured has an insurable interest, although the interest may be qualified or defeasible, or even an equitable interest, it is a sufficient compliance with this representation. *Fowle v. Springfield Fire & Marine Ins. Co.*, 122 Mass. 191, 194, 23 Am. Rep. 308.

Where a fire policy described the property as his—referring to a certain person—the interest was absolute, and aptly described by the possessive "his." *Martin v. State Ins. Co.*, 44 N. J. Law (15 Vroom) 485, 490, 43 Am. Rep. 397.

The expression "his property," as used in a complaint in an action on a fire insurance policy, in an averment that "this plaintiff says that after the loss and injury to his property insured," etc., cannot be otherwise construed than as showing that the property, when injured or damaged by the fire, belonged to the plaintiff. *Insurance Co. of North America of Philadelphia v. Hegewald (Ind.)* 66 N. E. 902, 905.

A license authorizing a person to use an invention at his own establishment does not authorize him to use it at an establishment owned by himself and others. *Providence Rubber Co. v. Goodyear*, 76 U. S. (9 Wall.) 788, 799, 19 L. Ed. 566.

The use of the word "his" in an affidavit in support of a mechanic's lien that certain materials were furnished the defendant for furnishing, equipping, and repairing his mill, is a word which may imply ownership, or mere possession or occupancy, or some other relation to the person, and therefore its use in the affidavit is not a sufficient allegation that defendant was the owner of the property in question. *Rugg v. Hoover*, 10 N. W. 473, 475, 28 Minn. 404.

Under Mansf. Dig. § 1807, excepting from the penalty for carrying concealed weapons, one carrying them "on his own premises," premises in the possession of a lessee whose term has expired are not the lessor's, and such lessor may be convicted under such section for carrying concealed weapons on such premises. *Jones v. State*, 55 Ark. 186, 17 S. W. 719.

#### As her.

The use of the pronoun "his" in a note, mortgage, and certificate of sale can have little, if any, greater effect than to raise a suspicion that the person referred to was a male, and not a female, and is not sufficient to create any substantial conflict in the evidence. *Bernlaud v. Beecher*, 11 Pac. 802, 804, 71 Cal. 88.

"His," as used in a suit against several persons, charging that "defendant did keep in his possession," etc., refers to each of the defendants, notwithstanding one of them was a woman. *State v. Prater*, 37 S. E. 933, 934, 59 S. C. 271.

When the word "he" or "his" occurs in the title relating to education, referring to either the members of the city board of directors, county superintendents of common schools, city superintendents, directors, clerks, state board of education, or other school officers, it shall be understood to mean also she or her. *Ballinger's Ann. Codes & St. Wash.* 1897, § 2462.

#### As their.

In Acts 1717, c. 13, providing that no negro or mulatto person, free negro, or

mulatto born of a white woman, during his time of servitude by law, shall be admitted and received as good and valid evidence in law, etc., "his" should be construed to mean "their." "The argument drawn from the circumstance that the personal pronoun is used in the singular number is not considered of much weight, because the words 'free negro' and 'mulatto' are joined by the conjunction disjunctive 'or,' and in such case the idiom of the English language admits the use of the singular pronoun, as applicable to each member of the sentence so joined. In such a sentence the word 'his' may have the same force and effect as the word 'their.'" *United States v. Mullany* (U. S.) 27 Fed. Cas. 20, 21.

#### **His attendants.**

Act Colo. approved April 19, 1899, provides that a person under sentence of death for a capital crime shall be kept in solitary confinement, and no person be allowed access to him, except his attendants, counsel, physician, spiritual adviser, and members of his family. Held, that the words "his attendants" evidently meant the officers of the prison and subordinates, who must necessarily furnish him with his food, clothing, etc. *In re Medly*, 10 Sup. Ct. 384, 387, 134 U. S. 160, 33 L. Ed. 835.

#### **His case.**

Under Sup. Ct. Rule No. 39, requiring that the defendant make affidavit that he has stated the case, an affidavit stating that the defendant had stated "his case in this cause" means no more than that the defendant had stated the facts on his side of the cause, or, in other words, his defense, and is not equivalent to "the case," as required by the above rule. *Ellis v. Jones* (N. Y.) 6 How. Prac. 296, 297.

#### **His commercial paper.**

Where a note was indorsed by an accommodation indorser, which note did not originate in the business of the indorser, and was not indorsed in the course of or in connection with his business, such paper is not his commercial paper, within Bankr. Act 1867, § 39, providing that any person, "being a banker, broker, merchant, trader, manufacturer, or miner, who has stopped or suspended, and not resumed payment of his commercial paper within fourteen days, shall be deemed to have committed an act of bankruptcy." *In re Clemens* (U. S.) 5 Fed. Cas. 1011, 1012.

#### **His constituents.**

Where a deed of the president of a corporation contained words of conveyance to the grantee of all the estate of the party of the first part and of his constituents, the words "his constituents" mean the corporation. *Villas v. Reynolds*, 6 Wis. 214, 227.

#### **His contract.**

Laws 1882, c. 410, relative to mechanics' liens, provides that an independent contract or shall have 60 days after the completion of his contract for the filing of a lien. Held, that the words "his contract" were equivalent to the expressions "his promise," "his claim," "the contract on his part." *Fay v. Muhler*, 20 N. Y. Supp. 671, 674, 1 Misc. Rep. 321.

#### **His lands.**

Where a proprietor granted the right to overflow his lands by a dam, the words "his lands," as so used, did not include a public highway existing on the land at the time of the grant, so as to authorize the grantee to destroy the highway by the exercise of the right so conveyed. *Inhabitants of Monmouth v. Gardiner*, 85 Me. 247, 253.

#### **His office.**

See "In His Office."

#### **His own use.**

The use of the words "his own use" in a deed conveying land, but saving and reserving to the grantor, for his own use, the coal contained in said land, does not operate to only reserve a right to take coal during the life of the grantor, but is a reservation of the full dominion and proprietorship over the coal. *Whitaker v. Brown*, 46 Pa. (10 Wright) 197-199.

#### **His property.**

Practice Act, § 131, declares that any person owing debts to the defendant, and having in his possession credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or a referee appointed by the court, and be examined respecting the same, and that the defendant may also be required to attend for the purpose of giving information respecting his property, and be examined on oath. Held, that the words "his property," as there used, should not be construed as restricted to credits or other personal property, to discover which a third party may be examined, but should be taken in its enlarged and comprehensive sense, to include any property belonging to the defendant subject to execution. *Bivins v. Harris*, 8 Nev. 153, 156.

#### **His town.**

Rev. St. c. 48, § 8, providing that any lunatic supported as a town pauper may be committed to the hospital by the overseers of his town, means the town where he is supported, whether it be that of his settlement or not, because towns are bound to support all paupers, sane or insane, who are in distress and in need of immediate relief therein, whether they have a legal

settlement in such towns or not. *Inhabitants of Cummington v. Inhabitants of Wareham*, 63 Mass. (9 Cush.) 585, 587.

#### His township.

The words "his township," in *Burns' Rev. St. 1901, § 2583*, providing that the owner of sheep killed by dogs shall report to the trustees of his township the damage sustained, means the township in which the damage is done. *Wayne Tp. v. Jeffery*, 64 N. E. 983, 934, 29 Ind. App. 574.

#### His wife.

A testator directed all his property to be sold, and vested the proceeds, after payment of debts, in his executors, as trustees; directing them to divide it into two equal parts. One part or moiety he ordered to be placed at interest, the interest to be paid to his daughter, E., during life, and, if she should die without leaving a child or children living, then the interest to be paid annually to the support and maintenance of his nephew, T., and R., "his wife," and their children. The other moiety or part was directed to be paid, in the discretion of his executors, to the support of his nephew, T., and his family. Held, that from the fact that R. was distinctly named in the first bequest as one of the objects of the testator's bounty, and from the entire difference in the language used by testator in that and the bequest of the other moiety, the words "his wife" should be construed to mean that R., the wife of T., should have a personal and individual interest in this bequest, and not simply an interest in it as the wife of T., or a member of the family. The words "his wife" should be construed as mere words of description, and not as meaning that R. must necessarily be the wife of T., and take in that capacity if at all. *Bullock v. Zillee*, 1 N. J. Eq. (Saxt.) 489, 492.

### HISTORICAL.

"Historical" means containing history or the relation of facts. *Carpenter v. Historical Society* (N. Y.) 2 Dem. Sur. 574, 576.

### HITHERTO.

"Hitherto," as used in an answer by trustees that "they have hitherto increased the annuities given to the complainant," qualifies and limits what otherwise might appear either general or uncertain, and restrains the increase of the annuity to that period of time then elapsed, and prevents its reaching the future. *Mason v. Jones* (N. Y.) 13 Barb. 461, 479.

### HOARDING.

"Hoarding," as defined by Webster, is "a fence inclosing a house and materials while

builders are at work"; but where plaintiff alleged that defendant wrongfully erected a hoarding near the plaintiff's windows, preventing the light and air from entering, the word did not necessarily mean a construction erected for mere temporary purposes. *Metropolitan Ass'n v. Petch*, 5 C. B. (N. S.) 504, 509.

### HOBBIT.

A term generally used in Wales to express a quantity made up of four Welch pecks, each peck weighing forty-two pounds, and consequently a hobbit consisted of 168 pounds. A sale of wheat by a hobbit was a sale by weight, and not by measure, though six pecks made a sack, and the custom on the delivery of wheat was to deliver it to the purchaser in sacks, but there was no distinct hobbit measure. *Hughes v. Humphreys*, 28 Eng. L. & E. 131, 132.

### HOCUSSED.

A declaration for libel stating that on a certain night a gentleman was hocused and robbed in a public house kept by the plaintiff would not support the innuendo, "meaning thereby that a person had been feloniously drugged and robbed in the said public house, and thereby intending to cause it to be believed that the said public house of the plaintiff was the resort of, and frequented by, felons, thieves, and depraved and bad characters." *Broome v. Gosden*, 1 C. B. 728, 730.

### HOG.

See "Pork Hogs."

Pen. Code, art. 679, makes it an offense to kill, etc., any horse, mule, cattle, swine, or other domesticated animal, etc. Held, that the term "swine" includes and is synonymous with the word "hog," and hence an information under the statute alleging the killing of a hog was sufficient as a description of the animal. *Rivers v. State*, 10 Tex. App. 177, 179.

The word "hog," as used in a statute prohibiting cattle and hog stealing, being a general term, was intended to comprehend all the different species of the hog kind, the stealing of which was larceny at common law. *State v. McLain* (S. C.) 2 Brev. 443, 444.

#### As beast.

See "Beast."

#### As cattle.

See "Cattle."

**As dressed hogs.**

The term in common parlance is applied not unfrequently to the dead as well as the living, and, as used in a contract for the delivery of 25 head of fat hogs, to be delivered at a certain day, at \$4 net per 100 pounds, is construed to mean dressed hogs. *Whitson v. Culbertson*, 7 Ind. 195, 196.

**Pigs and shoats.**

A pig four or five months old is properly termed a hog. *Lavender v. State*, 60 Ala. 60, 61.

Under an indictment charging defendant with stealing a hog, testimony that the animal taken was a Berkshire pig was properly admitted, and was not a variance. *Washington v. State*, 58 Ala. 355.

"Hog," as used in an indictment charging the stealing of a hog, should be construed to include a shoat, for the term "hog" is used as a generic term including all animals of that character, irrespective of their ages. For animals of this description, "swine" is the original generic term. *State v. Godet*, 29 N. C. 210, 211.

**Sows.**

Under Act 1861 (12 St. at Large, 903), making it a misdemeanor for any person to lawfully, etc., shoot, etc., any horse, mule, hog, sheep, etc., or other personal property of another, "hog" should be construed to include all the swine family, including both sexes, and hence an indictment charging the shooting of one sow, etc., is good. *Shubrick v. State*, 2 S. O. (2 Rich.) 21, 22.

**HOLD.**

See, also, "Held."

See "Adverse Holding."

The phrase "to hold" is defined by Webster to stop; to confine; to restrain from escape; to keep fast; to retain. And it is said that to hold rarely or never signifies the first act of seizing or falling on, but the act of retaining the thing when seized on or confined. *Griffin's Case* (U. S.) 11 Fed. Cas. 7, 24.

The use of the verb "holds" in Pol. Code, § 936, providing, when the title of the incumbent of the office is contested in court, no warrant for his salary can be drawn until the proceedings are finally determined, provided that this shall not apply to one who holds the certificate of election or commission of office, indicates that something tangible is meant to be held—that some paper, some evidence of title to office, must be in the possession of the incumbent of the office—and does not embrace a judgment in his favor rendered in quo warranto proceedings.

*Bledsoe v. Colgan*, 70 Pac. 924, 138 Cal. 34.

**Actual possession required.**

*Gantt's Dig.* § 399, providing that an officer shall execute an order of attachment on personal property capable of manual delivery by taking it into his custody and holding subject to order of the court, means that the property shall be taken into the actual and real custody of the officer, and that he must obtain control over it, and take it out of the control and power of the debtor, and that the officer must continue in the actual possession of it himself, or an agent appointed by him for that purpose, and that, if it is necessary to remove the property, it must be removed, and the debtor divested of his possession and control; and the fact that the removal of the property would be attended with some inconvenience is not an excuse for the failure to retain actual possession of it, and an ideal or constructive possession of the property is not sufficient to meet the requirements of the statute. *Adler v. Roth* (U. S.) 5 Fed. 895, 897.

In Act 1804, amendatory of Act 1789, declaring that, when any person holding real or personal estate shall die intestate, such estate shall be considered as altogether of the same nature and upon the same footing, the word "holding" embraces any tenure involving title. Ownership, in law or equity, is the sole test of descent. Legal seisin is a tenure or holding, and there is no authority to exclude from the meaning of the word that tenure, and limit it to a tenure by legal seisin. Actual seisin is not contemplated by the term "holding," in the statute. *Thompson v. Sanford*, 13 Ga. 238, 241.

The actual holding, which was absolutely essential to a common-law lien on personal property, does not exist in the case of statutory liens, but the holding which constitutes the latter class of liens is one in contemplation of law only. *Willingham v. Rushing*, 31 S. E. 130, 132, 105 Ga. 72.

Code 1873, § 1747, providing that the treasurer of a school district shall hold the moneys belonging to the district, ought not to be construed as exacting the physical retention of the money. All intended is that the officer retain control and keep it subject to the payment of orders when properly signed. That is precisely what is done when money is deposited in a bank. It cannot again be regained in kind, nor is this essential. Its equivalent answers every purpose, and this is returned on demand. *Hunt v. Hopley*, 95 N. W. 205, 206, 120 Iowa, 695.

**Alienation precluded.**

"Hold and enjoy," as used in an antenuptial settlement that the real and personal property should be held and enjoyed after

the marriage, during their joint lives, as if the articles had not been made, and that, if the wife survived, she should have all the real and personal estate of which the husband should die seised, does not prevent the husband, during the marriage, from making a gift of personalty, if it is perfected by delivery during his life. *Withers v. Weaver*, 10 Pa. (10 Barr) 391-393.

"Hold," as used in an agreement providing that a certain person was to take, own, and hold a certain number of shares of corporate stock, is not to be given any different meaning than that to be inferred from the context, the word being employed in such cases to vest an interest in real estate or personal property, and hence will not be construed so as to create a restraint upon the stockholder from disposing of his stock. *Burden v. Burden*, 54 N. E. 17, 20, 159 N. Y. 287.

A will creating a trust to hold property and its rents and income does not create a trust to sell and dispose of the proceeds, or to receive rents and profits, and pay them or apply them to the use of any person. *Carpenter v. Cook*, 64 Pac. 997, 999, 132 Cal. 621, 84 Am. St. Rep. 118.

#### Authority to sell implied.

A corporation created by a special act of the Legislature, and "capable of receiving, holding, and managing" a certain donation "as a corporation for that purpose only," is thereby impliedly vested with authority not only to receive and hold such donation, but to sue for and collect the money. *White Schoolhouse v. Post*, 31 Conn. 240, 257.

#### Detain equivalent.

In replevin, an allegation in the complaint that defendant unlawfully holds the property is equal to an allegation that it is unlawfully detained, within the meaning of *Rev. St. Ind. 1881, § 1547*. *Gould v. O'Neal*, 1 Ind. App. 144, 145, 27 N. E. 307.

#### Exclusive control authorized.

"Hold," as used in a will which provides that testator's wife should hold, use, occupy, and enjoy his entire estate, both real and personal, as he had done before, during her natural life, means that she should have exclusive control, direction, and superintendence of the property. *Rountree v. Dixon*, 11 S. E. 158, 159, 105 N. C. 350.

Code, § 1860, relating to public schools, and providing that the several boards of supervisors shall hold and manage the securities given to the school fund, does not mean that they should have manual possession of the fund, but is to be construed in the sense that the board shall have power and dominion over the fund for the purpose of managing it. *Madison County v. Tullis*, 27 N. W. 487, 489, 69 Iowa, 720.

#### As have.

In Const. 1846, art. 14, § 10, declaring that certain officers shall hold their office until the expiration of the term for which they are elected, "hold" is to be construed to mean "have." *Osgood v. City of New York*, 4 N. Y. Super. Ct. (2 Sandf.) 378.

#### As a legal holding.

Laws 1896, c. 821, providing that no honorably discharged Union veteran "holding a position" shall be discharged, except for incompetency or misconduct shown, after a hearing upon notice, does not apply to one holding a position by a mere de facto title, or an appointment or employment which was for any reason illegal; and hence the incumbent of an office, to which he was appointed without the civil service examination required by law, is not protected by such statutes from summary removal. *People v. Board of Health*, 47 N. E. 785, 153 N. Y. 513.

#### Ownership implied.

"Hold," as used in Acts 1891, c. 36, § 4, providing that when mineral water, oil, gas, or coal privileges or interests are held by a party or parties, or any company or association, exclusive of the surface, the same shall be assessed separately to such party or parties, company or association, at its cash or market value at the time of such revaluation, does not contemplate the holding of a lessee who pays a royalty for the coal mined and removed to the landowner, the title remaining in the lessor; but it does contemplate a case in which another party has become the owner of the mineral or coal, and holds it as such. *United States Coal, Iron & Mfg. Co. v. Randolph County Court*, 18 S. E. 566, 568, 38 W. Va. 201.

A charter of a bank provided that the bank should be capable of purchasing and holding real estate for its use, but that the real estate which it should be lawful for the corporation to hold should be only such as was required for its accommodation in relation to the convenient transaction of its business, or such as might have been bona fide mortgaged to it by way of security, or conveyed to it in satisfaction of its debts, etc. Held, that the disability to hold land should be construed to imply a disability to become the grantee and vendor of real estate, since the corporation cannot deal in real estate, receiving and conveying the title in its corporate capacity, without in every instance holding that estate, and hence the bank had no right to purchase lands for the purpose of selling them again. *Bank of Michigan v. Niles (Mich.)* 1 Doug. 401, 407, 41 Am. Dec. 575.

"Holding," as used in 2 Rev. St. p. 329, § 1, providing that all persons holding lands, etc., may have partition, etc., is equivalent and synonymous to "owning or have title to

lands," and is not used in the sense of requiring actual occupancy. *Godfrey v. Godfrey*, 17 Ind. 6, 9, 79 Am. Dec. 448.

A charter of a railroad company, providing that it shall not, in its corporate capacity, "hold, purchase, or deal in any land," other than lands on which such railroads shall run, or which may be actually necessary for the construction or maintenance thereof, and of warehouses, machine shops, etc., means the purchasing, holding, or dealing in real estate directly, and in a manner unconnected with the lawful and proper management and control of its affairs and business, and not to prevent its acquiring an interest therein, incidentally, whenever, in the proper exercise of its powers, it becomes necessary for it to do so in order to protect its legal rights. It does not prohibit the taking of a mortgage to secure a debt due the corporation. *Blunt v. Walker*, 11 Wis. 334, 347, 78 Am. Dec. 709.

To "hold" means to retain; to keep. When used in relation to land, it embraces the idea of actual possession. When used in the habendum clause of a deed, it includes the twofold idea of actual possession of the thing, and being invested with the legal title. *Stansbury v. Hubner*, 20 Atl. 904, 136 Pa. 499.

In the syllabus of *Grant v. Jones*, 39 Ohio St. 506, it is said: "Credits owned by a nonresident of this state are not taxable here unless they are held within the state by a guardian, trustee, or agent of the owner, by whom they must be returned for taxation." Referring to the definition of the word "hold," it is found that, as given by *Anderson* in his *Law Dictionary*, it means possess by lawful title, as hold a note or bond, hold lands or property; to have and to hold described premises; hold office; hold a fund or lien, a policy of insurance, a share, stakes, stock, etc., whence, also, freehold or leasehold. In *Witsell v. City of Charleston*, 7 S. C. 99, it was decided that, as a technical term, "hold" embraces two ideas—that of actual possession of some subject of dominion or property, and that of being vested with legal title or right to hold or claim such possession. It was recognized, however, that the interpretation of the word might be so controlled by the context as to require that it be construed to signify to have in possession or under control, merely. In *Godfrey v. Godfrey*, 17 Ind. 9, the Supreme Court referred to the statute of that state on the subject of partition, which provided that all persons holding land, etc., might have partition. The court said: "We do not construe the word 'holding,' thus used, as requiring actual occupancy, but as equivalent to owning or having title to lands." The word is not to be construed in the popular sense of only having possession and control

for certain specified purposes, as in the case of an agent acting for his principal. Hence debts owned by a nonresident of the state of Ohio, evidenced by notes and mortgages upon real estate within the state, are not held within the state, so as to be taxable there, although the notes and mortgages are in the hands of a resident agent, who made the loans, and collects and remits principal and interest as they become due. *Jack v. Walker* (U. S.) 19 Fed. 138, 140.

"Holding," as used in Code Proc. § 235, providing that the execution of an attachment on any debts, or other property incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment with the debtor, or "individual holding such property," would not include an attorney who had conducted a suit and obtained a judgment for his client, so as to authorize a levy on the judgment by serving the attorney; he not being the person holding the judgment. In *re Flandrow*, 64 N. Y. 1, 4.

The clerk of court, in whose office a judgment is recorded and docketed, is not a person holding property, within the meaning of Gen. St. c. 66, § 305, requiring service of execution on persons holding property. Such language has no application where the property levied on is a judgment or debt. *Wheaton v. Spooner*, 54 N. W. 372, 373, 52 Minn. 417.

#### Ownership of shares of stock.

The word "hold," in a statute providing that shares of stock held or owned by a married woman may be transferred by her without the signature of her husband, and that all dividends payable upon shares held by a married woman may be paid to her in the same manner as if she were unmarried, means holding the stock by certificate in her own name, with a proper transfer upon the books. *State v. Leete*, 16 Nev. 242-249.

#### Passive trust created.

The word "hold" was formerly a technical word employed in the tenendum clause of a deed, but now has no technical meaning when used in such instruments. The word means to derive title to; to retain in one's keeping; to be in possession of; to occupy; to maintain authority over; and a trust to hold property is not a passive trust. *Ure v. Ure*, 56 N. H. 1087, 185 Ill. 218.

#### Personalty.

"To hold and invest," as used in a will giving and bequeathing all the property of whatsoever kind to executors "to hold and invest," are applicable to personalty, and the use of these terms in respect to both realty and personalty indicates that it was all to be converted. *Cook v. Cook* (N. J.) 47 Atl. 732, 733.

**Purchase distinguished.**

The term "purchase and hold," in Act March 17, 1787, enabling the Bank of North America to have, hold, purchase, receive, possess, enjoy, and retain lands, rents, etc., and also to sell, grant, or convey the same lands, and providing that such lands and tenements which the said corporation was thereby able to purchase and hold should only extend to such lots of ground and convenient buildings, etc., which they might find necessary for carrying on the business of the said bank, etc., and all such lands and tenements which might be bona fide mortgaged to them as securities for their debts, cannot be construed as precluding a bank from purchasing absolutely lands in a distant county, which it does not occupy. "The restriction is that the bank shall not purchase or hold. Purchasing and holding are very different things, and the consequences of each are very different. If the words had been that the bank should neither purchase nor hold, then it could neither have done one nor the other." *Leazure v. Hillegas* (Pa.) 7 Serg. & R. 313, 319.

**As reserve or retain.**

A deed reciting that "I [the grantor] hold a life interest in the land conveyed," and that it is fairly understood that such land is to be the grantee's share of the estate of his father (the grantor), and further reciting only a nominal consideration, should be construed to reserve a life interest in such land. *Hurst v. Hurst*, 7 W. Va. 289, 293.

In an agreement for the lease of land for a proper rent authorizing the lessor to hold so many bushels of wheat per acre as security as certain plowing, "hold" means to hold back; withhold; retain. *Lloyd v. Powers*, 22 N. W. 492, 493, 4 Dak. 62.

**HOLD AND OCCUPY.**

The use of the words "hold and occupy," in a lease, which recites that the lessee shall hold and occupy the premises for a term of years, amounts to a general covenant for a quiet enjoyment during the term. *Ellis v. Welch*, 6 Mass. 246-250, 4 Am. Dec. 122.

**HOLD COURT.**

When a judge holds court, he directs, controls, and governs it as the chief officer, and this is the extent of the meaning of the word "preside." The presiding judge of a court consisting of several members, or of a court of which he is the sole judge, as of a court of oyer and terminer, with its grand and petit juries, its attending sheriffs, clerks, and other officers, does this, and nothing else, under the name of "holding" or "presiding" in the court. *Smith v. People*, 47 N. Y. 330, 334.

"To hold court," as used in Const. art. 8, § 12, authorizing a judge in one judicial district to hold court for the judge of another district, does not include the act of issuing an injunction in chambers during an adjournment of a term of court, being held by the judge of another district. *Wallace v. Helena Electric R. Co.*, 25 Pac. 278, 10 Mont. 24.

**HOLD OVER.**

See "Willful Holding Over."

"To hold over," when applied to an officer, implies that the office has a fixed term, which has expired, and the incumbent is holding into the succeeding term. Where there is no fixed term, there can be no holding over. *State v. Simon*, 26 Pac. 170, 174, 20 Or. 365.

"Holding over," as the term is used in the law of landlord and tenant, is defined to be the act of keeping possession of the premises. Where a tenant on the expiration of his term surrenders possession for any interval of time, his resuming possession under an agreement with the agent of the landlord, though the agent has no authority to grant such permission, does not constitute a holding over. *Frost v. Akron Iron Co.*, 37 N. Y. Supp. 374, 377, 1 App. Div. 449.

The holding over constitutes merely an enlargement of the term, and the lease is applied thereto with the same force as though it had been re-executed. In *Webber v. Shearman*, 3 Hill, 547, it was said: "Holding over after the expiration of a sealed lease is a continuation of the same tenancy, and an enlargement of the same term." *Baylies v. Ingram*, 82 N. Y. Supp. 891, 893, 84 App. Div. 360 (citing *People v. Paulding*, 22 Hun, 91).

"Hold-overs" is a term applied to police inspectors in the city of Chicago, who held their office by virtue of appointment prior to the date when the civil service act, as applied to the police force, went into operation. *Ptacek v. People*, 62 N. E. 530, 532, 194 Ill. 125.

**HOLD UP.**

"Holding up," when used in relation to an attack on a train, is distinctly and universally understood to mean the forcible detention of a train, with intent to commit a robbery or some other felony, and its use in an instruction could not possibly have been misunderstood by the jury. *Territory v. McGinnis*, 61 Pac. 208, 212, 10 N. M. 269.

Where, by threats and the use of deadly weapons, money is taken from a cash drawer from and in the presence of the proprietor, the offense is one commonly called a "hold

up." *Leo v. State*, 89 N. W. 808, 68 Neb. 723.

### HOLDEN.

St. 1826, c. 430, providing that the managers of the Sullivan Bridge Lottery "shall be holden to account for" all the tickets in every class in said lottery, and all prizes not claimed with one year, means not merely to render an account of, but to be responsible for. It stands in opposition to the right of appropriation to one's own use and benefit. In common cases of principal and agent, the expression would as well be satisfied by an honest return of that part of the principal's goods which the agent could not sell as by a payment of the proceeds in case he had sold them. Such is the common understanding of the language thus used. *Thomas v. Mahan*, 4 Me. (4 Greenl.) 442, 448.

The statute authorizing a tenant in real actions to claim for the value of the improvements made on land "holden by such person by virtue of the possession and improvement" means a holding adverse to the legal title. *Treat v. Strickland*, 23 Me. (10 Shep.) 234, 238.

### HOLDER.

See "Bona Fide Holder"; "Lawful Holder"; "Property Holder."

As defined by the law dictionaries, the word "holder" means one who is legally in possession of a negotiable instrument. Webster gives it also the legal meaning of one who holds land, etc., under another; a tenant. But its popular meaning is one who holds; and as used in St. 1895, p. 53, requiring sheep owners who are not the owners and holders of one acre of land for each two sheep to procure a license, it means one who is in possession, actual or constructive, of land. One whose title vested in him the right to immediate possession, and who could at any time, without hindrance, take actual possession, would doubtless be deemed the holder of the land, although not then in actual possession. A lessee of land for a fixed term would be a holder. *State v. Wheeler*, 44 Pac. 430, 433, 28 Nev. 143.

In Act Feb. 25, 1875, § 3, relating to the registration of county bonds, and providing that a fee shall be paid to the auditor by the holder thereof, the term "holder" means the person presenting the bonds for registration, whether a corporation or natural person. *State v. Wallichs*, 20 N. W. 27, 28, 16 Neb. 110.

The term "holder," as used in the negotiable instrument law, means the payee or indorsee of a bill or note, who is in pos-

session of it, or the bearer thereof. *Rev. Laws Mass. 1902*, p. 653, c. 73, § 207; *Ann. Codes & St. Or. 1901*, § 4592; *Rev. Codes N. D. 1899*, § 1060; *Code Supp. Va. 1898*, § 2841a; *Bates' Ann. St. Ohio 1904*, § 8178.

### Agent.

The holder of commercial paper is a person having possession of the paper and making demand, whether in his own right or as agent for another, and includes a notary or a bank holding the same for collection. *Bowling v. Harrison*, 47 U. S. (6 How.) 248, 258, 12 L. Ed. 423.

The term "owner or holder," within the meaning of a statute requiring notice of application for a public road to be served on the owner or holder of the land over which the road is to run, includes an overseer on the premises. "The words 'owner or holder' were not used as meaning the tenant only, or the person holding under a lease, but reasonably extend to any person occupying or in possession, placed there by the owner, who may be expected to take care of his interests in this, as in other matters connected with the land." *In re Kimmey* (Del.) 5 Har. 18.

### Bearer synonymous.

"Holder" is a word of similar import to "bearer," and by either of these words a note may be made negotiable by delivery. *Putman v. Crymes* (S. C.) 1 McMul. 9; 36 Am. Dec. 250.

The term "holder," when used with reference to negotiable paper, is properly applied to the person having possession of the paper and making the demand, whether in his own right, or as an agent for another. "Holder" is a word of the same import as "bearer," and is applied to any one in actual or constructive possession of the bill, and entitled at law to recover or receive its contents from the parties to it. *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 73 Pac. 456, 462, 139 Cal. 564, 63 L. R. A. 245, 96 Am. St. Rep. 169.

### Non-resident administrator.

In General Incorporation Act, art. 184, § 39, providing that every "holder of stock" in any company, as executor, administrator, guardian, or trustee, should represent the shares of stock in his hands at the meetings of the company, and vote accordingly as a stockholder, the quoted phrase should be construed to include an administrator taking title under a grant of letters of probate at the testator's domicile, in a foreign state. *In re Cape May & D. B. N. Co.*, 16 Atl. 191, 193, 51 N. J. Law (22 Vroom) 78.

### Owner synonymous.

The word "holder," in Act Pa. May 4, 1852, § 2 (P. L. 576), providing that every



five shares of stock in an academy of music should entitle the holder thereof to a free ticket of admission, means owner. *Kuhn v. American Academy of Music (Pa.)* 15 Wkly. Notes Cas. 251, 255.

The word "holder," in a policy of insurance providing that the same may be converted into cash, "at the option of the holder, at any time after the expiration of 15 years from the date herein," etc., means the person to whom the policy is by its terms payable—the owner thereof. *Travelers' Ins. Co. v. Healey*, 33 N. Y. Supp. 911, 921, 86 Hun, 524.

The word "holder," as used in a provision of a life policy providing that it is payable to the wife of insured, or, in the event of her prior death, to the children of insured, and that it may be converted into cash at the option of the holder, means those who in law are the owners of the policy, and entitled to the rights and benefits which may accrue under it; in other words, all the beneficiaries—not only the wife, but the children, of the insured. And therefore the option to convert the policy into cash cannot be exercised by the wife alone, but only by the wife and children jointly. *Entwistle v. Travelers' Ins. Co.*, 51 Atl. 759, 202 Pa. 141.

An averment that the president and directors of a bank were the holders and owners of a bill of exchange is equivalent to alleging that the bill was property of the bank. *Walker v. Bank of Alabama (Ala.)* 4 Stew. & P. 215, 219.

#### **Drawer and payee.**

The holder of a bill is he who is in the possession of the bill and is legally entitled to the benefit of it; and therefore the drawer as well as any other party may become the holder. *Rice v. Hogan*, 38 Ky. (8 Dana) 185.

The word "holder," as used in a mortgage conferring a power of sale upon the holder of a note which it was used to secure at the time of the execution of the mortgage, meant the payee, so that its use did not render the mortgage indefinite as to the person who was to execute the power of sale. *Ray v. Home & Foreign Investment & Agency Co.*, 28 S. E. 56, 57, 98 Ga. 122.

#### **Trustee for creditors.**

If a chattel mortgage be made and delivered to a trustee for creditors, the trustee is the holder, within the statute requiring the holder to make an affidavit in order to make it valid as against creditors. *Bonnet v. Hope Mfg. Co.*, 28 Atl. 601, 603, 51 N. J. Eq. (6 Dick.) 615.

#### **HOLDER FOR VALUE.**

Where value has at any time been given for the instrument, the holder is deemed a

holder for value, in respect to all parties who became such prior to that time. Negotiable Instruments Law, § 26 (Rev. Codes N. D. 1899, § 1043).

It is well settled that a pledgee or mortgagee of property is a holder for value. *Levy v. Rudolph (Ky.)* 56 S. W. 988, 990.

#### **HOLDER IN DUE COURSE.**

A holder in due course, under Negotiable Instrument Law, § 98, holds the instrument free from any defect of the title of prior parties. *Sutherland v. Mead*, 80 N. Y. Supp. 504, 508, 80 App. Div. 103.

#### **HOLDER OF POWER.**

The "holder of a power," as used in the chapter relating to powers, is the person in whom a power is vested, whether by grant, devise, or reservation. *Rev. St. Okl.* 1903, § 4101.

#### **HOLDING OFFICE.**

A statute declaring that an alien who has not declared his intention to become a citizen of the United States is ineligible to hold office should be construed to mean merely the holding of the office, and not the election thereto, so that, in case the disability is removed before the commencement of the term of office for which an alien has been elected, he will be entitled to enter upon and hold such office. The disqualification relates to the holding of the office, and not to the election thereto. *State v. Murray*, 28 Wis. 96, 100, 9 Am. Rep. 489.

"Holding an office," as used in the Constitution, disqualifying persons holding any lucrative office under the United States from holding an office under the state, cannot be construed to include one appointed to the office of Surveyor General, but who did not take the oath of office and notify the proper department at Washington of his acceptance of the commission until after the date of his election as State Comptroller. To constitute the holding of an office, within the meaning of the Constitution, there must be the concurrence of two wills—that of the appointing power and that of the person appointed. The mere tender of a commission does not produce that result. So far as regards the act of the appointing power, the appointment is complete when the commission is duly issued by the President. But Congress having required the giving of bond and the taking of an oath by the person appointed to the office of Surveyor General before he can possess such office, these acts are required to be done before he can be said to be holding the office. *People v. Whitman*, 10 Cal. 38, 48.

**Continuance in office.**

Continuing to perform the duties of an office is holding office, so that a surveyor who had resigned, but whose successor had not been appointed, and who, under the Constitution, was required to continue to perform the duties of his office until his successor was qualified, was holding office, within the provisions of Pen. Code, art. 123, imposing a fine on any county officer concerned in the purchase of any right or title in public land. *Keen v. Featherston*, 69 S. W. 983, 984, 29 Tex. Civ. App. 563.

**HOLDING OUT.**

By "holding out a woman to be the wife of another" is meant that the purported husband by language and conduct leads the world to believe that the parties are living and associating themselves together as husband and wife. *United States v. Snow*, 9 Pac. 697, 705, 4 Utah, 813.

**HOLIDAY.**

See "Legal Holidays."

At the common law a holiday was not, as in the case of Sunday, dies non juridicus, and holidays have only the sanctity attached to them by statute. *State v. Lewis*, 72 Pac. 121, 123, 31 Wash. 515.

"Holiday," as used in Laws 1862, c. 248, which declares the 25th day of December to be a legal holiday, imports that it shall be dies non juridicus, and that no authority exists on that day to do any official acts, though no express prohibition is contained in the act. A prohibition is implied in the term "holiday." *Lampe v. Manning*, 38 Wis. 673, 674; *In re Worthington* (U. S.) 30 Fed. Cas. 643.

Where the day on which a cause was tried and judgment rendered was a legal holiday, it was dies non juridicus, and the court had no authority to hear the cause and render judgment on that day, even though there was no express statutory prohibition. *Lampe v. Manning*, 38 Wis. 673, 674.

"Holiday," as used in the bankruptcy act, shall include Christmas, the Fourth of July, the Twenty-Second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving. U. S. Comp. St. 1901, p. 3419.

**Christmas.**

As legal holiday, see "Legal Holidays."

**Fourth of July.**

The term at the common law does not include the Fourth of July. *Rogers v. Brooks*, 30 Ark. 612, 613, 629.

**Memorial day.**

Rev. St. 1881, § 2008 (Rev. St. 1894, § 2194), forbidding the sale of liquors as a beverage on a legal holiday, applies only to general legal holidays, made so for all purposes by statute, and does not apply to the 30th of May, because of a statute declaring that it shall be a legal holiday in relation to commercial paper, and for no other purpose. *State v. Atkinson*, 39 N. E. 51, 52, 139 Ind. 426.

**Sunday.**

"Holiday," as used in Supp. Rev. 361, enacting that certain days shall be legal holidays, cannot be construed as indicating an intent to assimilate the status of the days so named to that of Sunday. "Holiday," in its present conventional meaning, is scarcely applicable to Sunday. When the statute declares certain days to be legal holidays, it does not permit a reference to the legal status of Sunday to discover its meaning. *Glenn v. Eddy*, 17 Atl. 145, 51 N. J. Law (22 Vroom) 255, 14 Am. St. Rep. 684. (Quoted in *Spalding v. Bernhard*, 44 N. W. 643, 644, 76 Wis. 368, 7 L. R. A. 423, 20 Am. St. Rep. 75.)

**HOLLOW WARES.**

"Hollow wares," as used in Act Cong. March 3, 1883, c. 121, 22 Stat. 488 [U. S. Comp. St. 1901, p. 2247], imposing certain duties on hollow wares, meant vessels of hollow ware made of cast iron. *Strausky v. Erhardt* (U. S.) 52 Fed. 806, 809.

**HOLOGRAPHIC WILL.**

A holographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of the state, and need not be witnessed. Civ. Code Idaho 1901, § 2506; Rev. Codes N. D. 1899, § 3647; Civ. Code Cal. 1903, § 1277; Civ. Code Mont. 1895, § 1724; *In re Soher's Estate*, 21 Pac. 8, 9, 78 Cal. 477; *Scott v. Harkness*, 59 Pac. 556, 557, 2 Idaho, 736; *Harrison v. Weatherby*, 54 N. E. 237, 240, 180 Ill. 418. It may be informally drawn, and may consist of one or more papers. No particular words are necessary to show a testamentary intent. It must appear only that the maker intended by it to dispose of property after his death. *Mitchell v. Donohue*, 34 Pac. 614, 615, 100 Cal. 202, 38 Am. St. Rep. 279.

The only difference between a holographic will and an attested will is in the form of the execution. *In re Soher's Estate*, 21 Pac. 8, 9, 78 Cal. 477.

A will written and signed by the hand of deceased, but bearing no date and not wit-

nessed, is not a holographic will. In re Martin's Estate, 58 Cal. 532.

In the case of a holographic will, no acknowledgment by the testator, attestation of witness, or any other mode of publication, other than that it be wholly written and subscribed by the testator, is necessary to make it valid. Porter v. Ford, 82 Ky. 191, 195 (quoting Bouvier, Law Dict.).

A letter written by testator, directing a change in his will, was held valid as a holographic will or codicil. Barney v. Hays, 29 Pac. 282, 284, 11 Mont. 571, 28 Am. St. Rep. 495.

A will partly written by the testator and partly written by another or printed, or if it be partly dated or signed by him and partly by another, is not a holographic will. Estate of Billings, 1 Pac. 701, 64 Cal. 427.

Where portions of the paper were printed in the form of a stationer's blank, and the vacant spaces were filled in the handwriting of deceased, the instrument was not a holographic will. In re Rand's Estate, 61 Cal. 471.

## HOME.

The word "home" suggests relations differing in breadth and strength, though not in kind, when applied, on the one hand, to a farmer who has resided since his birth, and expects to reside until his death, on the same spot, and, on the other hand, to the clergyman, whose home may change in two years, or to the railroad laborer, whose home may change in two months. Langhammer v. Munter, 31 Atl. 300, 301, 80 Md. 518, 27 L. R. A. 330 (citing Paine, Elect. 46; Chase v. Miller, 41 Pa. [5 Wright] 403; Story, Conf. Laws).

A person's home may be in his own house or his hired lodgings. School Dist. No. 2 in Brentwood v. Pollard, 55 N. H. 505.

A pauper, while supported as such, has no home or dwelling place, within the meaning of Gen. St. p. 132, providing that upon the division of any town, or the annexation of a part of one town to another town, every person having a legal settlement therein, but being absent at the time of such division or annexation, and not having acquired a settlement elsewhere, shall have his legal settlement in that town wherein his last dwelling place or home shall happen to fall. Town of Wilmington v. Town of Somerset, 35 Vt. 232.

"The place where one keeps his effects, his chest, etc., is said to be his home." Town of Barton v. Town of Irasburgh, 33 Vt. 159, 162.

A will bequeathing a "home and maintenance" to a daughter during the time she

remains unmarried—the section of the will following such bequest providing that the remainder of the testator's property, both real and personal, of which he might die possessed, after the payment of debts and legacies and the decease of his wife, shall go to certain other children—means a home and maintenance on the premises where testator lived at the time of his death. Parker v. Parker, 126 Mass. 433, 436.

It is said in Town of Berlin v. Town of Worcester, 50 Vt. 23, in a case involving the settlement of a pauper, that the idea of a right to be and remain at a particular place is inseparable from the conception of home or domicile. Jericho v. City of Burlington, 29 Atl. 801, 802, 66 Vt. 529.

The existence of a home is a question depending upon fact and intention, and the term may be applicable to a particular spot or to a whole country. A person who wanders from country to country, with no intention of remaining fixedly anywhere, acquires no new home. On the other hand, one who confines his wanderings to a particular country or locality, but declines to fix himself upon some particular spot, can very properly be said to have a home in that country or locality. Home, domicile, or residence may therefore include a spot or a wide area. Each of these words may be applied either to a house, a precinct, a ward, a county, or a state. Langhammer v. Munter, 31 Atl. 300, 301, 80 Md. 518, 27 L. R. A. 330.

### Domicile distinguished.

There is no substantial difference between the meaning of the words "home" and "domicile." King v. King, 56 S. W. 534, 535, 155 Mo. 406.

Home is that place or country at which a person either resides with the intention of residence, or in which, having so resided, or with regard to which, he retains either residence or intention of residence. The word is not synonymous with "domicile," yet home is the fundamental idea of domicile. The law takes the conception of home, and, molding it by means of certain rules to suit its own requirements, calls it "domicile." Dean v. Cannon, 16 S. E. 444, 446, 37 W. Va. 123.

"Home" means some permanent abode or residence, where the person residing intends to remain, "and is not synonymous with 'domicile,' as used in international law, but has a more restricted meaning." Inhabitants of Jefferson v. Inhabitants of Washington, 19 Me. 293.

"Home" and "domicile" may, and generally do, mean the same thing, but a home may be relinquished and abandoned, while the domicile of the party, upon which many civil rights and duties depend, may, in legal contemplation, remain." Thus the home, within the meaning of a statute providing

that a pauper shall be deemed to have a settlement in the town where he dwells and has his home, may be lost by his leaving the town where he has his home, without intending to return, though he fails to establish a home in any other place; and this is so without regard to whether he loses his domicile or not. *Inhabitants of Exeter v. Inhabitants of Brighton*, 15 Me. (8 Shep.) 58, 60.

#### As home port.

"Home," as used in the United States Revised Statutes, which declare that every master and commander of any vessel belonging in whole or in part to any citizen of the United States, who, without justifiable cause, forces an officer or mariner of such vessel on shore in order to leave him behind in any foreign port, or refuses to bring home again all such officers and mariners of such vessel whom he carried out with him, shall be punished, etc., means the home port of the ship for the voyage. It does not refer to the private, domestic abode of any seaman, native or foreign. *In re Ah Tie* (U. S.) 13 Fed. 291, 293 (citing *United States v. Coffin* [U. S.] 25 Fed. Cas. 485, 486).

#### As household.

A testator directed his property to be kept together, and his family supported out of it, under the government of his wife, and that no expenses should be charged to his children while they remained at home, and that his sons should, in the final division of his estate, account for expenses they might incur after leaving home to acquire professions, and that an equal division should be made when his youngest child attained full age. Held, that by "home," as used in the will, the testator meant the household of which he was the head while living, and the government whereof he committed to his wife upon his death, so that a daughter who left her stepmother and went to live with her sister was not at home, within the meaning of the term as used in the will. *Manning v. Woff*, 22 N. C. 11, 12.

#### Life estate implied.

In a will giving a wife a life estate in testator's property if she remained unmarried, and providing that the wife shall have the privilege of a home there, in case she desires it, during her natural life, such last clause does not show that the testator did not understand that he had already given her a life estate in the same property, since he may have desired to provide a home for her in case of her remarriage, when her estate as life tenant would terminate. *Clough v. Clough*, 52 Atl. 449, 451, 71 N. H. 412.

#### As location of corporation by charter.

The term "residence or home," when used with reference to a corporation, means

the place where it is located by or under the authority of its charter. It has no power to change its home or residence or its citizenship. *Ex parte Schollenberger*, 98 U. S. 369-376, 24 L. Ed. 853.

#### Maintenance and support included.

The use of the word "home" in a will devising all of testator's property to certain beneficiaries, but directing that it is his wish and desire that his daughters shall have a home in his house while they live single, is not broad enough in itself to show an intention to require the daughters to be maintained, also, but is confined to its natural signification as a place of permanent residence. Appeal of Kennedy, \*81 Pa. (32 P. F. Smith) 163-165; *Nelson v. Nelson*, 19 Ohio, 282, 284.

The word "home," as used in a deed whereby a father conveyed land to his two sons, and provided that his unmarried daughters should have a home on said land as long as they remained unmarried, does not include the right of an unmarried daughter to support and maintenance from the land. *Shuttleworth v. Shuttleworth*, 34 W. Va. 17, 25, 11 S. E. 714.

A testatrix devised a farm to one in fee, and then directed that another should have a home during her natural life on such farm. It was held that the devise of a home was not confined to a mere room and shelter in a house on the farm, but extended to the board and maintenance of the devisee. The word "home," not only in its true etymology, but in its ordinary acceptation, means something more genial than a mere privilege to perambulate a dreary room. The common sense as well as the common charity of the world revolts at the idea that a word everywhere hallowed, even among barbarians, as typical of something sacred and beneficent, should be dwarfed into the chilly proportions of a room fireless, bedless, and foodless. Such is not, and never was, its meaning, unless the whole world have up to the present time, with persistent ignorance, misused it. The testatrix intended to provide for the comfort, and not the annoyance, of the devisee; and, when she used the word "home," she understood it as importing what everybody else had been accustomed to understand as its meaning. *Willett v. Carroll*, 13 Md. 459, 468.

Within the meaning of a will devising a house to a son, and requiring him to furnish a daughter a home in the house in case she remains single and desires to have a home, the question arose as to whether the word "home" meant merely a place for shelter, and, if so, in what part of the house it was to be located, or whether it included the right of the daughter to occupy the entire house as a member of the family, and to be supported at his table. It was held that as

the value of the property was stated to be \$3,500, subject to a charge of \$1,000, and the daughter at that time was about 29 years of age, it was evident that support at the table as a member of the family could not have been intended; that the charge would have been greater than the amount of the devise, and the provision for a home for the daughter was intended to afford her such reasonable accommodations as she might desire to enjoy there in connection with, but not as a member of, the son's family. *Clough v. Clough*, 52 Atl. 449, 451, 71 N. H. 412.

"The word 'home,' when made the subject of a devise, is ambiguous, and may mean merely the use of sufficient room, or it may include a support." The term in a will in which testator gave his sister a home at his house as long as she should live, and directed his executors to attend to this, was construed to include necessary food and fuel. *Denfield v. Smith*, 30 N. E. 1018, 1019, 156 Mass. 285.

The word "home," in a will devising testator's real estate to his sons, and directing that, as long as a daughter should remain single, his house should be her home, free of expense, as to paying any rent or privilege in said house, was used to mean such a home as children have in the house of their parents, with whom they live. The word "home" could have been present to his mind in no other sense, and in this sense it includes maintenance and support; she rendering such service as a child, under the same circumstances, would be expected to render in the family of her parents. *Lyon v. Lyon*, 65 N. Y. 339, 340.

#### **Personal presence required.**

To constitute a residence or home, which, if continued for five years without interruption, will establish a legal settlement, it is requisite that there should be at the commencement actual personal presence, accompanied with the intention to make that residence a home. The act and the intention must concur. When such a home is once established, it continues until it is intentionally changed or abandoned. *Inhabitants of West Gardiner v. Inhabitants of Farmingdale*, 36 Me. 252, 254.

#### **As place of abode.**

The word "home," in the return of a sheriff reciting the service of the notice on a member of defendant's family, and that defendant was not at home, is synonymous with the phrase "place of abode," in Code 1887, § 3207, providing that notices may be served on a member of defendant's family at his usual place of abode in his absence. *Fowler v. Mosher*, 7 S. E. 542, 543, 85 Va. 421.

A statute providing that a man shall be taxed in the place where his home is, does not mean the principal place of abode of a man and his family, when such place is only a temporary abode. *Thayer v. City of Boston*, 124 Mass. 182, 147, 26 Am. Rep. 650.

Within the meaning of a contract, one of the provisions of which was that one of the contracting parties should make his home in a certain place, "home" means the place where a person abides, not for any fixed period, but with the intention of remaining until some event not yet in view shall make it desirable or necessary to give it up. *Welch v. Whelpley*, 28 N. W. 744, 745, 62 Mich. 15, 4 Am. St. Rep. 810.

#### **As residence.**

A testator made a bequest to his executors upon a trust to hold, manage, and receive the income thereof until an act of incorporation could be obtained, for the "Smith Memorial Home." The object of the bequest was stated to be for the founding of a home for aged, respectable, indigent women, who had been residents of the city of New London. Held that the word "home" should be construed in its ordinary meaning, as a dwelling house or residence for the persons made the object of the bequest. The word "home" sufficiently expresses the idea of a house for the permanent residence of the beneficiaries. *Coit v. Comstock*, 51 Conn. 352, 382, 50 Am. Rep. 29.

The word "home," as used in the pauper law, is synonymous with the words "residence or dwelling place." *Town of North Yarmouth v. Town of West Gardiner*, 58 Me. 207, 210, 4 Am. Rep. 279.

The word "home," as used in the Constitution, creating two classes of electors—the first class including every male citizen who has had his residence and home in the state for a year—is synonymous with "residence," and was used simply by way of emphasis, and not to add a further qualification, which is shown by the fact that, in describing electors of the second class, the word "residence" alone was used; there being no conceivable reason for any discrimination between the two classes of voters. *State v. Aldrich*, 14 R. I. 174.

In Act 1841, which defined the word "residence" as a place in which the person's habitation is fixed, without any present intention of removing therefrom, and to which, whenever he is absent, he has the intention of returning, and providing that a person shall not be considered or held to have lost his residence who shall leave his home and go into another state or county with the intent of returning, "home" is a convertible term with the word "residence," and to reside in a particular place means to have one's

home there. *Lehman v. McBride*, 15 Ohio St. 573-601.

The home of a person is where the person turns for social life; where his family, if he has one, usually dwells, and to which his mind turns when away; and where he has the present purpose of returning and remaining. It is not the place where a man happens to be temporarily residing, even though it be with his family, for a man may, for convenience sake, have a temporary residence and quasi home, which is not his home and residence proper; and, unless he has abandoned the latter for the former, with the intention of remaining permanently from it, the newly chosen residence is not his domicile. *Tyler v. Murray*, 57 Md. 418-441.

The home is the place where men permanently reside, and to which they intend to return when away from it. *Fry's Election Case*, 71 Pa. 302, 307, 10 Am. Rep. 698.

The home of a person is the place where he and his family habitually dwell, which they may leave for temporary purposes, and to which they return when the occasion for absence no longer exists. *Thomas v. Warner*, 34 Atl. 830, 831, 83 Md. 14.

#### **Settlement distinguished.**

"Home" is synonymous with "residence" or "dwelling place," and means some permanent abode or residence, with intention to remain, and has a different meaning from the word "settlement," as used in the pauper laws. *Inhabitants of Warren v. Inhabitants of Thomaston*, 43 Me. 406, 418, 69 Am. Dec. 69.

In the pauper laws there is a marked distinction between the place of residence or home and the place of legal settlement. The latter cannot be changed without acquiring a new one. The former may be abandoned without evidence that another residence has been secured. *Inhabitants of Phillips v. Inhabitants of Kingfield*, 19 Me. 375, 381, 36 Am. Dec. 760.

#### **As the whole house.**

The home is not confined to the particular bedroom in which the master of the house sleeps, for it may include his rooms for guests, and apartments he never enters. So, too, it may properly embrace a schoolroom, for he may teach in his parlor, where many physicians and dentists practice their professions. It is difficult, therefore, to understand how the particular use of a portion of a dwelling makes it any the less part of the household. *In re Hoope's Estate (Pa.)* 1 Brewst. 462-464, 6 Phila. 364, 365.

#### **HOME COMPANY.**

The term "home company," as used in a chapter relating to home life and accident

insurance companies, designates those life, accident, or life and accident insurance companies incorporated and formed in this state. Rev. St. Tex. 1895, art. 3096a.

#### **HOME FACTOR.**

A factor is called a "home factor" when he resides in the same state or country with his principal. *Ruffner v. Hewitt*, 7 W. Va. 585, 604, 605.

#### **HOME-MADE BEER.**

In a prosecution for the sale of liquors sold as pop beer or home-made beer, claimed by the prosecution to be intoxicating, the court says, "We discover no error in the charge that whether the liquor sold by defendant under the name of 'pop beer' or 'home-made beer' was intoxicating was to be determined as a matter of fact by the jury, and that they were not to be governed by the name which it was called." *State v. Kibling*, 22 Atl. 613, 616, 63 Vt. 636.

#### **HOME MISSIONS.**

A testator devised a portion of his estate to the Home and Foreign Missions of the Baptist Church, and it was contended that this bequest was too indefinite to be valid; but it was held that at the time of the execution of the will, and for many years before that time, there existed a distinct and well-defined branch of endeavor, known among Baptists as "Home Missions." This included in its area of church work the whole of the United States in its territories. Another branch equally well known and established was called "Foreign Missions." This included all foreign parts outside of the United States. Irrespective of their acceptance among Baptists, "home missions" and "foreign missions" are understood, in common parlance, in all churches, to have substantially the same meaning, and hence such bequest was valid. *Bruere v. Cook*, 52 Atl. 1001, 1004, 63 N. J. Eq. 624.

#### **HOME OFFICE.**

The term "home office" of a company, as used in a chapter relating to home, life, and accident insurance companies, means its principal office within the state or country in which it is incorporated or formed. Rev. St. Tex. 1895, art. 3096a.

#### **HOME PLACE.**

A devise of "my home place, where I now live," cannot be construed to include a group of tenement houses, although located on the same lot, as determined by unity of purchase and unbroken ownership. The testator lived upon the original lot, upon which all these dwellings were placed; and, if

the conditions absolutely forbade its being regarded as separated into different lots, it would be necessary to consider it his home place, as distinguished from other lots. *McKeough's Estate v. McKeough*, 37 Atl. 275, 276, 69 Vt. 34, 41.

### HOME PLANTATION.

A devise of testator's "home plantation" would not pass lots which had formerly been a part of the plantation, but which were subsequently laid off into town lots and occupied for town purposes. It would include only the plantation outside the limits of the town. *Hampton v. Cowles*, 20 N. C. 140, 142.

### HOME PORT.

It is difficult to formulate a precise rule by which the home port of a vessel belonging to persons residing in different states may be determined in every case, but it is well settled that a vessel cannot have more than one home port, or be a domestic vessel in more than one state. A fortiori, she may, if owned by residents of different states, be a foreign vessel in the port of a state wherein certain of her owners reside. Prima facie the home port is the place of enrollment where or nearest to which the owner, or, if more than one owner, the managing owner, resides. *The Ellen Holgate* (U. S.) 30 Fed. 125, 126.

The home port is the port at or nearest to which an owner, if there be but one, or, if more than one, the husband or acting and managing owner, of a ship or vessel, usually resides. *White's Bank v. Smith*, 74 U. S. (7 Wall.) 646, 651, 19 L. Ed. 211.

Within the meaning of the rule of the maritime law which provides that one furnishing supplies to vessels in a home port has no lien, the home port includes any port in the state in which the owner resides, and is not limited to the port where the vessel is enrolled. *The Albany* (U. S.) 1 Fed. Cas. 288, 290; *The Rapid Transfer* (U. S.) 11 Fed. 322, 330; *O. H. Burke Mfg. Co. v. The A. Saltzman*, 42 Mo. App. 85.

"Home port," as contradistinguished from "foreign port," within the meaning of the rule of law that for repairs done or supplies furnished to a maritime vessel in a foreign port the law will, if there be no special contract, imply a lien on the vessel, means not necessarily the vessel's chartered home, or the place of the owner's domicile, but any place or port where the owner should happen to be with his vessel. When the owner is present, the reason for the implied lien ceases, and the contract is inferred to be with the owner himself, on his ordinary responsibility, without a view to

the vessel as the fund from which compensation is to be derived. *Case v. Woolley*, 36 Ky. (6 Dana) 27, 32 Am. Dec. 54; *The St. Jago de Cuba*, 22 U. S. (9 Wheat.) 409, 417, 6 L. Ed. 122.

### HOME RANCH.

The term "home ranch," as used in herding, generally embraces the house, stable, and corrals, and necessary outbuildings used by a herder for branding the cattle, rounding them up, etc. *Holcomb v. Kellher*, 59 N. W. 227, 228, 5 S. D. 438.

The usual meaning of the words "home ranch," as used in the range country, is that it is the headquarters of the range. It is the place from which the riders start upon their rounds to round up and brand the stock, and to which they return when through. For the time being, it is their home. But this does not necessarily make it the home of the cattle, in reference to taxation. If gathered and herded and cared for regularly there each year, it would doubtless become such. *State v. Shaw*, 29 Pac. 321, 323, 21 Nev. 222.

### HOME RULE.

As descriptive of a policy, "home rule" is a significant and appropriate term; but, as descriptive of a right, it is indefinite, for it is coextensive with the right of local regulation or control, and its extent must always be tested by the Constitution. An act that incorporated into one school district lands previously divided between several districts was not invalid, as depriving the territory of local self-government, in that the act named definite terms for the officers of the municipality, and fixed definitely the site of the central school building, and did not allow the resident taxpayers and voters any voice in the matter, and fixed definitely what should be done with the territory of the old districts, and appointed a board of school inspectors, depriving the local taxpayers and voters of all voice in the matter. *Attorney General v. Lowrey*, 92 N. W. 289, 290, 131 Mich. 639.

### HOME STATION.

The term "home station," as used in herding, generally embraces the house, stable, and corrals, and necessary outbuildings used by a herder for branding the cattle, rounding them up, etc. *Holcomb v. Kellher*, 59 N. W. 227, 228, 5 S. D. 438.

### HOMEOPATHIC.

Whenever the term "homeopathic" is applied to a physician or a member of a medical school in any law of the state, the term

shall be construed to mean that said physician or member of a medical school shall be a graduate of a homeopathic medical college, or a member of the homeopathic state medical society, or a member of the homeopathic county medical society in the state. Gen. St. N. J. 1895, p. 2083, § 16.

### HOMEOPATHIC SPECIFIC.

A homeopathic specific is a remedy pertaining to homeopathy which exerts a special action in the prevention or cure of a disease. "The name can no more be appropriated, and is no more the property of Humphreys, than any other practitioner of the homeopathic system of therapeutics." *Humphrey's Specific Medicine Co. v. Wenz* (U. S.) 14 Fed. 250, 253.

### HOMESTALL.

"Homestall," in the ancient law, designates the mansion house. *Dickson v. Mayer*, 58 Tenn. (11 Heisk.) 515, 521 (citing 1 Bouv. Law Dict. 670).

### HOMESTEAD.

See "Business Homestead"; "Family Homestead"; "Pony Homestead"; "Probate Homestead"; "Urban Residence Homestead."

Estate of, see "Estate of Homestead."

"A homestead is the place of the house. Coke says, "'stethe" or "sted" betokeneth properly a bank of a river, and many times a place.' Co. Litt. 4b. 'Homestead,' then, means nothing more than home place." *Woodman v. Lane*, 7 N. H. 241, 244; *Barney v. Leeds*, 51 N. H. 253, 265 (citing *Austin v. Stanley*, 46 N. H. 52).

A "homestead" means the home place—the place where the home is—and such is its legal acceptance at the present day. It is the home, the house, and the adjoining land where the head of the family dwells—the home farm. *Oliver v. Snowden*, 18 Fla. 823, 825, 43 Am. Rep. 338.

"The word 'homestead' seems to be an abbreviation of 'homesteading' or 'home buildings,' and by its force includes no more than the actual buildings and so much land immediately contiguous thereto as is necessary to make a home." Lord v. Simonson (N. J.) 42 Atl. 741, 742 (citing Bouv. Law Dict.; Webst. Dict.).

The term "homestead" includes dwelling houses in which families reside, with the usual and customary appurtenances, including different buildings of every kind necessary or convenient for family use, and lands for the purpose thereof. If situated

in the country, it may include a garden or farm. If situated in town, it may include one or more lots, or one or more blocks. In either case it is limited by extent, merely. *In re Allen* (Cal.) 16 Pac. 319.

"Homestead" is defined to be a person's dwelling place, with that part of his land and property which is about and contiguous to it. *Linn County Bank v. Hopkins*, 23 Pac. 606, 47 Kan. 580, 27 Am. St. Rep. 309; *Anderson v. Sessions*, 51 S. W. 874, 875, 93 Tex. 279, 77 Am. St. Rep. 873.

The word "stead" originally meant place or spot. This meaning is now obsolete, except as preserved in compound words. Webster defines "homestead" as the home place. It is a house occupied by its owner as a dwelling, with the outbuildings and land used in connection with it. It is that part of a man's premises where he lives and has his home. Except as modified by limitations of value and questions of intent, the legal use of the term is the same as the popular use. *McKeough's Estate v. McKeough*, 37 Atl. 275, 276, 69 Vt. 34, 41.

The term "homestead" is defined to mean the place of the house, a mansion house with adjoining land (Worcester Dict.); a mansion house; a person's dwelling; the place with the inclosure or ground immediately contiguous; an abode; a home (Imperial Dict.). As said in a well-considered case, it is the home; the house; the adjoining land where the head of the family dwells; the home farm. It does not extend to other tenements, lots, and farms that are not occupied personally by the owner and his family—houses in which they do not dwell, and rooms in which they do not live. *Jaffrey v. McGough*, 7 South. 333, 334, 88 Ala. 648 (quoting *Hoitt v. Webb*, 36 N. H. 159).

A homestead is a right additional to and independent of the ordinary right of ownership. It is an additional tenure by which the owner holds the property. *Speyrer v. Miller*, 32 South. 524, 526, 108 La. 204, 61 L. R. A. 781.

A homestead is an artificial estate in land, devised to protect the possession of the owner against the claims of creditors while the land is occupied as a home. It should not be construed to protect a person in possession against the claims of the legal owner of the land. *Buckingham v. Buckingham*, 45 N. W. 504, 505, 81 Mich. 89.

A "homestead," in law, means the home place, or place of the home, and is designed as a shelter of the homestead roof, and not as a mere investment in real estate, or the rents and profits derived therefrom. *Lyon v. Harden*, 29 South. 777, 778, 129 Ala. 643; *Norris v. Kidd*, 28 Ark. 485, 493; *McGuire v. Van Pelt*, 55 Ala. 344, 355; *Dickman v. Birkhauser*, 16 Neb. 686, 688, 21 N. W. 396.



The leading and fundamental idea connected with a homestead is unquestionably associated with that of a place of residence for the family, where the independence and security of a home may be enjoyed without danger of its loss or harassment and disturbance by reason of the improvidence or misfortune of the head or any other member of the family. It is a secure asylum of which the family cannot be deprived by creditors. Within this sanctuary, however urgent may be their demands, they cannot intrude. *Iken v. Olenick*, 42 Tex. 195, 198.

The word homestead in the Constitution, exempting the homestead from execution, means the place of residence of the claimant and his family; that is, the home place of the debtor and his family. *Oliver v. Snowden*, 18 Fla. 823, 825, 43 Am. Rep. 338.

In California a homestead consists of the dwelling house in which the claimant resides, and the land on which the same is situated, selected as provided in Civ. Code, § 1237. *Grange v. Gough* (Cal.) 4 Pac. 1177, 1178; *Skinner v. Hall*, 10 Pac. 406, 407, 69 Cal. 195; *Ham v. Santa Rosa Bank*, 62 Cal. 125, 134, 45 Am. Rep. 654.

The homestead consists of the dwelling house in which the claimant resides, and the land on which the same is situated, selected as provided for in the chapter relating to homesteads and exemptions. *Ballinger's Ann. Codes & St. Wash.* 1897, § 5214; *Civ. Code Mont.* 1895, § 1670.

In a bequest to each of testator's servants at his homestead, or at the stable connected therewith, the word "homestead" was used in the sense of dwelling house, and not of home place, so that the bequests were intended for domestics or household servants, and not for one who worked out of doors on the home place, though he occasionally did work in the house. *Frazer v. Weld*, 59 N. H. 118, 177 Mass. 513.

"The word 'homestead' has both a popular and legal signification. In its popular sense, it signifies the place of the home; the residence of the family. It represents the dwelling house at which the family resides, with the usual and customary appurtenances, including the outbuildings of every kind necessary or convenient for family use, and lands used for the purpose thereof." *Keyes v. Cyrus*, 34 Pac. 722, 723, 100 Cal. 322, 38 Am. St. Rep. 296 (citing *Gregg v. Bostwick*, 33 Cal. 220, 227, 91 Am. Dec. 637).

"Homestead," as used before it acquired a technical meaning by statute, in a will devising the testator's homestead to his widow, etc., should be construed to embrace all the land which was appurtenant to, and which was used and considered by the testa-

tor as making up, the farm which he cultivated and on which he resided. "At that time the word 'homestead' was used in its general or popular sense, and it is in this sense that it is to be construed. At the time of the testator's death, he lived on a farm in the country, and consequently he used the term in a sense applicable to an agricultural or country residence. Farms are of various sizes, composed of one or more tracts. The word 'homestead' is indeterminate, and imports no specific quantity of land, but was employed, I apprehend, by the testator, in its then common acceptance, to include all the land that was appurtenant to—and considered by him as making up—the farm which he cultivated, and on which he resided." *Hopkins v. Grimes*, 14 Iowa, 73, 77.

"Homestead," as used in a will directing executors to sell testator's homestead and invest the proceeds in other property, was construed to include the house and all the ground where testator lived, and was not limited to the amount of lands constituting a statutory homestead. *Ford v. Ford*, 33 N. W. 188, 196, 70 Wis. 19, 5 Am. St. Rep. 117.

A testator, being the owner of 630 acres of land, forming one connected body of land, on which he resided, and which he cultivated and carried on as one common farm, besides some disconnected tracts, devised to his wife "my homestead, to have and to hold during her life, to occupy and use the same, or dispose of it at her will and pleasure, and use and control the proceeds thereof, in lieu of her dower in my real estate," etc. Held, that the word "homestead" was not used in the statutory sense as known in the homestead exemption law, but was used in the nontechnical, ordinary acceptance of the word; meaning the place on which he lived. Testator meant by the use of the word to embrace the entire farm on which he resided, being 630 acres. *Kennedy v. Kennedy*, 105 Ill. 350, 353.

"Homestead," as used in a will "bequeathing to my sister J. and to W. the homestead and buildings thereon, to have and to hold equally, on the lower side of the road," should be construed to designate the boundaries of the land, not to indicate the quality of the estate given. *Fearing v. Swift*, 97 Mass. 413, 415.

In Comp. Laws, § 10,711, providing that, where lands on which improvements are made are held and occupied as a homestead, the mechanic's lien provided for in the act shall attach to the lands and improvements, if the improvements be made in pursuance of a written contract signed by both husband and wife, the word "homestead" is used in its constitutional sense, and the excess over the \$1,500 exemption provided for in the Constitution is subject to mechanics' liens, though the contract for the improvements is

not signed by the wife. *McAlister v. Des Rochers* (Mich.) 93 N. W. 887, 888.

The term "homestead," as used in Gen. Laws 1875, c. 40, § 2, giving a surviving husband or wife a right to enjoy the homestead for life, was not used as a convenient designation of a certain portion of the estate, in which the survivor was to take a freehold, but eo nomine as created and defined in the homestead exemption act. *Eaton v. Robins*, 29 Minn. 327, 328, 13 N. W. 143.

The homestead has been called a determinable fee, but as we have seen that no new estate has been conferred upon the owner, and no limitation upon his old estate imposed, it is obvious that it would be more correct to say that there is conferred upon him a determinable exemption from the payment of his debts, in respect to the particular property allotted to him. *Jones v. Britton*, 102 N. C. 166, 182, 9 S. E. 554, 558, 4 L. R. A. 178 (citing *Citizens' Nat. Bank v. Green*, 73 N. C. 247).

#### **Actual occupancy, residence, and possession.**

A "homestead" means a place of residence, and implies occupancy and possession as such. *Moore v. Smead*, 62 N. W. 426, 429, 89 Wis. 558; *Voelz v. Voelz*, 60 N. W. 707, 708, 88 Wis. 461; *Bouscher v. Smith*, 85 N. W. 681, 683, 73 Iowa, 610; *Upman v. Second Ward Bank*, 15 Wis. 449; *Voelz v. Voelz*, 60 N. W. 707, 708, 88 Wis. 461; *Arnold v. Jones*, 77 Tenn. (9 Lea) 545, 548.

"Homestead" means the seat or mansion, and embraces the idea of actual occupancy. *Turner v. Turner*, 18 South. 210, 107 Ala. 465, 54 Am. St. Rep. 110.

Visible occupancy of the premises as the head of a family, under a recorded title, fixes the character of the property as a homestead. *Beckmann v. Meyer*, 75 Mo. 333, 335.

The word "homestead" itself means a place of residence, which, again, implies occupancy, possession. Therefore it is held that, even in the absence of a statute requiring that a homestead shall be occupied as such, occupation and use for residence purposes are essential to the establishment of a homestead. *Upman v. Second Ward Bank*, 15 Wis. 449, 453.

The word "homestead," in ordinary use, has a popular and well-understood meaning, which may be sufficiently accurately defined as the place of residence of the family. That is the prominent idea connected with the use of the word; a dwelling house being inseparably associated with the meaning of the word, in which the family of the owner resides, and, connected therewith, a greater or less quantity of land. The homestead is the land, with the dwelling house thereon and its appurtenances, owned and occupied by a

resident of the state. Actual residence on the premises is necessary to create a homestead. *Tillotson v. Millard*, 7 Minn. 513, 518 (Gil. 419), 82 Am. Dec. 112.

A homestead is the dwelling place at which the family reside, with the usual and necessary appurtenances, including everything necessary and convenient for family use, and the lands used for the purpose thereof. The "homestead" means the home place. The place where the home is, and such is its legal acceptance. A homestead necessarily includes the idea of residence. The use is a test by which to determine whether particular premises are or are not the homestead of the owner. Unless the premises are used as a homestead, no right or benefit of homestead exists therein. *Morris v. Brown*, 48 Pac. 750, 751, 5 Kan. App. 102.

A homestead consists of the dwelling house in which the claimant resides, and the land on which the same is situated, selected as provided in Civ. Code, § 1237. To constitute a valid homestead, the claimant must actually reside on the premises when his declaration is filed. *Skinner v. Hall*, 10 Pac. 406, 407, 69 Cal. 195.

Actual occupancy, as distinguished from mere possession, is the prominent idea associated with the word "homestead." But the term "actual occupancy" is not to be understood as requiring constant personal presence, so as to make a man's residence his prison, or that a temporary absence, enforced by some casualty, or for the purposes of business or pleasure, would constitute a removal, ceasing to occupy, or an abandonment. *Clark v. Dewey*, 73 N. W. 639, 640, 71 Minn. 108.

The word "homestead" is used in the law as meaning the place of a debtor's residence or dwelling, which is thereby exempted from forced sale on execution. In its popular meaning, the word means the family home or seat, and it seems that, in either sense, one may have a homestead without being in possession. *Byrne v. Hinds*, 16 Minn. 521, 524 (Gil. 469).

#### **As designation of amount of land.**

The term "homestead" means land of the extent and value specified by the homestead laws, which the head of a family may use and hold as a homestead exempt from execution and attachment. There is no distinction between the homestead estate and the fee in the land, and statutes relative to exemptions of homesteads cannot be construed to mean that the homesteads cannot be subjected to the payment of debts, but that the fee can be. So it is held that the word as used in Sess. Acts 1875, p. 60, § 1 (Rev. St. 1879, § 2693), providing that on the death of a husband, leaving a widow and minor children, his homestead shall continue

exempt from his debts, etc., means the land of the extent and value specified, which the head of a family might use and hold as a homestead exempt from execution or attachment, and does not mean merely a homestead estate, as distinguished from the fee, but under the statute the fee is exempt. *Keene v. Wyatt*, 63 S. W. 116, 120, 160 Mo. 1.

The homestead created by Const. 1885, art. 10, § 1, exempting a homestead of half an acre in a city or town, expressly provides that the exemption shall not extend to more improvements or buildings than the residence and business house of the owner. *Smith v. Guckenheimer*, 27 South. 900, 903, 42 Fla. 1.

Under the statute, a homestead consists of a dwelling house, outbuildings, and the land used in connection therewith, not exceeding \$500 in value, used or kept as a homestead. *Thorp v. Willbur*, 44 Atl. 839, 340, 71 Vt. 266.

"Homestead," as used in the Constitution, means the dwelling house where the family resides, and the test of whether or not it is a homestead is use and quantity. *Bebb v. Crowe*, 18 Pac. 223, 39 Kan. 342.

#### **Building alone.**

There can be no homestead right in a building alone, apart from the land on which it stands. Some estate in the land is essential. *Myrick v. Bill*, 17 N. W. 268, 271, 3 Dak. 284.

#### **Dower distinguished.**

Dower and homestead rights are different in character. Dower is a life estate that after assignment may be sold and conveyed as other estates. The homestead is not such a right as can be used in any manner other than as provided by the constitution. The grant of a homestead was intended to be in addition to the right of dower. *Horton v. Hilliard*, 24 S. W. 242, 243, 58 Ark. 298.

#### **Dwelling house necessary.**

The homestead must embrace the house used as a home by the owner thereof, and, if he has two or more houses thus used by him at different places and times, he may select that which he will retain as a homestead. Code 1873, § 1894. The selection of a house not used as a home as a homestead is therefore void. *Knorr v. Lohr*, 78 N. W. 904, 905, 108 Iowa, 181.

The homestead must include the dwelling, and, where the homestead is situated partly on land owned by the husband and partly on that owned by the wife, the homestead must consist of part of the two tracts, and the husband cannot claim the whole of his land as the homestead. *Henderson v. Rainbow*, 41 N. W. 29, 76 Iowa, 320.

"Homestead is the place of a home or house; that part of a man's landed estate which is about and contiguous to his dwelling house. A homestead necessarily includes the idea of a house or mansion house. The dwelling may be a splendid mansion, a cabin, or a tent. If there be either, it is under the protection of the law, but there must be a home residence before it and the land on which it is situated can be claimed to be a homestead." *Williams v. Dorris*, 31 Ark. 466.

A homestead is defined by the statutes to consist of a dwelling house, outbuildings, and the land used in connection therewith, not exceeding \$500 in value, and used or kept by such housekeeper or head of a family as a homestead. It necessarily implies a house owned and used or kept by the housekeeper as a dwelling place or home for himself and family, with a prescribed quantity of land, on which the house is situated. It requires that the home or abode or residence of the family shall be upon the land. One, therefore, cannot have a homestead in mere land, nor in land with no buildings but a barn on it. *Rice v. Rudd*, 57 Vt. 6, 10.

#### **As dwelling and adjoining land.**

"Homestead," as used in Rev. St. 1849, c. 102, § 51, exempting the homestead of a debtor from sale on execution, means "the land, not exceeding the prescribed amount, upon which the dwelling house, residence, habitation, or abode of the owner and his family are situated, without regard to the precise manner or style of the building thereon, and is restricted only by the amount of the land mentioned in the act, and not by the value or use thereof, if it be used for a dwelling house." *Phelps v. Rooney*, 9 Wis. 70, 83, 76 Am. Dec. 244.

"Homestead," as used in Homestead Act, § 1 (Gould's Dig. c. 68, § 29), providing that a homestead, to a certain extent, should be exempt from sale or execution, means the place of a home or house; that part of a man's landed property which is about and contiguous to his dwelling house, called anciently a "homestall" or "homestale." The homestead must be the home, the place of residence, of the party claiming it as exempt. *Tumlinson v. Swinney*, 22 Ark. 400, 403, 76 Am. Dec. 432.

"Homestead" is defined to be the place of the house; the mansion house, with adjoining land. *Worcester Dict.*; *Bouv. Law Dict.* It has received judicial interpretation in many respects. A man's homestead must be his place of residence; the place where he lives. *Philleo v. Smalley*, 23 Tex. 502. In the case of *Franklin v. Coffee*, 18 Tex. 413, 70 Am. Dec. 292, Chief Justice Wheeler, in describing what is not a homestead, says: "In this case there was no house or home

upon the land. He had made no preparation and done no acts which would evince a fixed intention and purpose to select and appropriate the place as a home." What is meant by a "homestead of the family," in the country, and its approximate locality, is determinable by obvious facts, as a determinate object, and not by the variable intention privately entertained or openly declared by the husband; he and his wife residing on the land, in their home, at the time. *American Freehold Land Mortg. Co. v. Pace*, 56 S. W. 377, 397, 23 Tex. Cr. App. 222 (quoting *Houston & G. N. Ry. Co. v. Winter*, 44 Tex. 609, 614).

"Homestead," as used in Gen. St. 1878, c. 68, § 8, exempting a homestead from forced sale, should be construed in its ordinary and popular sense—to designate a dwelling place used and occupied as a home for its owner and his family, if he have one. A homestead is the place made such by the choice, residence, use, and occupancy of the owner as a home, including, as its necessary incidents, the dwelling place and its appurtenances, and the land thereto belonging. But these are not, like the homestead itself, the primary objects of the exemption. They are not covered by it, because constituent parts of the homestead. They are necessarily included within it as such parts. *Ferguson v. Kumler*, 6 N. W. 618, 619, 27 Minn. 156.

#### Dwelling house in course of erection.

In holding that the term "homestead," in Rev. Laws, § 1894, exempting from forced sale the homestead, consisting of a dwelling house, outbuildings, and the land used in connection therewith, included land on which a house was being constructed, the court says in *Rice v. Rudd*, 57 Vt. 6, that "to constitute a homestead, within the protection of the exemption law, there must be a dwelling house upon the land owned by the housekeeper, or one in process of erection, and actually used or set apart and kept for a home and abiding place for the family." *Woodbury v. Warren*, 31 Atl. 295, 296, 67 Vt. 251, 48 Am. St. Rep. 815.

#### As an estate.

A homestead is not an estate, but only an exemption. It is a quality annexed to land, whereby an estate is exempt from sale under execution for debt, and is not a personal trust. *Thomas v. Fulford*, 23 S. E. 635, 117 N. C. 667.

Though the homestead right is not technically an estate in land, but only an inchoate right thereto, we think, after the death of the husband, the widow may be properly regarded as having such an interest in the property in which her right of homestead exists. *Andover v. Merrimack County*, 37 N. H. 484.

The right of homestead before the same is set out and assigned is not such an estate in land—such a subsisting legal right or interest—as will bar a right of entry, but only an inchoate right personal to the parties in whom it exists. *Tidd v. Quinn*, 52 N. H. 341.

In *Couch v. Capitol Building & Loan Ass'n* (Tenn.) 64 S. W. 340, 343, a homestead is said to be a property right, but in no correct legal sense a separate property right of the wife when the husband is living. It may be, in a sense, a joint property right of the husband and wife while both are living, and, being so, can be alienated only by their joint consent.

The homestead interest is not an estate in land. It has been sometimes spoken of, in loose and inaccurate speech, as an estate, but only to characterize it as a right secured by law. It is an exemption of land under stated conditions. If the conditions do not exist, or, having once existed, are at an end, the exemption ceases. *Ellinger v. Thomas*, 67 Pac. 529, 530, 64 Kan. 180.

Some have likened the character of a homestead, as an interest in land, to a joint tenancy. Others have treated it as a life estate, though this seems to be only in states where the homestead is not abandoned prior to the acquirement of another, or is designated as an estate. The interest is purely statutory, nothing like it being known at common law, and may not be alienated save by the joint instrument of husband and wife. In *Chase v. Abbott*, 20 Iowa, 157, the court said: "This right of the wife in the homestead is of a higher character, and more in the nature of a vested interest or title than is a dower right in the other real estate of the husband. It is of such a vested character as clothes her with a right to redeem from a tax sale." It is something more than a mere exemption to the owner, and more closely resembles the life estate than any other; differing therefrom in the manner of acquiring an alienation, and possessing some of the characteristics of a joint tenancy. *Sayers v. Childers*, 84 N. W. 938, 939, 112 Iowa, 677.

A homestead right, while perhaps not a new estate lying in grant or transferable by a conveyance, partook of the interest or right in a home, indeterminate in its duration, which might continue during the life of the owner and his wife, and perhaps the minority of the children. In its inception, a homestead is a parcel of land on which the family resides, and which is to them a home. It is constituted by the two acts of selection and residence in compliance with the terms of the law conferring it. *Gallagher v. Smiley*, 44 N. W. 187, 188, 28 Neb. 189, 26 Am. St. Rep. 319.

**As the exemption right.**

Within the statute exempting a homestead, and providing that the husband and wife shall be deemed to hold such homestead as joint tenants, the word "homestead" may be defined as meaning not only the real estate occupied as the home, but also the right to have it exempted from levy and forced sale, and the right of survivorship which adheres to joint tenancy would attach to the right to have the homestead exempted from sale. *Roberts v. Greer*, 40 Pac. 3, 7, 22 Nev. 318, 58 Am. St. Rep. 755.

**As freehold.**

See "Freehold."

**Garden.**

See "Garden."

**Intent as governing.**

Actual occupancy and use of the property as a homestead, or a present intention to so use it, coupled with some act indicating such intention, will constitute the property a homestead. *Wilkerson v. Jones* (Tex.) 40 S. W. 1046, 1047.

Present intention of occupancy as a homestead, with present action to carry the intention into effect, constitutes a homestead in law. *Mills v. Hobbs*, 42 N. W. 1084, 1085, 76 Mich. 122.

A homestead may be created by intention prior to actual occupancy, when it appears that the owner is entitled to the exemption as the head of a family, and that this intention has been manifested by such acts as amount to reasonably sufficient notice of that intention; the purpose of the law being to require such open evidence of this intention as will prevent the use of this right as a shield for fraud. *Wolf v. Butler*, 28 S. W. 51, 8 Tex. Civ. App. 468. In *Cameron v. Gebhard*, 85 Tex. 610, 22 S. W. 1033, 34 Am. St. Rep. 832, it is said: "The intention thus to appropriate the property should not only be found in the mind of the party, but should be evidenced by some unmistakable acts showing an intention to carry out such design, or some sufficient reason should be given why this intention was not demonstrated by such acts." In the same case this general rule is announced: "From the decisions it is apparent that intention is almost the only thing that may not be dispensed with in some state of case, and it follows that this intention in good faith to occupy is the prime factor in securing the exemption. Preparation \* \* \* is but the corroborating witness to the declaration of intention, the safeguard against fraud, and an assurance of the bona fides of the declared intention of the party." Justice Brown, in the same opinion, says further: "But the placing upon the premises of

unhewn logs, for the purpose of erecting thereon the humblest cabin, with a bona fide intention to occupy as soon as the cabin can be built, secures the right." *Foley v. Holtkamp* (Tex.) 66 S. W. 981, 982.

**Land never actually occupied.**

The term "homestead," in legal parlance, possesses the quality of inalienability for the debts of the judgment debtor, if he be the head of a family, and at the same time conveys the idea of a home place. The meaning of the word "homestead," as used in Comp. Laws 1880, § 3429, subd. 11, providing that, if the debtor be the head of a family, there shall be a further exemption of the homestead, consisting of lands, together with the appurtenances and improvements thereon, not exceeding in value a certain sum, evidently includes, not only the land whereon the family of a judgment debtor resides, but also any of his land of the limited value which he may have selected or may select for a home, although it may never have been actually occupied as the owner's place of residence. The idea of a family residence seems to pervade the entire statute, so that the judgment debtor cannot claim land removed from and in no way connected with the place where he resides. The real purpose of the statute was the preservation of the family home. *Gammitt v. Storrs*, 49 Pac. 642, 643, 15 Utah, 336.

As used in Code Civ. Proc. § 1465, providing that if no homestead has been selected, designated, and recorded during the lifetime of the deceased, the court must select, designate, set apart, and cause to be recorded a homestead for the use of the surviving husband or wife and the minor children out of the common property, or, if there be no common property, then out of the real estate belonging to the deceased, does not require that the property set apart be actually occupied at the time when the order is made, but it must be property which could have been selected as a homestead during the continuance of the marriage. In *re Estate of Noah*, 15 Pac. 290, 291, 73 Cal. 590, 2 Am. St. Rep. 834.

Land which a householder merely intends to occupy as a homestead, but which is in fact never so occupied by him, cannot be exempted as a homestead. *Levy v. Rubarts*, 17 Ky. Law Rep. 1370, 34 S. W. 1073.

**Terminated by lease.**

Homestead does not include leased property. *Holtt v. Webb*, 36 N. H. 158, 165, 166.

If the owner of a homestead transfers his possession to a tenant, disabling him for a term from returning and assuming possession at pleasure, and acquires a home elsewhere, the right of homestead ceases. *Boyle v. Shulman*, 59 Ala. 566, 569.

A homestead necessarily includes the idea of a residence, the place where the owner lives. Thus the question whether the property is a homestead does not depend upon its situation, external appearance, or internal arrangement, but upon the fact that it is really and truly occupied as a home for the family; and under this theory it is held that a house rented out by a debtor is not exempt as a homestead, though erected on the same lot on which the owner's residence is located, and though the value of both houses together does not exceed the statutory limit. *Garrison v. Penn* (Ky.) 66 S. W. 14, 15.

#### Life estate implied.

In a will providing that certain lands shall be divided equally between the heirs of two sons, so as to give each one the homestead he now occupies, the word "homestead" will not be construed in its technical sense, but in the sense of a home for life, thus implying a gift of a life estate in such premises. *Arrants v. Crumley* (Tenn.) 48 S. W. 342, 343.

#### More than one house.

When selected, as provided by Code, § 1237, the homestead would include the whole of the lot which was so selected, even though a second house was subsequently erected on the same provided it did not increase the value of the entire property beyond the amount allowed to be exempted as a homestead. *Lubbock v. McMann*, 27 Pac 1145, 1147, 82 Cal 226, 16 Am St Rep 108.

Within the meaning of Code, § 1237, a homestead includes only the land actually used and appropriated as the home of a family. Hence it would not include the whole of a lot on which there were two houses, separated by a fence, one of which only was occupied by the claimant; the other having been rented for several years. It is the principal use to which property is put, and not the quantity, which furnishes the test in determining the question whether or not property is subject to exemption as a homestead. *Maloney v. Hefer*, 17 Pac. 539, 540, 75 Cal. 422, 7 Am. St. Rep. 180.

#### Noncontiguous land.

A homestead consists of a dwelling house in which the claimant resides and the land on which the same is situated. It may consist of two or more separate parcels in some instances, but these parts or parcels must be so near together that they can be occupied and used for the purpose of a homestead. In *re Armstrong's Estate*, 22 Pac. 79, 80, 80 Cal. 71.

"Homestead," as used in Const. 1874, art. 9, § 384, providing that a homestead, outside of a city, town, or village, owned and occupied as a residence, should consist of not exceeding 160 acres of land, with the improve-

ments thereon, cannot be construed to include land a mile away from that on which the dwelling is situated, though used in connection with the homestead for supplying wood to the owner's house. *McCrosky v. Walker*, 18 S. W. 169, 55 Ark. 303.

"Homestead," as used in the Constitution and in Act 1866, exempting the homestead from forced sale, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, not exceeding a certain sum, should be construed in its ordinary or popular sense; or, in other words, its legal sense is also its popular sense. It represents the dwelling house at which the family resides, with the usual and customary appurtenances, including outbuildings of every kind necessary or convenient for family use, and lands used for the purposes thereof. If situated in the country, it may include a garden or farm; if situated in a city or town, it may include one or more lots or one or more blocks. In either case it is unlimited by extent merely, and need not be in a compact body; on the contrary, it may be intersected by highways, streets, or alleys. Neither is it circumscribed by fences merely. In respect to quantity, by itself considered, it is unlimited, whether in town or country. In short, the only tests are use and value. The former is both abstract and statutory; the latter, statutory only. Whatever is used, being either necessary or convenient as a place of residence for the family as contradistinguished from a place of business, constitutes the homestead, subject to the statutory limit as to value. If, however, it is also used as a place of business by the family, which frequently happens, it may not therefore cease to be a homestead, if it would be necessary or convenient for the family use, independent of the business. If what is actually used as a homestead is of greater value than \$5,000, the excess is not homestead under the statute, though so in fact. The homestead for which the statute provides is not one in name merely, but one in fact. *Gregg v. Bostwick*, 33 Cal. 220, 227, 91 Am. Dec. 637.

The Constitution protects to the family in a city, town, or village a homestead consisting of a "lot or lots," etc., provided that the same shall be used for the purpose of a home or as a place to exercise the calling or business of the head of a family. Under this provision the place of the home of the family, as well as the place of the business of the head of the family, although not on contiguous lots, is protected from forced sale so long as used for the purposes contemplated by the Constitution. *Shryock v. Latimer*, 57 Tex. 674, 677 (citing *Miller v. Menke*, 56 Tex. 539).

A homestead in a city, town, or village may consist of one or more lots, but there

is nothing in the Constitution or laws that forces the homestead character or quality upon a lot or lots adjoining the one on which the residence is situated. Whether such lot or lots are a part of the homestead is a question of fact. *Andrews v. Hagadon*, 54 Tex. 571, 575.

Under Const. 1876, art. 16, § 51, providing that the homestead in a city shall consist of a lot or lots, not exceeding \$5,000 in value, provided the same was used for purposes of a home, a lot used by the owner for raising garden vegetables and fruits for the exclusive use of his family is part of the homestead, though located in a different part of the city from the owner's residence lot. *Anderson v. Sessions*, 51 S. W. 874, 875, 93 Tex. 279, 77 Am. St. Rep. 873.

A small piece of land on which hay is cut for a cow, kept at the house where a man lives, may be regarded as a part of his homestead, though the land is separate from the house, and a mile distant, providing that the house and the land together do not exceed \$500 in value, and the land is used in connection with the house to furnish necessary feed for the cow. *Buxton v. Dearborn*, 46 N. H. 43, 44.

The chief characteristic or attribute of a homestead is what the word itself implies. It is land where is situate the dwelling of the family. In this connection the court observes: "We do not ordinarily give the name 'homestead' to several distinct and separate tracts of land, although the dwelling house may be situated on one of them, and they may be owned and cultivated by the same person. We do not speak of a homestead in this sense. We rather mean land upon which the dwelling is situated and the adjoining premises, in a reasonably compact form." So it is held that, under a statute giving a homestead exemption of 40 acres of land, the homestead cannot consist of two or more disconnected tracts, containing in the aggregate but 40 acres, although the ownership of one of them may be convenient for the procurement of articles, such as fuel and timber, essential to the enjoyment of the other, upon which the dwelling is situated. It is said, however, that the homestead may consist of two or more adjoining lots, which must constitute but one tract or body in a compact form, and the fact that the tract claimed as a homestead is divided into separate lots by a stream of water, a highway, or a railroad track will not defeat the claim of the owner to hold it as such, if it forms but one body, subject to the easement. *Bunker v. Locke*, 15 Wis. 635, 638.

The homestead is the home place; the place where the home is; the house and adjoining lands where the head of the family dwells; the land where is situated the dwell-

ing of the owner and his family. If the homestead or place of residence of the debtor and his family is in a town or city, the claim of exemption of rural lands cannot be allowed. It is only the place of the home of the debtor and the family that can be exempt from sales for debts. *Oliver v. Snowden*, 18 Fla. 823, 834, 43 Am. Rep. 338. Thus the head of a family residing in the state was not entitled to claim as part of his homestead a detached tract of land separated from the homestead by other parcels of land neither owned nor occupied by the owner of the homestead, though such other tract was used and cultivated as a part of the homestead, and both together did not exceed the constitutional limits as to quantity. *Brandies v. Perry*, 22 South. 268, 270, 39 Fla. 172, 63 Am. St. Rep. 164.

#### Outbuildings and contiguous land.

The homestead not only includes the dwelling house, but also embraces everything connected therewith which may be used and is used for the more perfect enjoyment of the home, such as outhouses for servants or stock, or property, gardens, yards, or lands to the extent allowed by the statute. *Ash-ton v. Ingle*, 20 Kan. 670, 671, 27 Am. Rep. 197.

The word "homestead," as used in Gen. St. Minn. p. 499 (exemption statute), means the place of residence or dwelling of its owner. Hence it is held that a person residing upon one parcel of land and owning a second parcel, upon which he has never dwelt and which corners upon the first, but does not otherwise adjoin it, cannot hold such second parcel exempt as a homestead. *Kresin v. Mau*, 15 Minn. 116, 118 (Gil. 87, 88).

A homestead is a place of a home; the house and that part of the man's landed property which is about or contiguous to his dwelling house. *Tumlinson v. Swinney*, 22 Ark. 400, 76 Am. Dec. 432. Two tracts, which corner, and on one of which the owner has his home, may be claimed as a homestead, where together they do not exceed the statutory area and value, and the owner has no other land. *Clements v. Crawford County Bank*, 40 S. W. 132, 133, 64 Ark. 7, 62 Am. St. Rep. 149.

"Homestead," in its ordinary significance, conveys the idea of the place of residence or dwelling of its owner, and in that sense it seems to have been used in the act of 1858. But it includes, not only the ground upon which the dwelling house rests, but more; and how much more it may include for the purposes of exemption the statute defines by providing that, where the property lies within the limits of an incorporated city, a "homestead consisting of a quantity of land not exceeding in amount

one lot" shall not be subject to levy, and the owner has the right of selection, so that, provided he confines himself to a compact quantity not exceeding in amount one lot, he can exercise an option as to the shape of the land which he desires to claim as his homestead. As to the balance beyond what was required for the site of his house, the owner seems to have been left free to allow it to remain uninclosed, unimproved, vacant, and idle, or to devote it to any use which he might choose. *Kelly v. Baker*, 10 Minn. 154, 156 (Gil. 124, 125).

Thus, where a man purchased 120 acres of land and built a house upon it, and from such time continuously he and his wife made their home thereon, such tract was his homestead, though he afterwards purchased other adjoining tracts, which he inclosed, cultivated, and used for pasture in one body. *Western Mortg. & Inv. Co. v. Burford* (U. S.) 67 Fed. 860, 867.

#### Placer claim.

Whatever is used, being either necessary or convenient, as a place of residence for the family, as contradistinguished from a place of business, constitutes the homestead, subject, however, to the statutory limit as to value. If, however, it is also used as a place of business by the family, which frequently happens, it may not therefore cease to be a homestead, if it be necessary or convenient for family use, independent of the business. Mineral lands of the United States, which have been located and used chiefly as a placer mining claim, though also used by the owner as a residence for himself and family, and to some extent for pasturing stock and raising vegetables, may be selected as a homestead; the court remarking, in answer to the objection that a homestead is intended to make a permanent home for the claimants, and that a placer mining claim is taken up for the purpose of washing it away, and thus in some limited time destroying the home, if located upon it, that it is not necessary that a homestead should be a permanent home. It may be sold and abandoned by the claimants. It only remains their home so long as they choose to make it so. *Gaylord v. Place*, 33 Pac. 484, 486, 98 Cal. 472.

#### Partial use for business.

A "homestead" being a place of the family, the place where the home is, it would seem unreasonable that premises should be regarded as a homestead unless devoted principally to such residence and home. It would seem unreasonable, for example, that a gas factory should be impressed with the character of the homestead, because the owner resided with his family in the upper story of the building, or that a storeroom should become exempt because the owner occupied

the basement in the same way. Where a building was intended for a dwelling house, as well as a hotel, it being the intention of the owner in its construction to make it his residence, and was occupied by him and his family as such residence before it was ever used as a hotel, and the nature and extent of the business did not interfere with its general character as a dwelling house, the keeping of boarders and the accommodation of lodgers and travelers not being inconsistent with the main purpose of taking the land and the erection of the building thereon, it constituted a homestead. *Ackley v. Chamberlain*, 16 Cal. 181, 183, 76 Am. Dec. 516; *Gregg v. Bostwick*, 33 Cal. 220, 227, 91 Am. Dec. 637.

A man's homestead must be his place of residence or place where he lives; the place where he usually sleeps and eats, where he surrounds himself with the ordinary insignia of home, and where he may enjoy its immunities. It is not sufficient that the owner of a house uses one of the rooms for ordinary business, as keeping a grocery, sleeps in one of the other rooms, and takes his meals habitually at another place. *Philleo v. Smalley*, 23 Tex. 498, 502; *Western Mortg. & Inv. Co. v. Burford* (U. S.) 67 Fed. 860, 867.

Defendant purchased one-third of a town lot, on which was a three-story building, and conducted therein the business of a retail merchant. Subsequently he purchased the other two-thirds of the lot, erected a dwelling house thereon, and used it for residence purposes; the two parts of the lot being separated by a fence. Held, that the one-third used for business purposes was a part of the homestead, if it was used as an appurtenance and convenience of the dwelling house; the court quoting from *Gainus v. Cannon*, 42 Ark. 504, where it is said: "It is a strange and irrational idea, sometimes advanced, that a man ought to lose his homestead as soon as he attempts to make any part of it helpful in family expenses." *Berry v. Meir*, 66 S. W. 439, 440, 70 Ark. 129.

Where, upon a lot on which is erected the dwelling of the owner, which is occupied and used by him as a homestead, there is erected a storehouse, which is used for the selling of merchandise, but said lot, together with the dwelling and storehouse, does not exceed the statutory value of a homestead, and the store is used only secondary to the occupation of the lot as a homestead, the erection of said storehouse does not prevent the owner from claiming said lot as a homestead exemption. *Marx v. Threet*, 30 South. 831, 832, 131 Ala. 340.

#### Residence of family.

A "homestead" does not exist until actual residence on the premises by the family of a married man. His residence thereon be-



fore the residence of his family does not create a homestead. *Cary v. Tice*, 6 Cal. 625, 630.

In *Hoitt v. Webb*, 36 N. H. 166, homestead is defined as "the home; the house and attached land where the head of the family dwells." Blackstone defines it as "the fixed residence of the head of the family, with the lands and buildings surrounding the main house." The obvious intent of the homestead act is to secure to every householder or head of a family a home, where the family may be sheltered and live beyond the result of those financial misfortunes which even the most prudent and sagacious cannot always avoid. Thus the word itself indicates that there must be a family. *McCanna v. Anderson*, 71 N. W. 769, 770, 6 N. D. 482.

The owner of land, on which he lives with his family, does not lose his homestead therein by the fact that his wife has obtained a divorce from him, and has been awarded the custody of the children, where he continues to live on the land, and is not expressly relieved by the decree of divorce from the duty of supporting his children. *Biffle v. Pullman*, 21 S. W. 450, 451, 114 Mo. 50.

A homestead is the land upon which is situated the dwelling house, residence, or abode of the owner, and where such owner resides with his family. The chief characteristic or attribute of homestead is what the word itself implies: that it is the land where is situated the dwelling of the owner and family. Under a statute exempting a debtor's homestead from execution, it is only the actual home which is exempt, so that a person cannot have two homes at the same time, and such a removal as gains a new home is an abandonment of the old. *Jarvais v. Moe*, 38 Wis. 440, 444, 446.

The homestead means the home place, the place where the house is. It is the home or house and the adjoining land where the head of the family dwells. It does not extend to other tenements, lots, or farms that are not occupied personally by the owner and his family; nor does it necessarily include all those parcels of land which may adjoin the tract on which the house stands. *Hoitt v. Webb*, 36 N. H. 158, 165, 166 (citing *Woodman v. Lane*, 7 N. H. 241, 245).

A homestead necessarily includes the idea of residence. An office, used only as a law office by a single man, is not within the meaning of the law in any just sense of the term "homestead," though a law office may be connected with and used as a part of a dwelling house, and thus by its use be brought within the homestead exemption. *Stanley v. Greenwood*, 24 Tex. 224, 225, 76 Am. Dec. 106.

A homestead may be described as a mansion house, with adjoining land, the place

of residence, the place where a man lives. Under the Texas homestead law it is provided that the homestead shall consist of not more than 200 acres of land, which may be in one or more portions, with improvements thereon. *Watkins v. Little* (U. S.) 80 Fed. 321, 330, 25 C. C. A. 438.

#### Temporary absence.

The homestead is the legal home and dwelling place of a person, though he may be temporarily personally absent. *Donaldson v. Lamprey*, 29 Minn. 18, 21, 11 N. W. 119.

The homestead right is not lost by a temporary removal, with an intention to return and make the premises a home again, accompanied with an actual keeping for that purpose. *Keyes v. Bump's Adm'r*, 59 Vt. 391, 395, 9 Atl. 598. To retain the home there, and return to it, would not be an abandonment of the home, or a relinquishment of the homestead right. *Austin v. Stanley*, 46 N. H. 51, 52.

A homestead is characterized by actual occupation as a dwelling place, as a home. A temporary absence from it, the character of a homestead having been impressed by a prior occupation, with an intention to return and occupy it as a homestead, does not operate as a waiver or forfeiture of it. A man can no more have two homes than he can have two domiciles at the same time. During his absence temporarily, occupation may remain with his servants or agents. *Boyle v. Shulman*, 59 Ala. 566, 569.

#### HOMESTEAD ENTRY.

As color of title, see "Color of Title."

A homestead entry is the initial step taken in the land office toward acquiring ownership under the homestead law, and precedes the performance on the part of a homestead claimant of the conditions of residence upon and improvement of land which constitute the real consideration for the transfer of the title, and which are conditions precedent to the vesting of title in the homestead settler. *McCune v. Essig* (U. S.) 118 Fed. 273, 277.

The expression "homestead entry" has an accepted and well-recognized signification in the acts of Congress, in the decision of the courts, and in common parlance. It is an entry under the provisions of the act of Congress entitled "An act to secure homesteads to actual settlers upon the public domain," approved May 20, 1862 (12 Stat. 392, c. 75), and the various amendments and additions thereto. Rev. St. p. 419, c. 5 [U. S. Comp. St. 1901, p. 1386]. *Hartman v. Warren*, 76 Fed. 157, 161, 22 C. C. A. 30.

Under the homestead law three things are needed to be done in order to constitute

an entry on public land: First, the applicant must make affidavit setting forth the facts which entitle him to make such entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made; the land is entered. If either one of these three integral parts of an entry is defective—that is, if the affidavit is insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash—the register and receiver are justified in rejecting the application. *Hastings & D. R. Co. v. Whitney*, 10 Sup. Ct. 112, 114, 132 U. S. 357, 33 L. Ed. 363. But the word "entry," as used in an indictment for making false, feigned, illegal, and fictitious entries under the homestead laws of the United States, cannot be limited to its technical meaning, but will be understood in its popular use, and in such use it is common to speak of an entry of and under the homestead law, meaning thereby not merely a preliminary application, but the proceedings as a whole—the complete transfer of title. *Dealy v. United States*, 14 Sup. Ct. 680, 682, 152 U. S. 539, 38 L. Ed. 545.

It is common to speak of an entry of land under the homestead law, meaning thereby, not a mere preliminary application, but the proceedings as a whole, a complete transfer of title; and it is so used in an indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], charging a conspiracy to defraud the United States of title to land, said land being land of the United States, "upon an entry." *Dealy v. United States*, 152 U. S. 539, 544, 14 Sup. Ct. 680, 682, 38 L. Ed. 545.

#### HOMESTEAD ENTRYMAN.

See "Owner."

In an action relating to public lands, it was contended that under Act Cong. June 8, 1896, relating to the confirmation of homestead entries prematurely commuted, and providing that whenever it shall be made to appear that there was at least six months' actual residence in good faith by the homestead entryman prior to such confirmation, etc., a six months' residence was required after the entry; the argument being that residence by an entryman can only exist after entry, as before that a claimant is not an entryman. It was held, however, that the word "entryman" may quite as naturally have been used merely to describe such person as was entitled to the benefit under the act, and that to be entitled to confirmation thereunder one must have been a homestead entryman; that the requirement was simply that there should have been six months' actual residence by the person who

at the time of the confirmation was the homestead entryman. *McCord v. Hill*, 37 N. W. 481, 483, 111 Wis. 499.

#### HOMESTEAD ESTATE.

The term "homestead estate," as used in the chapter relating to homesteads, is construed to mean the right to the possession, use, control, income, and rents of the real property held or occupied by such decedent as a homestead at death. Rev. Codes N. D. 1899, § 3627.

#### HOMESTEAD EXEMPTION.

The homestead exemption as it now exists is not only a privilege conferred, but under the Constitution it is an absolute right. It was intended to secure against creditors a home, and to a certain extent the means of support to every family in the state. *Eagle v. Smylie*, 85 N. W. 1111, 1113, 126 Mich. 612, 86 Am. St. Rep. 562 (citing *Riggs v. Sterling*, 60 Mich. 643, 27 N. W. 706, 1 Am. St. Rep. 554).

The homestead exemption, under laws allowing the widow and children to remain in possession of the homestead until final distribution of the estate, is not strictly an estate or property passing to those who are under the law entitled to enjoy it, but rather a protection to them in its enjoyment against the demand of creditors. As the creditors could not enforce their demands out of the property constituting the homestead during the life of the debtor, so neither they nor the creditors of any member of the surviving family can enforce them after his death, so long as there is a widow or child remaining in possession and occupying it as a homestead. The homestead right under such statute does not attach in favor of the widow or children unless the estate is insolvent and in debt, or is below the homestead allowance in value; and if it is not it goes to the heirs at once under the law of succession, subject to the widow's right of dower. *Knudsen v. Hannberg*, 30 Pac. 749, 751, 8 Utah, 208.

#### HOMESTEAD FARM.

The word "homestead" seems to be an abbreviation of homesteading or home building, and by its force includes no more than the actual buildings and so much land immediately contiguous thereto as is necessary to make a home. *Bouv. Law Dict.*; *Webst. Dict.* Where used to express more land than this, it is usual to add "farm," and say "homestead farm." *Lord v. Simonson* (N. J.) 42 Atl. 741, 742.

The words "homestead farm" have not acquired a definite signification in the law. They may have a broader signification than homestead. It does not necessarily consist

of a dwelling house and land actually contiguous to it. The land may be detached, and yet be so intimately connected with the dwelling as in effect to constitute a part of it. *Taylor v. Mixer*, 28 Mass. (11 Pick.) 341, 347.

"Homestead farm," as used in a mortgage describing the mortgaged premises as the "homestead farm" of the mortgagor, will not be construed to include the entire home place of the mortgagor, when the words "homestead farm" are restricted by an additional description showing that certain lands were all that were intended to be included therein. *Woodman v. Lane*, 7 N. H. 241, 244.

#### **HOMESTEAD FILING.**

A homestead filing is a certificate which on its face does not purport to give title, but is an instrument given to designate the person who has claim, or who is granted the right, to the use and occupancy of a tract of public land. The government merely parts with the possession of the land, and not the title. It does not convey color of title, and was not so intended. *Woodruff v. Wallace*, 41 Pac. 357, 363, 8 Okl. 355.

#### **HOMESTEAD LAW.**

The homestead law was called by the Supreme Court of California "a beneficent provision for the protection and maintenance of the wife and children against the neglect and improvidence of the father and husband." *Hughes v. Hodges*, 102 N. C. 236, 241, 9 S. E. 437, 438.

Homestead laws are enacted as a matter of public policy, in the interest of humanity, that, though a citizen may be overtaken by reverse of fortune, he and those of his household shall not be homeless, without shelter, raiment, and food. The state is concerned that the citizens shall not be divested of means of support and reduced to pauperism. The policy of the law is that families shall not be deprived of shelter and reasonable comforts. *Richardson v. Woodward* (U. S.) 104 Fed. 873, 875, 44 C. C. A. 235.

#### **HOMESTEAD RIGHT.**

The right of homestead is a quality annexed to land whereby an estate is exempt from sale under execution for a debt. *Littlejohn v. Egerton*, 77 N. C. 379, 384.

The homestead right is a purely personal one, which the owner may at any time waive or renounce. *Gilbert v. Provident Life & Trust Co.*, 95 N. W. 488, 489, 1 Neb. (Unof.) 282 (citing *Rector v. Rotton*, 3 Neb. 171).

The homestead right is merely an inchoate right, which is not assignable until the

homestead is set out and assigned in specific property. It then becomes a vested estate. *Lake v. Page*, 1 Atl. 113, 114, 63 N. H. 318.

The homestead right of a husband in the estate of his wife is an intangible, inchoate, and conditional interest, and nothing more than expectancy, and does not come within statutory or common-law definition of a freehold. *Hamilton v. Village of Detroit*, 88 N. W. 419, 421, '85 Minn. 83.

A homestead right is such a freehold estate as will avail the tenant in defense to a right of entry. *Swan v. Stephens*, 99 Mass. 7, 10.

The homestead right, created by the Illinois statutes in favor of the wife, is the right to live upon, occupy, and enjoy the premises as a home, and is paramount to any title or interest a husband can transfer to a purchaser. *Brooks v. Hotchkiss*, 4 Ill. App. (4 Bradw.) 175, 177.

The homestead right of a widow is no more than a conditional life estate, a mere right of occupancy. In *Norris v. Moulton*, 34 N. H. 392, 397, it is described as "a right to use and occupy for life." *Cross v. Weare*, 62 N. H. 125, 126.

The homestead right is not a fee-simple right, but a right of occupancy for life. It exists in equitable estates, as well as legal estates; but in the former the right is subject to liens acquired before the homestead was established. *Fauver v. Fleenor*, 81 Tenn. (13 Lea) 622, 625.

The homestead right is an inchoate one, not assignable until the homestead is set out and assigned in specific property, when it becomes a vested estate. It is said to bear analogy to the right of dower, which may be released in the lifetime of the husband, but cannot be set out or assigned before his death. A debtor is not entitled to the homestead exemption in property which he and his wife, subsequent to an attachment, but prior to the execution, have conveyed by deed in common form, with release of dower and homestead, and moved off the premises. *Beland v. Goss*, 44 Atl. 387, 68 N. H. 257.

The homestead right of the wife in the homestead occupied by herself and husband is a special and particular interest in real estate created by statute. Under the laws of Nebraska the wife succeeds to an estate for life in the homestead of her deceased husband, and she has a freehold estate therein; but this interest does not constitute her an owner of real property within the provisions of the statute limiting the qualifications of voters of a school district to persons who have resided in the district 40 days and who own real property in the district. *McLain v. Maricle*, 83 N. W. 85, 86, 60 Neb. 353.

The homestead right is the right to hold and use the land free from execution for debt. In other words, the homestead is the land itself, the homestead right is the right of the owner to hold the land exempt from execution, while the homestead exemption is a quality attached to the land by virtue of said right. The homestead right may exist as a pure abstraction, but there can be neither homestead nor exemption without the land. *Joyner v. Sugg*, 42 S. E. 828, 829, 131 N. C. 824.

#### HOMESTEAD SCRIP.

See "Soldier's Additional Homestead Scrip."

#### HOMICIDAL MANIA.

"Homicidal mania" is a term sometimes used to designate moral insanity. *Commonwealth v. Mosler*, 4 Pa. (4 Barr) 264, 266.

"We are obliged by the force of authority to say to you that there is such a disease known to the law as 'homicidal insanity.' What it is, or in what it consists, no lawyer or judge has ever yet been able to explain with precision. Physicians, especially those having charge of the insane, gradually, it would seem, come to the conclusion that all wicked men are mad, and many of the judges have so far fallen into the same error as to render it possible for any man to escape the penalty which the law affixes to crime. We do not intend to be understood as expressing the opinion that in some instances human beings are not afflicted with a homicidal mania, but we do intend to say that a defense consisting exclusively of this species of insanity has frequently been made the means by which a notorious offender has escaped punishment. What, then, is that form of disease, denominated 'homicidal mania,' which will excuse one for having committed a murder? Chief Justice Gibson calls it 'that unseen ligament pressing on the mind, and drawing it to consequences which it sees, but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance'—an irresistible inclination to kill." *Commonwealth v. Sayre* (Pa.) 5 Wkly. Notes Cas. 424, 425.

#### HOMICIDE.

See "Excusable Homicide"; "Felonious Homicide"; "Fleeing Homicide"; "Justifiable Homicide"; "Negligent Homicide."

Homicide is the killing of a human being. *Sanders v. State*, 38 S. E. 841, 842, 113 Ga. 267. See, also, Code, § 4319; *Daly v. Stoddard*, 66 Ga. 145, 146.

Homicide is the killing of any reasonable creature. *State v. Reed*, 9 N. C. 454, 455.

Every killing by one man of another is homicide. *State v. Peo* (Del.) 33 Atl. 257, 258, 9 Houst. 488.

Homicide is the killing of one human being by the act, procurement, or omission of another. Pen. Code, § 179; *People v. Hill*, 3 N. Y. Supp. 564, 565, 49 Hun, 432; *People v. Webster*, 68 Hun, 11, 21, 22 N. Y. Supp. 634; *People v. Connors*, 35 N. Y. Supp. 472, 475, 13 Misc. Rep. 582. The human being whose life is destroyed, of course, must be living; but as a child lives in its mother's womb, and as the destruction of its life while thus living may be held homicide, it is provided by statute that "the person upon whom the homicide is alleged to have been committed must be in existence by actual birth." This evidently means a complete expulsion of the child from the body of the mother alive. Being thus expelled and living, it is then, and not till then, a subject of homicide. *Wallace v. State*, 10 Tex. App. 255, 270.

Homicide is the destruction of the life of one human being, either by himself, or by the act, procurement, or culpable omission of another. *People v. Vanderpool*, 1 Mich. N. P. 264, 269.

Homicide, of course, is murder, and it includes all degrees of murder. Murder cannot exist without homicide, because its definition is "the killing of one human being by another." *People v. Connors*, 35 N. Y. Supp. 472, 475, 13 Misc. Rep. 582.

And. Law Dict. defines the word "homicide" as a generic term, embracing every mode by which the life of one man is taken by the act of another. Where a killing was admitted, an instruction that certain statements of defendant might be considered as strong proof against him in determining whether he committed homicide was harmless; the word "homicide" not necessarily importing a crime. *Siberry v. State* (Ind.) 47 N. E. 458, 461.

Every homicide at common law is *prima facie* murder, and the reduction of it to a less offense, after the slaying is proved, generally devolves on the prisoner. *State v. Anderson* (S. C.) 1 Hill, 327, 339.

Homicide is the mere killing of some person by another and does not of itself constitute murder. It may be murder, or manslaughter, or excusable or justifiable homicide, according to the circumstances. It is not, therefore, the act which constitutes the offense or determines its character, but the *quo animo*, the disposition or state of mind, with which the act is done. *Maher v. People*, 10 Mich. 212, 217, 81 Am. Dec. 781.

**Grades.**

At common law but two grades of felonious homicide existed, murder and manslaughter. *Commonwealth v. Sayres* (Pa.) 12 Phila. 553, 555.

Homicide is the killing of any human creature, and is of three kinds, justifiable, excusable, and felonious. *State v. Lodge* (Del.) 33 Atl. 312, 314, 9 Houst. 542; *State v. Miller* (Del.) 32 Atl. 137, 138, 9 Houst. 564; *State v. Jones* (Del.) 47 Atl. 1006, 2 Pennewill, 573; *Stout v. State*, 90 Ind. 1, 10.

Homicide is either murder, manslaughter, excusable homicide, or justifiable homicide. The killing of a human being, unless it is excusable or justifiable, is either murder or manslaughter. Pen. Code, §§ 179, 180, 183, 184, 188; *People v. Hill*, 3 N. Y. Supp. 564, 565, 49 Hun, 432; *People v. Connors*, 35 N. Y. Supp. 472, 475, 13 Misc. Rep. 582.

Code Ga. § 4319, defines homicide as being of three kinds, murder, manslaughter, and justifiable homicide. *Daly v. Stoddard*, 66 Ga. 145, 146.

"Homicide, of which murder is the highest and most criminal species, is of various degrees, according to circumstances. The term in its largest sense is generic, embracing every mode by which the life of one man is taken by the act of another. Homicide may be lawful or unlawful. It is lawful when done in lawful war upon an enemy in battle. It is lawful when done by an officer in the execution of justice upon a criminal pursuant to a proper warrant. It may also be justifiable, and of course lawful, in necessary self-defense." *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 303, 52 Am. Dec. 711.

In *State v. Smith*, 77 N. C. 488, it is said homicide is murder, unless it be attended with extenuating circumstances, which must appear to the satisfaction of the jury; and if the jury are left in doubt on this point it is still murder. *State v. Jones*, 3 S. E. 507, 510, 98 N. C. 651.

**HOMICIDE BY MISADVENTURE.**

"Homicide by misadventure" is the accidental killing of another where the slayer is doing a lawful act, unaccompanied by any criminally careless or reckless conduct. *State v. Miller* (Del.) 32 Atl. 137, 138, 9 Houst. 564; *State v. Lodge* (Del.) 33 Atl. 312, 314, 9 Houst. 542.

When instructing the jury in a prosecution for murder, the court said that, if the killing was unlawful, it was for the jury to inquire whether the act was intentional or unintentional. If it was unintentional, if the defendant had no purpose in firing his pistol, but it was discharged by him accidentally, and at the time of its discharge the pri-

son was engaged in no unlawful act, and if it was not negligently discharged, then the act of killing was a homicide by misadventure, and no crime. *United States v. Meagher* (U. S.) 37 Fed. 875, 879.

**HOMICIDE BY NEGLIGENCE.**

"Homicide by negligence," of the second degree, is that which occurs in the performance of an unlawful act. Pen. Code, art. 578. To constitute this offense there must have been an apparent danger of causing the death of the person killed. Article 586. To bring the offense within the definition of homicide by negligence of the first or second degree, there must be no apparent intention to kill, and the homicide must be in consequence of the act done or attempted to be done. Articles 584, 585. Where a husband was shown to have been in a quarrel with a neighbor in the former's dooryard, and was waving a pistol without any apparent intention to shoot, and his wife was shot on coming to the door and urging him to come in, in a prosecution for such killing, an instruction as to homicide by negligence should have been given. *Howard v. State*, 8 S. W. 929, 930, 25 Tex. App. 686.

**HOMICIDE IN SELF-DEFENSE.**

Homicide in self-defense is homicide committed in the defense of one's own life or that of his family, relatives, or dependents, within those relations where the law permits the defense of others as of one's self. *Pond v. People*, 8 Mich. 150, 175.

"Homicide in self-defense" occurs where one is assaulted upon sudden affray, and in defense of his person, where certain and immediate suffering would be the consequence of waiting for the assistance of the law and there is no other probable means of escape, he kills his assailant. *State v. Miller* (Del.) 32 Atl. 137, 138, 9 Houst. 564.

**HOMOEOPATHIC.**

See "Homeopathic."

**HOMOLOGATION.**

"To homologate is to say the like." *Viales' Syndics v. Gardenier* (La.) 9 Mart. (O. S.) 324, 325.

Homologation is a confirmation, an approval. To homologate is to say the like—"similiter dicere." An order for homologation has never been held as an interlocutory order which is effective without the signature of the court, and hence one not so signed does not constitute an homologation. *Hecker v. Brown*, 29 South. 232, 234, 104 La. 524.

## HOMOPOLAR MACHINE.

A unipolar or homopolar electrical machine is one in which currents are generated continuously in the windings in one direction. It is a machine in which the lines of force are cut in one direction only, as distinguished from alternating current machines, in which the lines of force are cut in alternating opposite directions, and which require the use of commutators to straighten out the current. *General Electric Co. v. Winsted Gas Co.* (U. S.) 110 Fed. 983.

## HONEST.

Defendant, in a prosecution for embezzlement, who had been indicted for a similar crime before, testified as a witness in his own behalf. The prosecuting attorney in his argument to the jury said that honest men were not indicted for embezzlement. Held, that the word "honest," as so used, would impress the jury with the idea, not that the party was unworthy of belief as a witness, but that he was a dishonest person in business transactions. *State v. Fourchy*, 25 South. 109, 114, 51 La. Ann. 228.

"Honest," as used in an instruction charging that the recent possession of stolen property is evidence which the jury is authorized to consider in determining the guilt of the accused, unless "such possession be accounted for in some honest, satisfactory way," refers to the account—that is, the explanation—of the possession and not to the character of the possession, or the way in which it was acquired; the word being used in the sense of "truthful." The words "honest" and "satisfactory," being used together, both refer to the account or explanation given of the possession. *Davidson v. State*, 30 S. E. 946, 104 Ga. 761.

## HONEST ACCOUNT.

Where, in a prosecution for larceny, the defendant requested an instruction that, if the defendant gave an "honest account" of how he came into possession of a steer which he was charged with stealing, the burden was on the state to show that such account was false, such instruction cannot be construed as meaning that the state would only be required to prove that the defendant's account of his possession was false, since an honest account is a true account, and hence the instruction would have required the state to prove that defendant had not stolen the steer, if he had stated that he did steal it, which is not the law. *People v. Beulina*, 22 Pac. 396, 397, 81 Cal. 135.

## HONEST BELIEF.

"Honest belief," as used in an instruction making the right of plaintiff to cross the

tracks of a railway company to depend on his honest belief that it was safe to do so, means such a belief as had a reasonable basis. *Redhing v. Central R. Co.*, 54 Atl. 431, 432, 68 N. J. Law, 641.

While the phrase "honest belief" may be found in legal opinions which undertake to define privileged communications, the phrase, without addition or qualification, is not sufficient as a definition of the law of justification for what would otherwise be regarded as slanderous words. A man may inflict an injury upon another without intending any injury, and still be liable for his unjustifiable act, and defendant, in order to clear himself from the imputation of carelessness, should show, not only that he was acting in an honest belief that the story communicated by him was true, but that there were reasonable grounds to induce such belief. *Toothaker v. Conant*, 40 Atl. 331, 91 Me. 438.

## HONEST CLAIM.

"Honest claim," as used in the statement that the compromise of a disputed claim is a good consideration for a compromise, if the claim is an honest one, means "a claim which the claimant does not know is unsubstantial, or such that he does not know facts which show that his claim is a bad one." *Miles v. New Zealand Alford Estate Co.*, 32 Ch. Div. 266, 283.

## HONESTY.

"Honesty," as used in an offer by defendant, in a prosecution for carnal knowledge of a girl under age of consent, to prove his reputation for morality, virtue, and honesty of living, means chastity. The word "honesty," from the Latin "honestus," is essentially a word that takes its meaning from its context. Primarily it means suitable, becoming, or decent; meanings that obviously lend themselves to divers contexts. In moneyed transactions it means financial integrity; in affairs of state it means loyalty; in matters of friendship it means steadfastness; and so on. This is an accepted signification. In Webster's Dictionary it is said to mean chastity, modesty. *State v. Snover*, 43 Atl. 1059, 63 N. J. Law, 382.

"According to the best lexicographers of our language, at least in this country, the words 'truth,' 'veracity,' and 'honesty' are almost synonymous, very nearly the same definitions being given to each of the words. Truth is so nearly allied to honesty and moral soundness, it seems to us, that where a witness has testified in chief that the reputation of a person for truth and veracity is good, it is competent to ask him on cross-examination if he has not heard of a certain matter which would seriously affect the repu-

tation of the party for honesty and moral soundness, as being necessarily inconsistent and at variance with the reputation he has given the party." *Wachstetter v. State*, 99 Ind. 290, 297, 50 Am. Rep. 94.

## HONOR.

See "Office of Honor."

"Honored" means when the bills were paid, and not when they were accepted. *Lucas v. Groning*, 7 Taunt. 164, 168.

Writing the word "honored" on a bill is a sufficient acceptance. *Peterson v. Hubbard*, 28 Mich. 197, 199.

In an action on a bill as to which the drawee had written that the bill would meet with due "honor" from him, the court said: "It would have been much better doctrine if it had been originally determined that nothing else should amount to an acceptance than a written acceptance on the bill itself, but it is now too late to revert to that; it having been determined by many cases that an acceptance may be by parol. What is an acceptance but an engagement to pay the bill when due? This, then, is stronger than a parol acceptance, because it is a written engagement"—and held that such promise to honor the bill was an acceptance. *Clarke v. Cock*, 4 East, 57, 72.

## HONORABLE DISCHARGE.

"Honorable discharge," as used in Act March 14, 1895 (P. L. 1895, p. 317), prohibiting the removal of an honorably discharged Union soldier from a position under the government of any city of the state, except for good cause shown and after a hearing upon written charges preferred against the incumbent, cannot be construed to apply to a soldier of the War of the Rebellion who deserted from his regiment, but who afterwards received his discharge under an order of the war department which authorizes such discharge to be issued to him upon his furnishing a substitute. *Francis v. City of Newark*, 33 Atl. 853, 855, 58 N. J. Law, 522.

## HONORABLY BOUND.

The use of the words "honorably bound," in a written proposition from a creditor to a debtor, requesting the execution and delivery to him of a deed of the mortgaged property and the title papers, and to surrender possession, which states that "I shall consider myself honorably bound, if anything can be made out of the property, to give A. the benefit of it," does not show that the creditor does not intend to bind himself legally to do as he agrees. *Lake v. Freer*, 11 Ill. App. (11 Bradw.) 576, 580.

## HONORARIUM.

"Honarium" is a voluntary donation in consideration of services which admit of no compensation in money; in particular to advocates at law, deemed to practice for honor and influence, and not for fees. It is a lawyer's or counselor's fee. The term is applied mostly to English barristers, advocates, etc., being seldom applied in this country. *McDonald v. Napier*, 14 Ga. 89, 105; *Mooney v. Lloyd (Pa.)* 5 Serg. & R. 412, 415.

## HONORARY.

The word "honorary," in a resolution of a board of health that the office of engineer to such board shall be "honorary," means without profit, fee, or reward, and in consideration of the honor conferred by holding a position of responsibility and trust. If a recompense was to be received or a payment made, either by salary or otherwise, the office would not be "honorary" alone, but one of emolument also. *Haswell v. City of New York*, 81 N. Y. 255, 258.

## HOOK.

The common and ordinary meaning of the word "hook" is not "steal," nor does its connection with the words "You hooked my geese" give it that signification, so as to make the words actionable per se, as imputing a criminal charge. *Hays v. Mitchell (Ind.)* 7 Blackf. 117.

## HOOP IRON.

The words "all hoop iron," as used in the act of June 30, 1864, subsequently incorporated in section 2504, Rev. St., include not only hoop iron in strips of from 30 to 60 feet in length as it comes from the rolls, in which form it is usually bought and sold, but also all lengths of hoop iron not changed by manufacture into a new and distinct article. *Kennedy v. Hartranft (U. S.)* 9 Fed. 18, 19.

## HOP.

The words "hop cars," when used in reference to the practice of a newsboy to hop street cars while on the street while in motion, for the purpose of selling his papers, means to jump on and off the cars. Such a newsboy is not a passenger. *Raming v. Metropolitan St. Ry. Co.*, 57 S. W. 268, 269, 157 Mo. 477.

## HOP ALE.

See "American Hop Ale."

As intoxicating liquors, see "Intoxicating Liquor."

## HOP BEER.

Whether the term "hop beer" designates an intoxicating liquor is a question for the jury, in a prosecution for the sale of hop beer. *State v. McCafferty*, 63 Me. 223, 224.

## HOP TEA.

"Hop tea," and "hop tea tonic," as sold in Kansas, are imitations of lager beer, made from malted grain, hops, and water, slightly fermented, and contain a very slight percentage of alcohol. *City of Lincoln Center v. Linker*, 53 Pac. 787, 788, 7 Kan. App. 282.

## HOPE.

The word "hope," as used in a will, in a clause stating that the testator hopes a legatee will make a certain disposition of the fund bequeathed, is a word of intention, which the court will carry into effect, as if the testator had used an absolute word of devise in trust, and the court will direct the donee or first taker to hold as a trustee for those whom the donor intended to benefit. *Cockrill v. Armstrong*, 31 Ark. 580, 589 (citing 1 Perry, Trusts, c. 4, § 112).

The word "hope," as used in a will wherein testator makes a devise and thereafter expresses a hope as to the disposition of the property or fund, is a precatory word, sufficient to create a trust in the property devised. *Curd v. Field*, 45 S. W. 92, 103 Ky. 293; *Major v. Herndon*, 78 Ky. 123, 129; *Bohon v. Barrett's Ex'r*, 2 Ky. Law Rep. 371, 374.

## HOPPER.

A "hopper" is a mechanical device, which, in the progress of the arts, was resorted to, to take the place of the hands, for the purpose of feeding or conducting a substance from one position to another. *Carter Mach. Co. v. Hanes*, 78 Fed. 346, 348, 24 C. C. A. 128.

## HORIZONTAL REDUCTION.

A horizontal reduction is a uniform reduction made by a carrier in transportation charges. *Steenerson v. Great Northern Ry. Co.*, 60 Minn. 461, 472, 62 N. W. 826.

## HORN CHAIN.

"A horn chain need not necessarily be made wholly from horn, but may be true to its name, though made partly of hoof, as a contract to furnish gold watches or mahogany furniture would not be construed as to require the whole watch to be gold, or the whole piece of furniture to be mahogany."

*Swett v. Shumway*, 102 Mass. 365, 368, 3 Am. Rep. 471.

## HORS DE SON FEE.

"Hors de son fee" was a plea in use when Norman French was the only language used in the courts of England. It means, literally translated, "out of his fee." In England, at common law, the property of a tenant could never be taken after the disruption of the relation of landlord and tenant, and a removal from the demised premises. In such a case the tenant set up "hors de son fee," which was to say, "I am no longer your tenant, and am, with my goods, out of your land." *Mather v. Wood*, 12 Pa. Co. Ct. R. 3, 4.

## HORSE.

See "Farm Horse"; "Work Horse."

The word "horse," as used in the statutes of 1850, 1851, and 1866, defining the manner of estraying stock, is used in a quasi generic sense to include every description of the male, in contradistinction to the female or mare, whether stallion or gelding. *Owens v. State*, 38 Tex. 555, 557.

The word "horse" includes animals of both sexes and of all ages. *Rev. St. Wyo.* 1899, § 5203.

The word "horse," as used in a provision of the Code punishing the felonious taking or stealing of any horse, mule, or ass, includes animals of both sexes and all ages, embraced under such terms. *Shannon's Code Tenn.* 1896, § 6553.

If a person agrees to sell a "horse," there is no ambiguity in the expression, though it is uncertain whether the horse is of one sex or the other. *Ashworth v. Mounsey*, L. R. 9 Exch. 175, 187.

**As beast, cattle, or domestic animal.**

See "Beast"; "Cattle"; "Domestic Animal."

**As chattel or merchandise.**

See "Chattel"; "Merchandise."

**Colt.**

The term "horse," as distinguished from "colt," means a horse old enough to be worked. *Mallory v. Berry*, 16 Kan. 293, 295.

"Horse" is the generic name of the equine species. It includes a colt, and therefore an indictment charging that defendant branded a colt with the intent to defraud, etc., is sufficient to show that the branded animal was a horse. *Pullen v. State*, 11 Tex. App. 89, 91.



There is a general tendency of the courts to hold that, where a statute exempts "horses," young animals of the species and description, that by time and subsequent growth would become such in a popular sense, are within the meaning and import of these terms as used in the statute. *Berg v. Baldwin*, 18 N. W. 821, 822, 31 Minn. 541.

The term "horses," in a statute exempting two horses from execution, includes a colt, if the owner does not own other horses. *Kennedy v. Bradbury*, 55 Me. 107, 92 Am. Dec. 572.

#### Filly.

"Horse," as used in Pasch. Dig. art. 2409, providing for the punishment of any person who steals "any horse, gelding, mare, colt, ass, or mule," cannot be construed in its generic sense, so as to include a filly. *Lunsford v. State*, 1 Tex. App. 448, 450, 28 Am. Rep. 414.

#### Gelding.

Under a statute exempting to each family two horses, geldings are exempt. *Allison v. Brookshire*, 38 Tex. 199, 201.

The term "horse" includes a gelding, and therefore an indictment for selling a horse may be sustained by evidence of the theft of a gelding. *State v. Donnegan*, 34 Mo. 67; *Baldwin v. People*, 2 Ill. (1 Scam.) 304; *People v. Butler*, 2 Utah, 504, 507; *Hooker v. State*, 4 Ohio (4 Ham.) 348, 350.

"Horse," as used in Pen. Code, art. 765, which declares that, if any person shall steal "any horse, gelding, mare, colt," etc., he shall be punished, etc., does not include a gelding. Hence an indictment charging the stealing of a horse is not sustained by proof of stealing a gelding. *Jordt v. State*, 31 Tex. 571, 572, 98 Am. Dec. 550; *Banks v. State*, 28 Tex. 644; *Persons v. State*, 3 Tex. App. 240, 242; *Johnson v. State*, 16 Tex. App. 402, 409; *Valasco v. State*, 9 Tex. App. 76, 77; *Brisco v. State*, 4 Tex. App. 219, 221, 30 Am. Rep. 162.

In an affidavit for continuance in a prosecution for the theft of a gelding, in which it was alleged that defendant expected to prove by certain witnesses that he purchased the horse, for which he is charged of theft, from a certain person who had authority to sell such horse, "horse" should be construed in its generic sense, so as to include a gelding. *Trevinio v. State*, 1 Tex. App. 72, 73.

Webster defines "horse" in two senses: (1) Generically, as the family simply, including all variations of age, sex, and conditions; (2) specially, as indicating the male, in distinction from the female. The term has a third sense, a popular sense, as denoting a castrated male, in distinction from a stallion. In statutes employing the word "horse" as one of the subjects of larceny, it means the

unaltered male animal; and hence proof, under an indictment charging the theft of a gelding, which described the animal simply as a horse or colt, constituted a fatal variance. *State v. McDonald*, 24 Pac. 628, 629, 10 Mont. 21, 24 Am. St. Rep. 25.

In common parlance the terms "horse" and "gelding" are often used interchangeably, so that, under an indictment charging the theft of a gelding, the refusal of an instruction that, if the proof showed the theft of a horse, the jury must acquit, was not error. *State v. Ingram*, 15 Kan. 14, 19.

The term "horse," in an indictment charging the stealing of a horse in violation of a statute making it criminal to steal any "horse, mare, or gelding," does not include the term "gelding," and therefore proof of the stealing of a gelding will not sustain the conviction. Where, in a statute, a general word is used, and afterwards more special terms, defining an offense, an indictment charging the offense must charge the most special terms, and if the general word is used, though it would embrace the special term, it is bad. Thus, if the descriptive term "horse" alone had been used in the statute, evidence that a gelding had been stolen would have been admissible; but, as the Legislature have thought proper to particularize and define other objects, the conclusion is obvious, from the reasoning employed, that in an indictment under the statute it is necessary to be equally specific. *State v. Plunket* (Ala.) 2 Stew. 11, 12; *State v. Buckles*, 26 Kan. 237, 241.

#### Jack.

The term "horse," in a statute exempting horses from execution, includes a jackass. *Robinson v. Robertson*, 2 Willson, Civ. Cas. Ct. App. §§ 253, 254.

In popular acceptance, a jack is not a horse. One who goes to a liveryman and engages a horse to ride would not expect to have a jack brought out for his use, nor would one who advertised the sale of jacks expect that prospective horse buyers would attend. Horses and jacks are different animals, and the word "horse," as used in a shipping contract, in a clause limiting the measure of recovery for each "horse, mule," etc., does not include a jack; the word not being used in a general sense, so as to include all quadrupeds of a similar description. *Richardson v. Chicago & A. Ry. Co.*, 50 S. W. 782, 785, 149 Mo. 311.

#### Mare.

The term "horse," in a statute making it criminal to willfully kill or destroy any horses, etc., includes a mare, as the term "horse" is nomen generalissimum. *State v. Dunnivant* (S. C.) 3 Brev. 9, 10, 5 Am. Dec. 530.

"Horse," as used in an Indiana statute providing that any person who "shall suffer his horse, mare, or gelding to be run in what is commonly called a horse race shall be fined," etc., means a stallion; and hence an indictment under the statute, charging that the defendant suffered his mare to be run, etc., is not supported by evidence that the animal run was a "horse." *Thrasher v. State* (Ind.) 6 Blackf. 460.

"Horse," as used in Comp. Laws, § 2108, making it grand larceny to steal a horse, mare, or gelding, includes both mare and gelding, and under an indictment for stealing two horses a conviction for stealing a gelding and a mare will be sustained. *People v. Butler*, 2 Utah, 504, 507.

"Horse," as used in a statute relating to the stealing of any horse, is used in its generic sense, and includes a mare. *State v. Gooch* (Ark.) 29 S. W. 640, 60 Ark. 218 (citing 1 Tayl. Ev. § 290; 1 Bish. Cr. Proc. § 620; *Rex v. Aldridge*, 4 Cox, Cr. Cas. 143; *People v. Monteith*, 73 Cal. 7, 14 Pac. 373).

Code, § 4328, declares horse stealing shall be denominated simple larceny, and the term "horse" shall include a mule and ass, and each animal of both sexes, without regard to the alterations which may be made by artificial means. Held, that the word "horse," as used in the statute, excludes mares, if used in an indictment, since Code, § 4249, requires an indictment to designate the nature, character, and sex of the animal, and give some other description by which its identity shall be ascertained. *Taylor v. State*, 44 Ga. 263, 264.

Horse is used at common law in its generic sense, as including all animals of the horse species, whether male or female; hence an indictment charging the stealing of a horse is sustained by proof of the stealing of a mare. *People v. Pico*, 62 Cal. 50, 52; *Baldwin v. People*, 2 Ill. (1 Scam.) 304; *Davis v. State*, 4 S. W. 590, 23 Tex. App. 210.

"Horse," as used in Pen. Code, art. 746, providing for the punishment of any person stealing a horse, should be construed in its generic sense, and embraces all animals of the horse species. A mare falls within the designation of horse. *Collins v. State*, 16 Tex. App. 274, 281.

"Horses," as used in P. L. 80, c. 7, providing that if any person shall in the nighttime maliciously, unlawfully, and willingly kill or destroy any horses, sheep, or other cattle, he shall be guilty of a felony, includes mares as nomen generalissimum. *State v. Dunnavant* (S. C.) 3 Brev. 9, 10, 5 Am. Dec. 530.

The term "horse," in a bill of sale of one gray horse, one black horse, and one

gray mare, does not include a black or bay mare. *Miller v. Hahn*, 84 N. C. 226, 229.

The word "horse" is a generic term, and includes a mare, and hence the substitution of the word "mare" for "horse" in an amended complaint in an action against a railroad company for killing a horse is not the substitution of a new cause of action. *South & N. A. R. Co. v. Bees*, 2 South. 752, 753, 82 Ala. 340.

"Horse" is a generic term, and includes ordinarily the different species of the animal, however diversified by age, sex, or artificial means; and hence a finding that two horses were released from a chattel mortgage is a sufficient finding that two mares were released. *Troxler v. Buckner*, 58 Pac. 691, 692, 126 Cal. 288.

Acts 1870, p. 121, exempts to every family from forced sale, among other things, two horses, etc. Held, that the word "horses" should be construed to include geldings, mares, or mules; all being used for the same purpose. The object of the Legislature in passing the exemption law was manifestly to secure to each family a sure means of support, and the exemption of two horses was evidently intended to protect family animals used to cultivate the soil, and it would not be a liberal construction of the legislative intent to say that the use of the word "horses" in that connection excluded geldings, mares, or mules, since all are used for the purpose. *Allison v. Brookshire*, 38 Tex. 199, 201.

A mare is none the less a "horse" because spelled "mair" in an indictment for horse stealing. *State v. Myers*, 85 Tenn. (1 Pickle) 203, 5 S. W. 377.

#### **Mule or ass.**

Horses include mules. *Davis v. Collier*, 13 Ga. 485, 491.

"Horses," as used in a statute requiring a railroad company to erect and maintain fences sufficient to prevent cattle, horses, sheep, and hogs from getting on such railroad, includes mules and asses. "Horses and asses are both defined by lexicographers as 'quadrupeds of the genus equus.'" *Ohio & M. R. Co. v. Brubaker*, 47 Ill. 462, 463.

The word "horse" is sometimes used as a generic name, including all animals of the horse kind. As used in Acts 1833, c. 10, prohibiting the running of a horse race along a public road, it should be construed to include mules. *Goldsmith v. State*, 38 Tenn. (1 Head) 154, 156 (citing Bouv. Law Dict. 590).

The term "mares, horses, or geldings," in Act March 15, 1821, providing for the payment of reward to any person who shall pursue and apprehend any person who shall have stolen any mare, horse, or gelding, etc.,

does not include a mule. *Commonwealth v. Davidson*, 4 Pa. Dist. R. 172.

Under a statute exempting two horses for each family, mules are exempt, as they are used for the same purposes. *Allison v. Brookshire*, 38 Tex. 199.

Code, § 530, exempting from execution or attachment, if the debtor at the time is actually engaged in the business of agriculture, one "pair of horses," should be construed to include a team of mules. *State v. Cunningham*, 6 Neb. 90, 92.

"Horse," as used in a statute exempting from execution a horse used by the head of a family, means any animal of the genus "equus" or "horse," and hence includes an ass. *Richardson v. Duncan*, 49 Tenn. (2 Heisk.) 220, 222.

#### **Pony.**

Though a pony is defined by Webster to be a small horse, the terms "horse" and "pony" are not, in common usage and acceptance, synonymous or convertible terms; but, on the contrary, the term "pony" is used to distinguish from horses in general a peculiar breed having well-known and strongly marked characteristics. Thus a description in a chattel mortgage of one pair of clay-bank horses is not sufficient to describe a yellow pony with some white about him. *Golden v. Cockrill*, 1 Kan. 259, 266, 81 Am. Dec. 510.

#### **Stallion.**

"Horse," as used in Penal Codes, imposing a penalty for stealing any horse, mare, colt, mule, or ass is not used in its comprehensive and general sense but is synonymous with "stallion." *Banks v. State*, 28 Tex. 644, 648; *State v. Plunket* (Ala.) 2 Stew. 11, 12; *Thrasher v. State* (Ind.) 6 Blackf. 460; *Turley v. State*, 22 Tenn. (3 Humph.) 323, 324; *State v. Buckles*, 26 Kan. 237, 241.

"Horses," as used in Practice Act, § 219, subd. 3, exempting from execution the farm utensils of the judgment debtor, also two oxen, or two horses, or two mules, and food for them for one month, means horses suitable and intended for the ordinary work conducted on a farm. The purpose of the act was to secure to the judgment debtor the means to prosecute his vocation and earn a support for himself and family. "In securing to a farmer two horses, the Legislature intended by this exemption to enable him to prosecute his business of farming in the ordinary sense of that term, and the horses which are reserved to him must be such as are suitable and intended for that use, and hence a stallion is not exempt." *Robert v. Adams*, 38 Cal. 383, 99 Am. Dec. 413.

Acts 1833, c. 80, § 1, exempting one farm horse from execution, may include a

stud horse, for he may be used for farming purposes. *Tipton v. Pickens*, 31 Tenn. (1 Swan) 25, 26.

Gen. St. § 3243, par. 3, exempting from execution "two oxen, or two horses, or two mules, and their harness, two cows, and one cart or wagon," does not apply to stallions kept solely for breeding purposes and not used as work horses; the statute only intending such animals as would be useful in assisting the debtor to gain a livelihood by farming, etc., as ordinarily conducted. *Krieg v. Fellows*, 30 Pac. 994, 995, 21 Nev. 307.

#### **Saddle, bridle, etc.**

As used in Hart. Dig. art. 1270, declaring that one horse shall be reserved of every citizen of this republic, free and independent of a writ of fieri facias or other execution, includes the saddle, bridle, martingale, and everything absolutely essential to the beneficial enjoyment of the horse; and it would seem that by fair construction the statute must include, not only the subject itself, but everything absolutely essential to its beneficial enjoyment. *Cobbs v. Coleman*, 14 Tex. 594, 597.

#### **HORSE BEAST.**

A description of an animal maliciously wounded as a "horse beast" in the indictment, is sufficient to include any animal of the horse kind, as distinguished from animal of the cow kind, or any other kind of a beast, within the purview of the act punishing malicious mischief. *State v. Pearce*, 7 Tenn. (Peck) 66, 68.

#### **HORSE POWER.**

The term "horse power," as used in a warranty that an engine was a "thirty horse power engine," means one possessing a certain mechanical force defined by the number 30 horse power, a horse power being a definite amount of mechanical force, and one that is capable of furnishing that amount of power, without being strained or injured in its parts as a machine. *Harrington v. Smith*, 138 Mass. 92, 96.

#### **HORSE RACING.**

As a game, see "Game."

As lottery, see "Lottery."

#### **HORSE RAILROAD.**

A city ordinance authorized a railroad chartered to construct a road between such city and another town to lay "horse railroad" tracks within said city; and in construing this ordinance, the court said: "The words 'horse railroad track' \* \* \* must be taken as descriptive of the railroad to be constructed, and not of the motive power to

be used. Railways in the streets of cities, laid to conform with the grade of the streets, and properly known as 'street surface railroads,' by common usage had been designated as 'horse railroads,' from the fact that they were for a long time operated exclusively by horses being attached" to the cars. "Horse railroads" and "street surface railroads" have come to be convertible terms. *Paterson Ry. Co. v. Grundy*, 26 Atl. 788, 791, 51 N. J. Eq. (6 Dick.) 213.

New Orleans City Charter (Acts 1882, pp. 14, 21, No. 20), § 8, providing that the common council should have power to authorize the use of the streets for "horse and steam railroads," cannot be construed as limiting the power with reference to railroads propelled by other motive powers; the terms "horse" and "steam" being mentioned merely because, according to the then existing state of the art, horses and steam were the only means for the propelling of street cars in use, but not being designed as limitations. *Buckner v. Hart* (U. S.) 52 Fed. 835, 836.

In 1867 a corporation was given by its charter the exclusive horse railway franchise of Omaha for 50 years. Later another company, under a city ordinance consented to by the people in 1884, and authorizing it to do so, undertook to lay a cable tramway on streets occupied by plaintiff, who sought to enjoin defendant, complaining that, as at the date of its grant horse railways were the only street railways known, the term "horse railway" should be regarded as covering all varieties of street railways. Held, that under the rule that all grants and franchises belonging to the public should be construed against the grantees, and for the stronger reason that grants giving monopolies should be so construed, it cannot be held that the term "horse railway" included all forms of street railway connection. *Omaha Horse Ry. Co. v. Cable Tramway Co.* (U. S.) 80 Fed. 324, 327.

#### HORSE SPECIES.

"Horse species," as used in an indictment charging the theft of an animal of the horse species and as commonly understood—that is, as defined by the standard lexicographers and as taught in our common schools—includes a stallion, a gelding, a mare, a filly, a colt; in short, a horse, and nothing more nor less. In zoology the horse is a species of the genus "equus," which genus consists of six distinct, though nearly allied, species. The word "species" means a sort, a kind, a class, subordinate to a genus; while the word "genus" signifies a class embracing many species. The expression "an animal of the horse species" would not include any animal belonging to a distinct species, though of the same genus. *Smythe v. State*, 17 Tex. App. 244, 251.

#### HORSES.

"Horses," as used by miners, means the formation of a number of seams, and the decomposition of the material included between the seams, of unaffected wall rock. *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* (U. S.) 63 Fed. 540, 544.

#### HORSESHOE CALK.

A horseshoe calk is a mere bit of iron or steel, not intended for display, but for an obscure use, and adapted to be applied to the shoe of a horse for use in snow, ice, and mud. *Rowe v. Blodgett & Clapp Co.* (U. S.) 103 Fed. 873, 874.

#### HORSESHOE DISTRICT.

The phrase "horseshoe district" is as well known in New Jersey as a synonym for unfair political methods as is the word "gerrymander" throughout the United States. *Morris v. Wrightson*, 28 Atl. 56, 63, 56 N. J. Law, 126, 22 L. R. A. 548.

#### HOSIERY.

The term "hosiery," as used in the tariff act of 1832, was a word of more general signification than "stockings," which was the word used in the act of 1816, and which was dropped in the act of 1828, when the word "hosiery" was introduced. It signifies a class or description of goods. *Hall v. Hoyt* (U. S.) 11 Fed. Cas. 226, 227.

#### HOSPES.

The word "hospes," among the Romans, was a term to designate the owner of a mansion having on either side of it apartments for the entertainment of strangers. It was also used to designate the guest received by him. *Cromwell v. Stephens* (N. Y.) 2 Daly, 15, 17.

#### HOSPITAL.

See "Permanent Hospital."

As charity, see "Charity"; "Public Charity."

The primary meaning of the word "hospital" was an inn where guests were entertained for compensation. Now the word is more commonly applied to a building founded from charity, where the sick and disabled may be treated solely at their own expense, or at the expense of a corporation which receives only indigent patients, and is sometimes known as an "almshouse," and in either case it becomes a charitable institution. In *re Curtiss*, 7 N. Y. Supp. 207, 208, 1 Con. Sur. 471.

"Hospitals," as used in Hill's Code Wash. § 1022, exempting all hospitals for the care of sick from taxation, will not be held to include the land upon which the hospitals are situated, but the buildings alone. *Thurston County v. Sisters of Charity of House of Providence*, 44 Pac. 252, 253, 14 Wash. 264.

#### **Pesthouse.**

"Hospitals," as used in an ordinance providing for the establishment of hospitals, includes pesthouses. *Clayton v. City of Henderson*, 44 S. W. 667, 668, 103 Ky. 228.

#### **State prison.**

In Act March 21, 1895 (Laws 1895, c. 54), providing that any person who shall become a pauper or public charge while at any hospital shall be chargeable for support to the county in which he resided before entering such institution, "hospital" cannot be construed to include the state prison. *New Hampshire Asylum for Insane v. Belknap County*, 44 Atl. 928, 69 N. H. 174.

### **HOSPITIUM.**

Among the Romans, on either side of the spacious mansions of the wealthy patricians, were small apartments, known as the "hospitium," or place for the entertainment of strangers. *Cromwell v. Stephens* (N. Y.) 2 Daly, 15, 17.

### **HOST.**

"To host" was to put up at an inn. *Cromwell v. Stephens* (N. Y.) 2 Daly, 15, 20.

### **HOSTEL.**

"Hostel" was a word applied to signify large houses in France, built upon a scale sufficiently extensive to enable their owners to discharge the duties of hospitality. *Cromwell v. Stephens* (N. Y.) 2 Daly, 15, 17.

### **HOSTILE POSSESSION.**

"Hostile possession," when applied to the possession of an occupant of real estate holding adversely, is not to be construed as meaning ill will, or that he is in any sense an enemy of the person holding the legal title, but means an occupant who holds and is in possession as owner, and therefore against all other claimants of the land. *Ballard v. Hansen*, 51 N. W. 295, 297, 33 Neb. 861; *Hofdne v. Ewing*, 84 N. W. 93, 94, 60 Neb. 729; *Griffin v. Mulley*, 31 Atl. 664, 167 Pa. 339.

### **HOSTLER.**

"Hostler" was the title of the officer in a monastery charged with the entertainment

of guests. It was also the Norman word for innkeeper, and was in use until about the time of Elizabeth. When the keeping of horses at livery became a distinct occupation, it was the term for the keeper of a livery stable, and afterwards of the groom who had charge of the stables of an inn. *Cromwell v. Stephens* (N. Y.) 2 Daly, 15, 20.

At a roundhouse a "hostler" is a man whose duty it is to care for locomotives at the roundhouse and to run them in and out of it. *Chicago & W. I. R. Co. v. Massig*, 60 Ill. App. 666, 667.

In railroad parlance a "hostler" is he who receives engines from the regular engineers as they come from the road, and takes charge of them in the shops or roundhouse, and has them cleaned and ready for departure on the road again when they are wanted. *Chicago & St. L. R. Co. v. Ashling*, 34 Ill. App. 99, 105.

A railway employé, whose duty it is to move engines when sent to the roundhouse and to take an engine to the cinder or ash pit preparatory to cleaning it, is called a "hostler." *Grannis v. Chicago, St. P. & K. C. R. Co.*, 46 N. W. 1067, 81 Iowa, 444.

### **HOTCHPOT.**

By "hotchpot" is meant that each child is to inherit at the death of the parent an equal proportion of the estate. *McLure v. Steele* (S. C.) 14 Rich. Eq. 105, 116. But that part of the estate which has been advanced must be estimated at what it is worth at the death. *McCaw v. Blewit* (S. C.) 2 McCord, Eq. 90, 104.

"By the English statute of distributions (St. 22 & 23 Car. II, c. 12) the division by hotchpot prevails only by virtue of the express reservation of York and London. As a common-law proceeding it was only known in England in partition between sisters, coparceners, one of whom had received gifts of estates in frank-marriage. In such case, if land descends from the same ancestor to her and her sisters in fee simple, she shall have no share in them, unless she will agree to divide lands so given in frank-marriage with the rest of the lands descending. *Law v. Smith*, 2 R. I. 244, 249 (citing 2 Bl. Comm. 189; Co. Litt. §§ 266-273).

Hotchpot is the blending and mixing of property belonging to different persons in order to divide it equally. It does not mean that property or money advanced by a parent shall, on the distribution of the estate of the parent in kind or specie, be thrown in with the property which has descended, but that it is to be estimated and charged against the party according to its value at the time the advancement was made. *Ray v. Loper*, 65 Mo. 470, 472 (citing 2 Bl. Comm. 190).

"Hotchpot," as used in a statute requiring advancements to be "brought into hotchpot" with the whole real and personal estate descended, and that such party returning such advancements as aforesaid shall thereupon be entitled to his proper portion, etc., does not mean "that the party should relinquish his interest in that particular property, but it is intended to be brought in for the purpose of being taken into consideration in making a distribution of the entire estate, in order to ascertain whether it amounts to his full share of the estate. His title of the property is derived from the gift, and cannot be affected by the distribution, and consequently its value must be estimated at the time when the gift was made." *Jackson v. Jackson*, 28 Miss. (6 Cushm.) 674, 680, 64 Am. Dec. 114.

It appears to have been settled in England, soon after the passage of St. 22 & 23 Car. II, that the child who had been advanced was not required to bring his advancement into hotchpot, except in the case of a total intestacy. The rule established by 1 Rev. St. p. 754, §§ 23-26, relating to title to real property by descent, is that, if any child of an intestate shall have had advancements, the amount thereof shall be estimated in the division and distribution of the real and personal estate of the intestate. Within the meaning of this law and rule a man who dies leaving a will is not an intestate, although by his will he bequeaths only his personal estate, leaving his real estate undisposed of. *Thompson v. Carmichael* (N. Y.) 3 Sandf. Ch. 120, 127, 129.

## HOTEL

See "Family Hotel"; "Regular Hotels."  
Hotel keeping, as business, see "Business."

A hotel is a place where the proprietor makes it his business to furnish food or lodging, or both, to travelers. *Bunn v. Johnson*, 77 Mo. App. 596, 599.

A hotel is a house for entertaining travelers; an inn or public house of the better class. *Fruchey v. Eagleson*, 43 N. E. 146, 147, 15 Ind. App. 88; *City of St. Louis v. Siegrist*, 46 Mo. 493, 595; *People v. Jones* (N. Y.) 54 Barb. 311, 316; *Bonner v. Welborn*, 7 Ga. 296, 334, 337.

A hotel is a place for the general entertainment of all travelers and strangers who apply, paying suitable compensation. *Comer v. State*, 10 S. W. 106, 107, 26 Tex. App. 509.

A hotel is a place where every well-behaved stranger or traveler, who is willing to pay reasonable rates for accommodation, is entitled to receive food, drink, and lodging. *In re Application for License* (Pa.) 19 Wkly.

Notes Cas. 350, 300; *In re Beaver County Licenses* (Pa.) 3 Montg. Co. Law Rep'r, 64, 66.

The words "regular hotels and eating houses," in Rev. St. § 8092, providing that all places where intoxicating liquors are sold shall be closed on Sunday, but that the term "place," in reference to regular hotels and eating houses, shall be construed to mean a room or part of the room where such liquors are usually exposed to sale, designate places the principal, and not the subordinate, business of which is the carrying on of a hotel or eating house. *Lederer v. State* (Ohio) 3 O. C. D. 303, 304.

A hotel is none the less a hotel from the fact that it was not immediately on a highway, or that the grounds on which it stood were inclosed and the gates closed at night. Its location, and the extent of the ground surrounding it, and the manner in which those grounds were improved and reserved for the exclusive use and enjoyment of those who patronized it, doubtless made it more attractive to those who chose to make a transient resort of it, but did not convert it into a mere boarding house. A hotel is none the less one because in some respects it may be conducted differently or have more attractions than other public hotels, so long as it is held out to the public as a place for the entertainment of all transient persons who may have occasion to patronize it. Modes of entertainment alter with the fashion of the age, and to preserve a clear definition is not easy. "It is not wayfarers or travelers from a distance that at the present day give character to an inn; the point being rather that people resort to the house habitually, no matter whence coming or where going, for transient lodging and entertainment." *Fay v. Pacific Imp. Co.*, 26 Pac. 1099, 1100, 93 Cal. 253 (citing *Schouler*, Ballm. p. 249).

An inn or hotel is a house where all who conduct themselves properly and who are able and ready to pay for their entertainment are received, if there is accommodation for them, or who, without any stipulated engagement as to the duration of their stay or as to the rate of compensation, are, while there, supplied at a reasonable charge with their meals, their lodging, and such services and attention as are necessarily incident to the use of the house as a temporary abode. *Cromwell v. Stephens* (N. Y.) 3 Abb. Prac. (N. S.) 26. This is the same definition applied to the term "hotel" by the liquor tax law. *In re Brewster*, 80 N. Y. Supp. 666, 667, 39 Misc. Rep. 689.

A building containing ten rooms, separated by thin partitions, two of which rooms were well furnished, while five contained single beds and mattresses only, the remainder being unfurnished, was not a "hotel," within Laws 1896, c. 112, § 31, subd. 2, regulating the

liquor traffic and defining a hotel as a place in which there are at least ten bedrooms for the accommodation of guests. *In re Place*, 50 N. Y. Supp. 640, 645, 27 App. Div. 561.

Where the occupants of a building fitted up one side of a room with several stalls, where oysters, cooked and raw, pie, cheese, etc., were served to persons who might call for the same, mostly to teamsters and others who were stopping in the village for a short time, the building is used for "hotel purposes," within the restriction of a deed prohibiting the use for such purposes. *Stevens v. Pillsbury*, 57 Vt. 205, 210, 52 Am. Rep. 121.

The word "hotel," in France, has long ceased to be confined to its original signification, and has become a word of a more extensive meaning. It is the term for the mansion of a prince, nobleman, minister of state, or of a person of distinction of celebrity. *Cromwell v. Stephens* (N. Y.) 2 Daly, 15, 19.

#### **Boarding house distinguished.**

"Hotel," "tavern," and "inn," are properly applied to places kept for the entertainment of travelers and casual guests, as distinguished from a boarding house, which is kept principally for the residence of permanent boarders. *Martin v. State Ins. Co.*, 44 N. J. Law (15 Vroom) 485, 492, 43 Am. Rep. 397.

The word "hotel," "inn," or "tavern," implies a place for the entertainment of strangers and travelers. It does not mean a boarding house. To answer the requirements of the law relating to the granting of licenses for the sale of liquor, such places should be located with reference to their object; in the country on a regularly traveled public road, and not in a secluded spot, difficult of access, and in boroughs, towns, and villages in such convenient place, with reference to railroads or other roads and places of business, as will be most convenient to those desiring to patronize them. *In re Liquor Licenses* (Pa.) 4 Montg. Co. Rep'r, 77, 79.

#### **European plan hotel.**

The term "hotel," within the meaning of a statute in reference to the liability of the proprietor of a hotel for the loss of property of his guests, includes the class of hotels commonly known as "European." *Bernstein v. Sweeny*, 33 N. Y. Super. Ct. (1 Jones & S.) 271, 274.

A European plan hotel is a hotel in which rooms and lodging are furnished, without board. *Vonderbank v. Schmidt*, 10 South. 616, 617, 44 La. Ann. 264; 15 L. R. A. 462, 464, 32 Am. St. Rep. 336.

#### **Inn synonymous.**

See "Inn."

#### **Lodging house.**

The term "inn," "tavern," or "hotel," does not properly designate a mere lodging house, although the keeper thereof may send out and procure cooked food for his guests. A house which does not contain the means of preparing food for the table in the ordinary way has not the necessary accommodation to entertain travelers, and is not an inn within the meaning of Act 1857 in reference to the licensing of innkeepers. *Kelly v. Excise Com'rs of New York* (N. Y.) 54 How. Prac. 327, 331.

"Hotel," as used in a city ordinance fixing the rate at which hotels should be charged for the water furnished them by a water company, cannot be construed to include a large structure, eight stories in height, those above the basement being exclusively used as lodgings for single persons at a fixed rate per night; there being no arrangements for board or cooking for guests, nor any bar or restaurant belonging to or connected with the occupation of the building. *Allison*, one of the earliest of American lexicographers defines a hotel to be "an inn of a high grade; a respectable tavern." Webster calls it "a house for entertaining strangers or travelers," and says that it was formerly a house for genteel strangers or lodgers, but that the name is now given to any inn. Worcester's definition is: "A superior lodging house with the accommodations of an inn; a public house; a genteel inn; an inn." And in the last edition of Webster (1864) there is given an addition to the previous general definition: "An inn; a public house, especially one of some style or pretention." The word is of French origin, being derived from "hostel," and more remotely from the Latin word "hospes," a word having a double signification, as it was used by the Romans to denote a stranger who lodges at the house of another, as well as the master of a house who entertains travelers or guests. A hotel in this country is what in France was known as a "hotellerie," and in England as a "common inn," of that superior class usually found in cities and large towns. A common inn is defined by Bacon to be "a house for the entertainment of travelers and passengers, in which lodging and necessaries are provided for them and their horses and attendants"; and an inn is a house where all who conduct themselves properly and who are able and ready to pay for their entertainment are received, if there is accommodation for them, and who, without any stipulated engagement as to the duration of their stay or as to the rate of compensation, are while there supplied at a reasonable charge with their meals, their lodging, and such services and attention as are necessarily incident to the use of the house as a temporary home. This is exactly what is understood in this country by a hotel. In one of the earliest adjudicated

cases (Thompson v. Lacy, 3 Barn. & Ald. 283) Justice Bayley declares a hotel to be a house where a traveler is furnished with everything which he has occasion for while on his way, and in the same case it is said to be a house the owner of which holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received. A distinction was soon drawn between inns and lodging houses; it being held in numerous cases that a lodging house keeper must make a contract with every man that comes, while an innkeeper was required to furnish accommodation to any guest who should present himself. "The innkeeper," said Coleridge, J., in *Rex v. Ivens*, 7 Car. & P. 213, "is not to select his guests. He has no right to say to one, 'You shall come into my inn,' and to another, 'You shall not,' as every one coming and conducting himself in a proper manner has a right to be received; inn-keepers being a kind of public servants, having the privilege of entertaining travelers, and of supplying them with what they want." In *Carpenter v. Taylor* (N. Y.) 1 Hilt. 183, 195, it was held that a restaurant, to which a person resorts for the temporary purpose of obtaining a meal, is not an inn. On the contrary, as the customs of society changed and the modes of living were altered, the law as established under different circumstances must yield and be accommodated to such changes. Mere eating houses cannot now be considered as inns. They are wanting in some of the requisites necessary to constitute them inns, as no lodging places are provided for travelers; and, though the person may carry on in another part of his premises the business of an innkeeper, it does not follow that the liability for that part of the premises is to be extended to the whole. *Cromwell v. Stephens* (N. Y.) 2 Daly, 15, 17, 23, 3 Abb. Prac. (N. S.) 26, 36.

#### HOTEL BILL.

A contract guarantying the payment of a hotel bill includes a bill for board and lodging, but not for billiards, cigars, and liquors. *Patterson v. Gage*, 16 Pac. 560, 561, 11 Colo. 50.

#### HOTEL GARNI.

A "hotel garni" was an establishment common in Paris, in which furnished apartments were let by the day, week, or month. *Cromwell v. Stephens* (N. Y.) 2 Daly, 15, 20.

#### HOTEL KEEPER.

As a merchant, see "Merchant."

The keeper of a private lodging house, who also furnishes her guests with provisions

at a profit, is subject to the bankrupt laws as a "hotel keeper," though the provisions were set apart as the separate property of each guest. *Smith v. Scott*, 9 Bing. 14.

A hotel keeper is a person who receives and entertains as guests those who choose to visit his house, and it would not include one who merely keeps a restaurant where meals are furnished. *People v. Jones* (N. Y.) 54 Barb. 311, 316.

#### HOTELLERIES.

"Hotelleries" is a name which has been in use in France several centuries, and is still in use to some extent as a common term for inns of the better class. *Cromwell v. Stephens* (N. Y.) 2 Daly, 15, 19.

#### HOTTEST.

While it cannot be said that the word "hottest," as used in its ordinary sense, is vulgar per se, yet in its colloquial or vernacular meaning, as applied to a woman, it is obviously different. The word "hot," as defined in Webster's Unabridged Dictionary, means, among other things, "lustful, lewd, lecherous." As used in the song "Dora Dean," "She's the hottest thing you ever seen," it is used in its superlative sense, and is applied to a female. It is difficult to escape the conclusion that the word "hottest," as used in the song, has an immoral signification. *Broder v. Zeno Mauvals Music Co.* (U. S.) 88 Fed. 74, 79.

#### HOURS.

See "Banking Hours"; "Business Hours."

#### HOUSE.

See "Bad House"; "Banking House"; "Boarding House"; "Brick House"; "Business House"; "Dwelling—Dwelling House"; "Open House"; "Opera House"; "Private House"; "Public House"; "Storehouse."

Any house, see "Any."

Any other house, see "Any Other."

Other house, see "Other."

"The word 'house' clearly means a building in the ordinary sense of the word, and such building or house is not necessarily the habitation of man or beast." *Ford v. State*, 14 N. E. 241, 244, 112 Ind. 873.

A building divided into floors and apartments, with four walls, a roof, a door, and chimneys, would be considered, in ordinary parlance between man and man, as a "house." The word "house" does not necessarily mean a dwelling house. *Daniel v. Coulsting*, 7 Man. & G. 125.



The term "house," as used in an indictment for arson, imports a dwelling house. *Commonwealth v. Elliston*, 14 Ky. Law Rep. 216, 20 S. W. 214.

Within the meaning of Code, § 4068, which declares that every person who shall willfully or maliciously burn or set fire to any house, barn, stable, or other valuable building, etc., shall be imprisoned, etc., "house" is not limited in its meaning to dwelling house, or other house within the curtilage, but is used in a far more general sense as meaning any erection of value which might fall within the general description of a "house." Hence it would include a barrel house attached to a cooperage establishment. *Pike v. State*, 76 Tenn. (8 Lea) 577, 578.

The word "house," as used in an indictment charging that defendant "a certain building, to wit, a house, of one C., did set fire to and burn," does not include a dwelling house. *Commonwealth v. Smith*, 151 Mass. 491, 24 N. E. 677.

A building erected, not for habitation, but for workmen to take their meals and dry their clothes in, which has four walls, a roof, a door, but no window, but in which a person slept with the knowledge, but without the permission, of the owner, is not a "house," the setting fire to which is a felony, within St. 1 Vict. c. 89, § 3. A cottage, however mean or wretched, used as the habitation of man, is a house, within the meaning of the statute. *Reg. v. England*, 1 Car. & K. 533, 535.

A "house," as used in the definition of arson, is any building, edifice, or structure inclosed with walls and covered, whatever may be the materials used for building. *Pen. Code Tex.* 1895, art. 757; *Killman v. State*, 2 Tex. App. 222, 225, 28 Am. Rep. 432; *Smith v. State*, 5 S. W. 219, 220, 23 Tex. App. 357, 59 Am. Rep. 773.

The word "house," in a statute declaring that the offense of burglary may be committed in any dwelling house or in any other house or building, is to be construed to mean a house, without regard to its inhabitancy. *State v. Dan*, 4 Pac. 336, 18 Nev. 345.

"House," as used in St. 1858, p. 206, declaring the crime of burglary to be the breaking into any house, room, apartment, or tenement, etc., means any structure which has walls on all sides, and is covered by a roof, regardless of the fact whether it is at the time, or ever has been, inhabited by members of the human family. *People v. Stickman*, 34 Cal. 242, 245.

"House," as used in an indictment charging the felonious breaking "of the house of P.," means an edifice for the habitation of men; a dwelling house, or abode for the

human species. It does not mean a wood-house, henhouse, ashhouse, hoghouse, corn-house, warehouse, etc. *Thompson v. People* (N. Y.) 3 Parker, Cr. R. 208, 214; *Palmer v. State*, 47 Tenn. (7 Cold.) 82, 86.

A "house," within the meaning of the chapter defining and punishing burglary, is any building or structure erected for public or private use, whether the property of the United States, of this state, or of any public or private corporation or association, or of any individual, and of whatever material it may be constructed. *Pen. Code Tex.* 1895, art. 843.

The term "house" prima facie means a dwelling house. It means a house intended for human habitation, as used in St. 51 Geo. III, fixing a charge upon all houses, within a certain parish, to be paid by the occupiers of such houses. *Surman v. Darley*, 14 Mees. & W. 181, 183.

*Gen. St. p. 267, § 137*, forbidding the keeping of a disorderly house or a house where lewd and dissolute persons resort, does not mean a dwelling house only, but means any building kept by a person in which the disorderly conduct forbidden by the statute is permitted. *State v. Powers*, 38 Conn. 77, 79.

A warrant attached to a complaint directed the officer to enter the "house and premises mentioned in the above complaint," and the language of the complaint was, "the house and premises of D., of G., in the county of H." Held, the word "house" should be construed as meaning the dwelling house of D., and to refer to such house occupied by him as a dwelling, and not to one owned by him in addition to his dwelling, and hence the warrant was not defective for uncertainty. *Wright v. Dressel*, 3 N. E. 6, 7, 140 Mass. 147.

The word "house," as used in a complaint under the act for the suppression of intemperance, alleging that certain intoxicating liquors were kept in a certain house occupied and kept by a certain person on a certain lot, is not equivalent to "dwelling house," as used in the statute relating to proceedings when the liquors are kept in a dwelling house or a house in which a family resides. *Sanders v. State*, 2 Iowa (2 Clarke) 230, 277.

#### **Apartment, office, or room.**

"House," as used in *Comp. Laws, § 1537*, giving landlords a lien on the property of their tenants which remains in the house rented, includes a separate apartment in the building which is occupied by a tenant, and is not limited to a separate building. *Wolcott v. Ashenfelter*, 23 Pac. 780, 5 N. M. 442, 8 L. R. A. 691.

"House," *ex vi termini*, at least, embraces the land on which the building is erected. A house and apartments within it are not the same. "House" may include the subjacent land, but apartments within it may not. *McMillan v. Solomon*, 42 Ala. 356, 358, 94 Am. Dec. 654.

"House," as used in a statute prohibiting the keeping of a disorderly house, means any building or part of a building, or even a single room, used for disorderly purposes. The common law takes no notice of an offense of keeping a disorderly tenement, but part of a house used for such purposes constitutes a disorderly house within the statute. *Commonwealth v. Bulman*, 118 Mass. 456, 457, 19 Am. Rep. 469; *State v. Garity*, 46 N. H. 61, 12.

A house, within the meaning of the statute prohibiting the keeping of a house which the occupant permits to be used as a public resort for the playing of any unlawful game, includes a single room in a house which is used for such purpose, even though there is no evidence of the occupant paying rent. *Commonwealth v. Hyde, Thacher*, Cr. Cas. 19, 22.

A violation of Code, art. 30, § 56, providing that no person shall keep any gaming table, or any house, vessel, or place for the purpose of gaming, is shown by an indictment that defendant kept a certain place, to wit, a certain room in his hotel, for gambling. *Wheeler v. State*, 42 Md. 563, 567.

In *Weiss v. State*, 16 Tex. App. 431, 432, it was held that "room" and "house," as used in an indictment for gaming, were not synonymous terms. *Hodges v. State*, 72 S. W. 179, 180, 44 Tex. Cr. R. 444.

"House," as used in Pen. Code 1895, art. 704, defining burglary as being the entry of a house by force, etc., includes a sheriff's office. *Bigham v. State*, 20 S. W. 577, 31 Tex. Cr. R. 244.

Pen. Code, art. 709, relating to the offense of breaking a house to commit a crime therein, and defining "house" to be any building or structure erected for public or private use, of whatever material it may be constructed, should be construed to include an office, room, or apartment in one corner of a hardware room, made of pickets four feet high, one inch square, and three inches apart, on top of which there was a plank, where the account books, money, etc., of a lumber company were kept, and where the business of such company was transacted by their agent or clerk, and used separately from any other portion of the hardware house for a particular business, in fact and commonly understood to be a room in such hardware house. *Anderson v. State*, 17 Tex. App. 305, 310.

In an ordinance declaring that any person offering for sale, etc., any goods, wares, or merchandise along or upon the public streets, alleys, or other public places of the town, or from house to house, shall be deemed a peddler, "house" will include an office, so that an offer of goods for sale from one office to another would constitute a person a peddler. *Town of Spencer v. Whiting*, 28 N. W. 13, 14, 68 Iowa, 678.

#### Boat.

A statute prohibited the keeping of any house of ill fame or any erection or building resorted to for the purposes of prostitution and lewdness. Held, that it was not necessary that an erection should have a fixed position, in order to be a "house," but the word included a houseboat moored in a river, constructed for the purpose of floating from point to point on the Mississippi and using it as a place of resort for prostitution and lewdness. *State v. Mullen*, 35 Iowa, 199.

The term "house," in the statute in reference to gambling houses, includes a boat equipped to carry on a gambling business. *State v. Metcalf*, 65 Mo. App. 681, 685.

#### In boundaries.

When a house is referred to in the field notes of a surveyor, it constitutes a monument, the same as a witness tree. *Wise v. Burton*, 14 Pac. 678, 681, 73 Cal. 166.

A deed describing the boundary line of the premises conveyed as commencing a certain number of feet east of the grantee's "house" cannot be construed to mean an imaginary plane extending perpendicularly from the extreme outer edge of the overhanging projection to the ground. The word "house" may have various meanings, dependent upon or made evident by the purpose of the parties and the subject-matter of the contract. When it is the subject-matter of a deed or other contract, it may be found to include other buildings not popularly known as houses, or a garden, an orchard, etc. (*Marston v. Stickney*, 58 N. H. 609); or a stable (*Bridge v. Bridge*, 146 Mass. 373, 377, 15 N. E. 899). It may even exclude the approaches of steps leading up to it (*United States v. Mueller*, 113 U. S. 153, 5 Sup. Ct. 380, 28 L. Ed. 946). *Kendall v. Green*, 42 Atl. 178, 179, 67 N. H. 557.

#### Building synonymous.

See "Building (In Criminal Law)."

#### Chicken house.

A stationary structure eight feet tall, covered with shingles and inclosed with wire, erected for the purpose of the safe-keeping of birds and fowls, is a "house" within the Georgia Code, defining the offense of "larceny

from the house." *Williams v. State*, 32 S. E. 129, 105 Ga. 814, 70 Am. St. Rep. 82.

"House," as used in Pen. Code, § 178, providing that "larceny from the house is the breaking or entering any house with the intent to steal, or, after breaking or entering said house, stealing therefrom anything of value," includes a permanent building or fixture erected on a place for the safety of chickens, and called a "chicken house," and stealing chickens therefrom is larceny from the house. *Gardner v. State*, 31 S. E. 577, 578, 105 Ga. 662.

Whether a conviction upon an indictment for simple larceny can or cannot be sustained on evidence showing that the accused committed the offense of larceny from a house, such conviction may be sustained where the evidence warranted a finding that the structure from which the stolen goods were taken and carried away was a chicken coop and not a house. *Willis v. State*, 102 Ga. 572, 28 S. E. 917.

#### **Corncrib or oat bin.**

A corncrib, used solely for storing corn and feed, is a "house," within the statute relating to burglary. *Barber v. State* (Tex.) 69 S. W. 515, 516.

A crib in which corn and fodder are kept is undoubtedly such a structure as comes within the provisions of a statute punishing the burning of a house or building. *Brown v. State*, 52 Ala. 345, 347.

A portable box, 4 feet high on one side and 18 inches on the opposite side, 14 feet long, and 6 feet wide, used to hold oats, is not a "house," within the contemplation of the statute relating to burglary. *Williamson v. State*, 44 S. W. 1107, 39 Tex. Cr. R. 60, 73 Am. St. Rep. 901.

#### **County jail.**

1 Rev. Code, p. 587, c. 160, § 4, prohibiting the burning, either in the day or night, of any house or houses whatsoever other than those previously enumerated in the statute, should be construed to include the common jail and county prison of a county; they not being especially enumerated. *Stevens v. Commonwealth* (Va.) 4 Leigh, 683, 684.

#### **Curtilage or land included.**

A bequest of a house passes everything which was occupied by testator with it as proper and convenient for the occupation of the house, though the word "appurtenances" be not added. The distinction between "house" and "messuage" is too subtle to be relied upon, for whatever will pass by the one will equally pass by the other. *Clements v. Collins*, 2 Term R. 498, 502; *Gibson v. Brockway*, 8 N. H. 465, 470, 31 Am. Dec. 200; *Board of Education of City of Topeka v. State*, 67 Pac. 559, 561, 64 Kan. 6.

A devise of a house includes the city lot upon which the house stands. It would also pass the orchard, garden, and curtilage. *Common Council of City of Richmond v. State*, 5 Ind. 334, 337; *Rogers v. Smith*, 4 Pa. 93, 101; *Bennet v. Bittle* (Pa.) 4 Rawle, 339, 342 (citing 2 Ch. Cas. 27; *Kielway*, 57); *Elliot v. Carter*, 29 Mass. (12 Pick.) 436, 440; *Brown v. Turner*, 20 S. W. 660, 661, 113 Mo. 27; *Fiske v. Wetmore*, 10 Atl. 627, 628, 15 R. I. 354; *Sparks v. Hess*, 15 Cal. 186, 196; *Riddle v. Littlefield*, 53 N. H. 503, 508, 16 Am. Rep. 388.

It is a general rule of construction that the grant of a house gives a freehold in the land under it as incident thereto and necessary to its enjoyment. *Bacon v. Bowdoin*, 39 Mass. (22 Pick.) 401; *Id.*, 43 Mass. (2 Metc.) 591; *Inhabitants of Cheshire v. Inhabitants of Shutesbury*, 48 Mass. (7 Metc.) 566. And the same principle applies to a reservation or exception in a deed. *Webster v. Potter*, 105 Mass. 414, 415 (citing *Esty v. Currier*, 98 Mass. 500).

A house has been construed to mean both the structure and the land on which it stands. *Cassiano v. Ursuline Academy*, 64 Tex. 673, 675 (quoting *Gerke v. Purcell*, 25 Ohio St. 229; *Mullen v. Erie County Com'rs*, 85 Pa. 288, 27 Am. Rep. 650; *Trinity Church v. City of Boston*, 118 Mass. 164); *McMillan v. Solomon*, 42 Ala. 356, 358, 94 Am. Dec. 654.

"The common and ordinary acceptance of the word 'house' embraces every appurtenant and accessory to the main building; so in legal acceptance the sale of a house carries along with it whatever may be necessary to a full and complete enjoyment of the thing sold." As used in a fire policy on a house, the word was construed to include buildings accessory to the main building. *Workman v. Insurance Co.*, 2 La. 507, 509, 22 Am. Dec. 141.

"House," as used in the common-law definition of arson, defining the crime as the malicious burning of the house of another, means the dwelling house and all outhouses which are a parcel thereof. *State v. McGowan*, 20 Conn. 245, 246, 52 Am. Dec. 836.

A reservation of the "house and garden" in the sale of a tract of land should be construed as carrying with it a reservation of the dooryard and the use of estovers. *Baxter v. Brand*, 36 Ky. (6 Dana) 296, 297.

The word "house" does not include any part of the garden, orchard, or curtilage, so as to prevent interference therewith by a railroad, under Rev. St. 1840, c. 81, § 5, providing that in locating railroads no corporation shall take any meeting house or dwelling house without the consent of the owners thereof. *Wells v. Somerset & K. R. Co.*, 47 Me. 345, 347.

**Different use of portion.**

A building, the lower part of which is used as a cowhouse and stable, and the upper part consisting of a chamber used as a dwelling house, is a "house," within St. 2 Wm. IV. c. 45, § 27, giving the right of voting to the occupier of a house. *Nunn v. Denton*, 7 Mann. & G. 66, 68.

A building calculated to be used as a dwelling house, but some of the upper portions of which, not so occupied, are cut off to be used as workshops, is a "house," within the meaning of St. 2 Wm. IV. c. 45, § 27, giving the right of voting to the occupier of a house. *Daniel v. Coulsting*, 7 Mann. & G. 122, 123.

**External ornaments as part of.**

The owner of two adjoining houses contracted to sell one of them, describing it as "all that dwelling house now in the occupation of P." On the front of defendant's house, at the side which joined plaintiff's, was a slight projection of 2 or 3 inches, 9 feet in width and in the middle of this projection was a doorway  $3\frac{1}{2}$  feet wide, on each side of which was a small pillar, supporting a small portico. Over the doorway was a window, and over this a slight pediment, which extended 8 inches beyond each side of the projection. On the inside the party wall dividing defendant's house from plaintiff's house, instead of being coincident with the projection, was about 2 feet 11 inches more to the south, and was in a direct line with the side of the doorway, so that from 2 to 3 feet of that which appeared from the outside to form a part of defendant's house from the inside formed a part of the wall of the front room of plaintiff's house. An action was brought for painting the pillar and the parts of the portico over it, and the pediment, all of which were to the north of the plaintiff's side of the middle of the party wall, and all of which plaintiff claimed as part of his house, while defendant claimed them as part of the "house in the occupation of P." Held, that the "house in the occupation of P." meant those parts which he used and enjoyed internally with the external walls that protect them, and the parts of the adjoining house the frontage walls of which protected plaintiff's house, did not cease to be his merely because their external ornaments apparently belonged to defendant's house. *Fox v. Clarke*, L. R. 7 Q. B. 748, 753. In the same case, on another appeal, the court held that "by the house now in the occupation of P." included that part which overlapped the front room of plaintiff; it having become a part of the house occupied by P. *Fox v. Clarke*, L. R. 9 Q. B. 565, 569.

**Firm synonymous.**

The word "house," in an instrument guarantying the house of J. De Rivera, signifies nothing more than the firm or partner-

ship of J. De Rivera & Co. The word "house" is an equivalent expression for the word "firm." *Burch v. De Rivera*, 6 N. Y. Supp. 206, 207, 53 Hun, 367.

**Freight car.**

A freight car body, which has been detached from the wheels and placed upon permanent posts near a railway track at a station, and to which a platform has been attached, thus constituting a structure to be used as a freight warehouse, and which is used for this purpose only, is a "house," within Pen. Code, § 136, defining the offense of arson. *Carter v. State*, 32 S. E. 845, 846, 106 Ga. 372, 71 Am. St. Rep. 262.

**Fruit stand.**

A fruit stand, built somewhat in the shape of a piano box, about eight feet high, with shelves and counters, so that the proprietor could, in making sales, stand inside or outside of the structure as he desired, is a "house," within the meaning of that term as used in the statute relating to burglary. *Willis v. State*, 33 Tex. Civ. App. 168, 25 S. W. 1119.

**Gin house.**

The word "house," as used in Act March 22, 1875, c. 228, defining the malicious setting fire to any church, chapel, meeting house, or any house, stable, coach house, outhouse, warehouse, office, shop, etc., does not include a gin house. *State v. Thorne*, 81 N. C. 555, 559.

**Inclosed park or arbor.**

The term "house," as used in Gen. St. tit. 52, § 4, prohibiting the keeping open on Sunday of any shop, house, etc., for the sale of intoxicating liquors, will not include an inclosed park where such liquors are sold. *State v. Barr*, 39 Conn. 40, 44.

A liquor dealer's bond obligated him to keep an orderly "house or place of business." In an action for breach of the bond, it appeared that in the back of defendant's store there was a bar and in the rear of the store a door opened on an alley across which there was an arbor. Defendant had control of this arbor, which was arranged with tables at which persons drank beer purchased at the store. Held, that the words "house or place of business" included all places connected with and in which defendant transacted his business of retailing liquor, and therefore included the arbor, though the same was separate and apart from the store in which the liquors were kept. *Whitcomb v. State*, 21 S. W. 976, 977, 2 Tex. Civ. App. 301.

**Livery stable.**

A deed conveying property in a residence district, restricting the grantee to the erection of not "more than two houses thereon," means the erection of two dwelling houses of

the general character and description adopted and used in that particular locality for private residences. It was contended that the word was to be construed in its ordinary and popular meaning as defined by Webster: "A building or shed intended or used as a habitation or shelter for animals of any kind; but, properly speaking, a building or edifice for the habitation of man"—and that a livery stable might be erected on the property, but the court confined the word to the erection of a dwelling house. *Schenck v. Campbell* (N. Y.) 11 Abb. Prac. 292, 294.

#### **Material after destruction.**

Pen. Code, art. 651, defines arson as being the willful burning of any house included within the meaning of article 652, and article 652 defines a "house" as any building or structure inclosed with walls and covered, whatever may be the material used for the building. Held that, since a building ceases to be a building or structure after it is torn down, the burning of the material of which it was formerly composed would not constitute the burning of a house, and was therefore not arson. *Mulligan v. State*, 25 Tex. App. 199, 7 S. W. 664, 8 Am. St. Rep. 435.

#### **Outhouse.**

The words "house or outhouse," as used in the statutes of Tennessee, making the burning of a house or outhouse of another arson, are not synonymous. Therefore an indictment charging defendant with burning a house or outhouse of another is defective, for it charges separate offenses. *Whiteside v. State*, 44 Tenn. (4 Cold.) 175, 183.

#### **As a part of realty.**

Houses, as a general rule, are part of the freehold, and pass or descend with the land. The prima facie intendment is that they are part of the realty, and, if there be no proof to take the case without the general rule, they are part and parcel of the land, and whoever owns the land owns the houses standing thereon; but this is not a conclusive presumption. It may be rebutted, and if a house is built by one person on the land of another, with the consent of the owner of the land, and with an agreement that the house shall belong to the builder, and may be removed or disposed of by him, the house does not become a part of the realty, but continues to be personal property. *Harris v. Powers*, 57 Ala. 139, 143. But where there was no reservation of the right to remove such house, the house becomes a part of the realty, and the one who built it has no right to remove it or dispose of the lumber of which the house was composed. *Powers v. Harris*, 68 Ala. 409, 410, 411.

#### **Portable box.**

A portable box, 4 feet high on one side, 18 inches on the opposite side, 14 feet long,

and 6 feet wide, used to hold oats, is not a house within the contemplation of the statute defining burglary. *Williamson v. State*, 39 Tex. Cr. R. 60, 44 S. W. 1107, 73 Am. St. Rep. 901.

#### **As premises.**

The words "house or place," in the statute requiring the complaint for a search warrant to be on oath that the goods are concealed in some house or place, is not equivalent to the term "premises," and therefore an affidavit stating that the stolen goods are on certain premises is not a compliance with the statute. *Humes v. Taber*, 1 R. I. 464, 470.

"House," as used in Act June 3, 1885, authorizing the boards of health in cities of the first class to regulate house drainage, should be construed in its most comprehensive meaning, which is given by Webster as "a building intended or used as a habitation or shelter for animals of any kind." Therefore, while it may be permissible for a pleader to use the word "building," instead of "house," yet he cannot substitute other words for it. The word "property" is improper in this connection. A meadow and a natural lake are properties, but they are not houses or buildings, within the meaning of the act. *Commonwealth v. Lambrecht*, 3 Pa. Co. Ct. R. 323, 325.

#### **Shop or store.**

St. 2 Wm. IV, c. 45, § 27, giving a right to vote for members of Parliament to every male person of full age who occupies "any house, warehouse, counting house, shop, or other building," does not apply to a shop which was separated from the rest of the premises by a yard, and around which there was no complete curtilage or fence; the yard being approached by a passage at the side of the shop open to the street, which was the property of the occupant of the house and shop, but used by the tenant of the adjoining house in common with him. *Powell v. Price*, 4 C. B. 105, 114.

In a complaint alleging that one, not being a taverner, did keep a certain "house, store, and shop" for the purpose of selling wine and spirituous liquors to be drunk thereat, does not charge the keeper of a house, and also a store, and also a shop, as three distinct and separate places for the purpose of selling wine and spirituous liquors, the keeping of each of which constitutes a distinct offense; the words "house, store, and shop" being used as synonymous, and as defining but one place. *Rawson v. State*, 19 Conn. 292, 297.

#### **Smokehouse.**

A building with walls, roof, and a door, used as a smokehouse, is a "house," within

the meaning of the statute defining burglary. *Albritton v. State* (Tex.) 26 S. W. 398.

An indictment charging defendant with committing larceny from a smokehouse sufficiently charges that the larceny was committed from a house. A smokehouse would be a house if the adjective was not employed to denote it a smokehouse, and the adjective only renders the description of the house more definite. *Irvin v. State*, 37 Tex. 412, 413.

In Act May 17, 1865, § 2, which makes it a capital offense to break into the house of another for the purpose of committing a larceny or robbery therein, "house" means a house in which persons dwell or reside. It does not refer to nor include smokehouses. *Palmer v. State*, 47 Tenn. (7 Cold.) 82, 86.

#### Tenement.

The word "house" is held synonymous with "tenement" in an indictment for arson, under Sand. & H. Dig. § 4164, defining arson as "the willful and malicious burning of the house \* \* \* of another." The indictment only alleges that one object was burned, and that is described as one house and tenement, and we understand from this that the defendant was charged with burning a house. *State v. Snellgrove*, 71 S. W. 266, 267 (citing *Commonwealth v. Bossidy*, 112 Mass. 277).

A five-story tenement house, in which a man and his family occupied three adjoining rooms, was the "dwelling house" of such party, within the statute relating to arson. *Levy v. People*, 80 N. Y. 327, 332.

#### Tent.

A large tent of canvas, supported by poles let into the ground, the walls and roof being of canvas and the floor of plank, is a house, within the meaning of Pasch. Dig. art. 2027, providing punishment for the keeping of a disorderly house. *Killman v. State*, 2 Tex. App. 222, 224, 28 Am. Rep. 432.

The term "house," in the law of burglary, defined in Pen. Code 1895, art. 843, as including any building or structure erected for public or private use, of whatever material it may be constructed, includes a structure in which the builder resides, built by placing two forked poles upright in the ground, resting another upon them, over which a wagon sheet is stretched, and the ends fastened to boards nailed to the posts for sides. *Favro v. State*, 46 S. W. 932, 89 Tex. Cr. R. 452, 78 Am. St. Rep. 950.

"House," as used in Pasch. Dig. art. 2409, providing that, if any person shall steal property from a house in such manner as that the offense does not come within the definition of burglary, he shall be punished, etc., does not apply to a tent consisting of two

forks driven in the ground, with a ridge pole, across which is stretched a piece of ducking, and which is closed at one end by another piece of cloth hung up, and is open at the other end. *Callahan v. State*, 41 Tex. 43, 44.

#### Theater.

"House," as used in St. 51 Geo. III, c. 150, charging a yearly sum upon the houses of the inhabitants of a certain place, means houses intended for human habitation, and does not include a theater. The term "house" prima facie means a dwelling house. *Surman v. Darley*, 14 Mees. & W. 181, 186.

#### Unfinished house.

A building intended for and constructed as a dwelling house, which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements, is not a house, within the meaning of St. 9 Geo. I, c. 22, § 7, so as to entitle the owner to maintain an action against the hundred for an injury sustained by him in consequence of malicious setting fire to the same. *Elsmore v. Inhabitants of St. Briavells*, 8 Barn. & C. 461.

#### Wagon.

A house is an abiding place, an abode, a place or means of lodgment. It need not necessarily be built of stone, brick, wood, iron, and glass, or any other material or combination thereof, nor is it determined by a fixed and definite size and shape; and hence a covered wagon is a house, within the meaning of the statute prohibiting the keeping of a house of ill fame. *State v. Chauvet*, 83 N. W. 717, 111 Iowa, 687, 51 L. R. A. 630, 82 Am. St. Rep. 539.

"In the ordinary and most common use of the word 'house,' it means an ordinary building for the use of a family, a dwelling house; but that is not the only definition of the word, either in common parlance or in the law. Both recognize such houses as packing houses, smokehouses, icehouses, banking houses, millhouses, etc., and, in general, business houses. In such cases the word 'house' is the equivalent of 'building.'" As used in Rev. St. 1881, § 5320, making it criminal for any person not licensed to sell liquor to be drank in his house, it means a building or inclosed structure, and does not include an uncovered wagon. *Schilling v. State*, 18 N. E. 682, 684, 116 Ind. 200.

#### HOUSE AND LOT.

In a deed the premises conveyed were described as a "house and lot" in a row of houses, and in giving the boundaries of the lot the side lines were stated to be "80 feet or a fraction more or less" in length. At the time of the conveyance the side lines of

the lot were marked by fences, and a fence ran along the rear of the curtilages of the several houses in a row at a depth of about 65 feet from the front. Held, that the expression "house and lot," used in the above deed and as ordinarily used in reference to premises in a city, imports a house with a curtilage shut off from the neighboring grounds by some physical objects. Thus the deed bears upon its face an intimation that the land to be conveyed by it is inclosed within visible boundaries, and hence the fence will be considered as controlling the distance of feet as expressed in the deed. *Smith v. Negbauer*, 42 N. J. Law (13 Vroom) 305, 307.

A will devising "the house and lot in which I now reside" should be considered to mean only the lot which the testator, prior to the date of his will, had separated from his adjacent lands and inclosed by fences. The words are manifestly limited in their scope, and, read in their ordinary and natural sense, cannot be construed to comprehend anything more than what the testator used as a homestead. Besides it is of the first importance to note that he used the word "lot" in describing the quantity or extent, which is a form more generally used to describe a small parcel of land than a large parcel. The words "house and lot in which I reside," therefore, cannot be construed to include all the lots occupied by the testator. *Inhabitants of Town of Phillipsburgh v. Bruch's Ex'r*, 37 N. J. Eq. (10 Stew.) 482, 486.

#### HOUSE FOR RETAILING SPIRITUOUS LIQUORS.

"House," as used in Rev. Code, § 3620, prohibiting gaming, card playing, etc., at any tavern, inn, or "house where spirituous liquors are retailed," etc., does not include a private bedroom in the second story of a house, where spirituous liquors were retailed in a store room below. The object of the statute was, not only to suppress every practice of gaming, but to disconnect it from tippling shops and houses where ardent spirits are retailed. There must be a business connection between a room in which the gaming is carried on and the place where the spirits are sold to constitute guilt. *Phillips v. State*, 51 Ala. 20, 22.

The term "place or house where spirituous liquors are retailed," in a statute prohibiting the playing of cards at any house or place where spirituous liquors are retailed, includes a room in the second story of a two-story house, which is accessible only by means of a flight of stairs leading up to it on the outside, and which is used by one of the proprietors of the house as a sleeping apartment; the lower room being used by the proprietors for retailing spirituous liquors. "We are of the opinion that it comes both within the letter and spirit of the prohibi-

tion. The upper story not only constituted a part of the house, but was used by the proprietors as an appendage to the prosecution of their business. We think the obvious design of the statute would be defeated if parties could evade the law by playing in a room other than that in which the retailing is carried on, but which constitutes a part of the same house and is used by the same concern in the prosecution of their business." *Johnson v. State*, 19 Ala. 527.

It was held in *Cole v. State*, 9 Tex. 42, *Pierce v. State*, 12 Tex. 210, and *Redditt v. State*, 17 Tex. 610, that the words "house for retailing spirituous liquors," included the whole house from cellar to garret, regardless of approaches; but such holding was subsequently overruled. *O'Brien v. State*, 10 Tex. App. 544, 545. See, also, *Watson v. State*, 13 Tex. App. 160, 161; *Robinson v. State* (Tex.) 19 S. W. 894.

The term "house for retailing spirituous liquors," in a statute prohibiting card playing at such a house, includes a room in a building in the rear of a drinking saloon, where there is a partition containing a sliding window, through which the players in a rear room are supplied with liquors. *Stebbins v. State*, 2 S. W. 617, 22 Tex. App. 32.

The term "house where spirituous liquors are retailed," in a statute prohibiting card playing in any house where spirits are retailed, includes a counting room attached to and under the same roof with a storeroom in which spirituous liquors are retailed; the entire premises being under the control of one person. *State v. Terry*, 20 N. C. 325, 326.

The question whether the term "house for retailing spirituous liquors," within the meaning of the statute prohibiting card playing in such a place, includes a room attached to and constituting a part of the house, is a question for the jury. *Cherry v. State*, 30 Tex. 439, 440.

A conviction for playing cards at a house for retailing spirituous liquors cannot be sustained on evidence that the playing was done in the house which was in the same town lot with a drinking saloon, but in no wise connected with the saloon or controlled by its keeper, and not accessible to the public through the saloon. *Harcrow v. State*, 2 Tex. App. 511.

The term "house for retailing spirituous liquors," in a statute prohibiting card playing at such place, does not necessarily include all saloons, as the word does not necessarily mean a place for retailing liquors, and therefore evidence that card playing was at a saloon is not sufficient to show a violation of the statute. *Springfield v. State* (Tex.) 18 S. W. 752.

**HOUSE CONNECTIONS.**

The words "house connections," as used in *Swan & S. St.* p. 847, providing for the sewerage of cities of the first class, includes only such as are a part of the plan of sewerage provided for by the act, and the city authorities are not empowered to contract for a construction of house connections with a street sewer, unless the house connections are made a part of the plans and specifications for the sewerage. *Cordeman v. City of Cincinnati*, 23 Ohio St. 499.

**HOUSE OF CORRECTION.**

A "house of correction" as its name indicates, "is designed for the reformation of youthful criminals." *Ex parte Moon Fook*, 12 Pac. 803, 804, 72 Cal. 10.

**HOUSE OF ENTERTAINMENT.**

The expression "house of entertainment," as used in Act 1791, requiring a license for keeping a house of entertainment or tavern, is synonymous with the word "tavern" as there used. *Bonner v. Welborn*, 7 Ga. 296, 304.

In an indictment charging that certain gaming was carried on at a "house of entertainment," such expression means a tavern. *Linkous v. Commonwealth (Va.)* 9 Leigh, 608, 612.

The act of 1801, prohibiting gaming "in a house of public entertainment or a tavern," does not include a house where a person entertains strangers only occasionally, though he receives compensation for it. The owner thereof is not liable to punishment under the statute, since the act does not prohibit gaming in a private house. *State v. Mathews*, 19 N. C. 424, 426.

**HOUSE OF ILL FAME.**

A house of ill fame is defined to be "a house kept for the convenience and shelter of persons desiring unlawful sexual intercourse, and in which such intercourse is practiced." *United States v. Snow*, 9 Pac. 501, 510, 4 Utah, 280; *Posnett v. Marble*, 20 Atl. 813, 816, 62 Vt. 481, 11 L. R. A. 162, 22 Am. St. Rep. 126.

The term "house of ill fame," as used in a Michigan statute punishing any person keeping a house of ill fame, means a place of ill repute in the vicinity. *People v. Pinkerton*, 44 N. W. 180, 181, 79 Mich. 110.

To constitute a house one of ill fame, and sustain an indictment for keeping such a house, it is not necessary that it be kept for lucre and gain. *Commonwealth v. Wood*, 97 Mass. 225, 228.

Rev. St. 1881, § 2003, which declares that any female who frequents or lives in houses

of ill fame should be deemed a prostitute, and on conviction thereof should be fined, etc., includes one house of ill fame; hence an indictment charging that the defendant lived in a house of ill fame is sufficient. *State v. Nichols*, 83 Ind. 228, 229, 43 Am. Rep. 66.

A building or place generally reputed in the neighborhood where the same is located to be a building or place where persons of opposite sex meet for the purpose of prostitution is a house of ill fame. *Bates' Ann. St. Ohio* 1904, § 4364 —1.

The term "house of ill fame or assignation," as used in the Penal Code, includes all premises which by common fame or report are used for the purpose of prostitution or assignation. *Pen. Code N. Y.* 1903, § 718.

**As bawdy house or brothel.**

The term "house of ill fame" was said in *State v. Boardman*, 64 Me. 523, to be synonymous with "bawdy house." It is a species of disorderly house, and indictable as a nuisance. *Henson v. State*, 62 Md. 232, 234, 50 Am. Rep. 204.

As used in *St.* 1845, c. 20, p. 22, prohibiting any person from keeping a house of ill fame resorted to for the purpose of prostitution or lewdness, the term "house of ill fame" should be construed, in connection with the context, to mean a house which in fact is a brothel or bawdy house. The strict etymological sense of the words, standing alone, refers to reputation and general belief, but, being connected with the subsequent words, means more than the popular signification. It means a house actually a brothel or bawdy house. *Cadwell v. State*, 17 Conn. 467, 471; *McAlister v. Clark*, 33 Conn. 91, 92.

A house of ill fame is a nuisance at common law, for it holds out allurements to a miscellaneous and common bawdry, corrupting to the public morals. The words "ill fame" are used to give name and character to the house, and do not refer to its reputation. Both at common law and in common parlance the words "house of ill fame" mean a house resorted to for the purpose of prostitution. *State v. Plant*, 32 Atl. 237, 67 Vt. 454, 48 Am. St. Rep. 821.

The term "house of ill fame" is a mere synonym for bawdy house, having no reference to the fame or reputation of the place, but denoting the fact. *State v. Smith*, 12 N. W. 524, 29 Minn. 193.

**HOUSE OF INDUSTRY.**

Either of the terms "almshouse," "poorhouse," "schoolhouse," or "house of industry," within the meaning of statutes exempting such houses from taxation, includes



buildings owned by the Church Charity Foundation, and used for the care, maintenance, education, and support of aged and indigent persons and indigent orphan and half-orphan children, and other children left in a destitute and unprotected state or condition. *Church Charity Foundation v. People* (N. Y.) 6 Dem. Sur. 154, 157.

"House of industry," within the meaning of a statute exempting such houses from taxation, includes the Hebrew Benevolent and Orphan Asylum of the city of New York. *Hebrew Benevolent and Orphan Asylum v. City of New York* (N. Y.) 11 Hun, 116.

#### HOUSE OF LEGISLATURE.

The term "house," as used in Const. U. S. art. 4, § 8, providing that a majority of each house shall constitute a quorum to do business, means the entire number of which the Assembly or Senate may be composed. In re Executive Communication Nov. 9, 1868, 12 Fla. 653.

"Houses," as used in a statute relating to Senate and General Assembly of the state, and providing that the two "houses" shall meet separately, etc., must of necessity be construed to denote the members of such houses. *Werts v. Rogers*, 28 Atl. 726, 762, 56 N. J. Law (27 Vroom) 490, 23 L. R. A. 354.

#### As quorum.

Where a constitutional provision required that the Legislature should pass no act of incorporation unless with the assent of at least two-thirds of each house, the word "house" means members present and doing business, being a quorum. *Zeller v. Central Ry. Co.*, 35 Atl. 932, 935, 84 Md. 304, 34 L. R. A. 469; *Southworth v. Palmyra & J. R. Co.*, 2 Mich. 287.

Const. art. 3, § 17, providing that a majority of each house of the Legislature shall constitute a quorum to do business, means any number of the members thereof sufficient to constitute a quorum, and does not mean all the members elected, and therefore an amendment ratified by two-thirds of a quorum is ratified by two-thirds of that house, within the meaning of the Constitution. *State v. McBride*, 4 Mo. 303, 306, 29 Am. Dec. 636.

"House," as used in Const. 1868, art. 42, requiring a vote of four-fifths of the house in which a bill is pending to dispense with the reading of a bill, means a quorum of the members elected. *Frellsen v. Mahan*, 21 La. Ann. 79, 108.

#### HOUSE OF PUBLIC WORSHIP.

See, also, "Public Worship."

"House of public worship," within the meaning of a statute exempting houses of

public worship, etc., is to be construed as meaning the buildings in which public worship is held, and lots are exempt from taxation under the statute from the moment the construction of a church building thereon is commenced. *Washington Heights M. E. Church v. City of New York* (N. Y.) 20 Hun, 297.

Rev. St. c. 20, p. 103, exempting from taxation all houses of public worship, etc., should be limited to the buildings alone, and not to include the lot or ground upon which the houses of public worship stand. *Lefevre v. City of Detroit*, 2 Mich. 586, 589.

Under the Constitution, providing that houses used exclusively for public worship may by general laws be exempted from taxation, and the statute, providing that houses used exclusively for public worship and the grounds attached to such buildings, necessary to their proper occupancy, use, and enjoyment, shall be exempt, such exemption does not include a vacant lot purchased in contemplation of its being used for the future erection of a church. *Matlack v. Jones*, 13 Ohio Dec. (2 Disn.) 2, 4.

#### HOUSE OF RELIGIOUS WORSHIP.

"House of religious worship," within the meaning of the statute exempting such houses from taxation, does not include a church building, which, after the society owning it has erected a new church building, is stripped of its ornaments and fixtures, and is rented for a time, and then sold on condition that it shall never be used as a place of worship. *Old South Soc. v. City of Boston*, 127 Mass. 378, 379.

Rev. St. c. 7, § 5, exempting all "houses of religious worship" and the pews and furniture within the same from taxation, means such distinct tenements as are used for that purpose and for purposes connected with it, and does not include distinct tenements used for other purposes, though under the same roof. The story under a church and vestry let as stores, and of which the church takes the income, is not a house of religious worship. *Proprietors of South Congregational Meeting House in Lowell v. City of Lowell*, 42 Mass. (1 Metc.) 538, 540.

#### Land or parsonage included.

The term "house of religious worship," within the meaning of a statute exempting such houses from taxation, which has been construed in *Trinity Church v. City of Boston*, 118 Mass. 164, to include the land on which such house stands, does not include land owned by a religious corporation upon which no church edifice has been or is intended to be erected, and which is separated by a passageway from the portion of the estate on which the church of the corporation stands, and which is not necessary or

incidental to the use of the church as a house of public worship. *Boston Soc. of Redemptorist Fathers v. City of Boston*, 129 Mass. 178, 180. In such statute the word "house" was not limited to the actual church edifice erected for religious worship, but included as well the lot of land purchased by the church for the purpose of building on such lot, being the only one held, and not more than sufficient for its reasonable requirements in that respect. *Trinity Church v. City of Boston*, 118 Mass. 164, 167.

"Houses of religious worship," within the meaning of the statute exempting houses of religious worship from taxation, and providing that portions of such houses appropriated for purposes other than religious worship shall be taxed, does not include a parsonage erected upon church grounds, together with the lands upon which it stands, although the house is occupied by the pastor free of rent. *Third Congregational Soc. v. City of Springfield*, 18 N. E. 68, 147 Mass. 396.

#### HOUSEBREAKING.

See, also, "Breaking (In Criminal Law)." As felony, see "Felony."

The offense of "housebreaking" is committed where there is an internal communication between the room or apartment broken into and the room or building into which the felonious entry is charged to have been made. *Commonwealth v. Bruce*, 79 Ky. 560, 561.

A warrant alleging that complaint had been made to the magistrate that the offense of breaking into the storehouse of one A. had been committed involves the averment of housebreaking, which in common parlance implies burglary, and hence the warrant sufficiently designates the crime of which the defendant is charged. *Adams v. Coe*, 26 South. 652, 653, 123 Ala. 664.

#### HOUSEHOLD.

A household is a family living together. *May v. Smith*, 48 Ala. 483, 488 (citing *Allen v. Manasse*, 4 Ala. 455; *Sallee v. Waters*, 17 Ala. 482); *Woodward v. Murray* (N. Y.) 18 Johns. 400, 402. But not necessarily wife and children. *Fink v. Fraenkle*, 14 N. Y. Supp. 140, 141, 20 Civ. Proc. R. 402.

"Household" means persons who dwell together as a family. *Arthur v. Morgan*, 5 Sup. Ct. 241, 243, 112 U. S. 495, 28 L. Ed. 825.

The term "household" includes all the dwellers in a house under the common control of one person. In *re Lambson* (U. S.) 14 Fed. Cas. 1047, 1048.

"Household" is the definition of the Latin "familia." The approved definition of "household" is "a number of persons dwelling under the same roof and composing a family; and by extension all who are under one domestic head." *And. Law Dict.* p. 448, and authorities there cited. *Ferbrache v. Grand Lodge A. O. U. W.*, 81 Mo. App. 268, 271.

One's household is the place where one holds house, his home. The home is not confined to the particular bedroom in which the master of the house sleeps, but may include his rooms for guests and apartments which he never enters. *Appeal of Hoopes*, 60 Pa. 220, 222, 100 Am. Dec. 562; *Estate of Hoopes* (Pa.) 6 Phila. 364, 365.

Within the meaning of the Alabama statute which renders a wife's separate estate liable "for articles of comfort and support of the household," servants necessarily employed and residing in the family are a part of the household, and necessities supplied them can be charged on the wife's estate. *Pippin v. Jones*, 52 Ala. 161, 165.

#### HOUSEHOLD EFFECTS.

A will bequeathing testator's furniture and other household effects to his wife does not include coffee in a bag, wine in bottles, and brandy in a cask, laid in by the testator for the current use and consumption of himself and family. *Foxall v. McKenney* (U. S.) 9 Fed. Cas. 645, 646.

#### HOUSEHOLD FURNITURE.

See, also, "Household Goods."

Rev. St. art. 2335, providing that household furniture shall be reserved to every family exempt from attachment or execution or from forced sale for the payment of debts, means pertaining or belonging to the house or family, such being its general definition. *Alsup v. Jordan*, 6 S. W. 831, 833, 69 Tex. 300, 5 Am. St. Rep. 53.

"Household furniture," as used in Gen. Laws, c. 224, § 2, exempting household furniture from execution and attachment, means furniture in actual use in the household or place of residence, or intended for such use. *Bond v. Tucker*, 18 Atl. 653, 65 N. H. 165.

When used in a bequest in a will of all the testator's "household furniture," the term embraces everything in the house which has usually been enjoyed therewith. *Chase v. Stockett*, 19 Atl. 761, 762, 72 Md. 235; *Carnagy v. Woodcock* (Va.) 2 Munf. 234, 239, 5 Am. Dec. 470.

An exemption of household furniture from execution is not strictly limited to such furniture as may be absolutely necessary;

but where the value is not so great as to be evidence of extravagance, it does not cease to be household furniture because it may be greater in amount than is required for the immediate need of the family. *Haswell v. Parsons*, 15 Cal. 266, 267, 76 Am. Dec. 480.

"Household," as used in a bequest of household goods and household furniture, "may designate the character of the goods or furniture wherever or in the possession of whomsoever they may be, or it may indicate whatever is connected with the testator's domestic establishment and employed as articles of use or ornament, although it may not be what is ordinarily known as furniture." *Dayton v. Tillou*, 24 N. Y. Super. Ct. (1 Rob.) 21, 27.

"Household," as used in an insurance policy insuring household furniture, means belonging to the house and family, and will be held to include such articles as books and games, writing materials, child's swing, and child's walker. *Huston v. State Ins. Co.*, 69 N. W. 674, 675, 100 Iowa, 402.

A will of "household furniture and other household effects" comprises all the property in the house and on the premises intended for use, for consumption therein, or for the ornamentation thereof, so that pistols, a melodeon, paintings, an organ, a parrot, books, wine, and liquors will pass, but not a pony, cow, or fowling pieces, unless they are kept for the defense of the house. *Cole v. Fitzgerald*, 1 Sim. & S. 189.

#### **Boarding house or school furniture.**

Furniture of a householder, used in the sleeping rooms of his boarders or guests, is "household furniture," within Pub. St. c. 11, § 5, cl. 6, exempting from taxation household furniture not to exceed a certain value. *Day v. City of Lawrence*, 45 N. E. 751, 167 Mass. 371.

A will giving all the testatrix's household furniture to a certain person should be construed to include all the furniture used by the testatrix in a boarding school in which she lived, for a man's household is the place where he holds house, and is his home, and that which supplies it is its furniture. The home is not confined to the particular bedroom in which the master of the house sleeps, for it may include his rooms for guests and apartments he never enters. So, too, it would properly embrace a school room, for he may teach in his parlor. The particular use of a portion of the dwelling cannot make it any the less a part of the household. *Estate of Hoopes (Pa.)* 6 Phila. 364, 365, 1 Brewst. 462, 464.

"Household furniture," within the meaning of the statute exempting from execution the household furniture of a debtor, includes the same amount of household furniture belonging to a boarding house keeper as he

would be entitled to if he maintained only a private residence. *Vanderhorst v. Bacon*, 38 Mich. 669, 672, 33 Am. Rep. 328.

"Household and kitchen furniture," within the meaning of a statute exempting from execution all household and kitchen furniture of the debtor, includes all the furniture of a widow with one child, who occupies a house of seven or eight rooms, and incidentally keeps boarders for the purpose of support, although a portion of such furniture is in the rooms occupied by the boarders. *Mueller v. Richardson*, 18 S. W. 693, 694, 82 Tex. 361.

A statute exempting from attachment such "household furniture" as is essential to the personal comfort of the debtor and his dependent family cannot be construed to exempt furniture kept for boarders and necessary to their use; the debtor being engaged in keeping a boarding house, and the furniture being used by such boarder for compensation, and useful to a debtor only as a means of profit, and such furniture not being necessary to enable the debtor and her daughter to live in a comfortable and convenient manner in ordinary housekeeping. In deciding what is necessary household furniture, the vocation of the debtor may properly be taken into consideration, as his personal wants and those of his family may depend largely on the nature of the business whereby he is seeking a livelihood. *Weed v. Dayton*, 40 Conn. 293, 296.

#### **Books, pictures, and statuary.**

Books are not within the term "household furniture." *Towns v. Pratt*, 33 N. H. 345, 350, 66 Am. Dec. 726; *Kendall's Ex'r v. Kendall (Va.)* 5 Munf. 272, 274.

Books will be included in the term "household furniture," as used in an insurance policy. *Huston v. State Ins. Co.*, 69 N. W. 674, 675, 100 Iowa, 402.

A will bequeathing to a certain person all the testator's "library and household furniture of every description," etc., includes a portrait of the testator, painted after the making of the will and at the time of his death still in the possession of the artist in another city. The term "household furniture," though not susceptible of strict definition, has acquired a definite meaning, by which it is understood to include everything which may contribute to the use or convenience of the householder or to the ornament of the house, such as plate, linen, china, pictures, etc. *McMicken v. Board of Directors of McMicken University*, 2 Am. Law Reg. (N. S.) 489, 490. It also would include bronzes, statuary, etc. *Richardson v. Hall*, 124 Mass. 228, 237.

"Household furniture," as used in a statute taxing household furniture, cannot be construed to include works of art and antiques.

ties. The word "furniture" is undoubtedly susceptible of use in a sense that would include paintings, engravings, and works of art and curiosity used in the ornamentation of a house. Ornamentation is not furniture, though incidentally to its own purpose it may contribute to the idea of furnishings. Appeal of Lea (Pa.) 15 Wkly. Notes Cas. 61, 62.

Pictures hung up, but not books in a library, will pass under the term "household furniture." Kelly v. Powlet, 2 Amb. 605, 611.

#### **Carpets, curtains, and bedding.**

Carpets and bedclothing are covered by the term "household furniture" in an insurance policy. Patrons' Mut. Aid Soc. v. Hall, 49 N. E. 279, 282, 19 Ind. App. 118.

A statute exempting from execution "household furniture necessary for supporting life" should be construed to include articles which to the common understanding suggest ideas of comfort and convenience, but to exclude all superfluities and articles of luxury and ornament. It cannot be construed to include four sets of lace curtains, with tassels, suspended from cornices of black walnut, which serve no strictly useful purpose, nor protect from heat or cold or observation; there being many families of refinement and culture, living in homes of comfort and convenience, in which these articles are not to be found. They are not necessary to the support of life in comfort or convenience. Nor can it include a pier glass with base of much value, though mirrors of common size and cost are exempt; nor a clock of considerable value, for clocks marking time with sufficient accuracy for the ordinary purposes of the household can be obtained for a comparatively small sum of money. Hitchcock v. Holmes, 43 Conn. 528, 529.

A fire policy on the stock of a grocer, wearing apparel, and household furniture does not cover linen sheets, etc., not laid in for the use of the family, but smuggled into the country for clandestine sale. Clary v. Protection Ins. Co. (Ohio) Wright, 227, 229.

#### **China, linen, and plate.**

"Household furniture" is incapable of definition. It is capable only of a description. It comprises everything that contributes to the use or convenience of the household or ornament of the house. The circumstances may be so various as to occasion different, and even contradictory, determinations as to what the term includes. The rank and quality of the person possessing it will occasion the determination one way. If a person of rank buys a service of plate suitable to his quality, and never uses it, yet I think the plate would pass by the term 'household furniture.' There is no general

rule that plate will not pass, unless used as such by testator. This question always depends on circumstances, and was never determined by the plate being used or not. Linen and china, both useful and ornamental, in a house, \* \* \* will pass under the term." Kelly v. Powlet, 2 Amb. 605, 610.

China, linen, and plate are within the term "household furniture," as used in wills. McMicken v. McMicken University, 2 Am. Law Reg. (N. S.) 489, 490.

"Household furniture," as used in a policy of insurance, includes a Japanese vase worth \$500, which was in the house and a part of its furnishings. Bowne v. Hartford Fire Ins. Co., 46 Mo. App. 478, 477.

#### **Clock.**

The term "household furniture" may include a clock. Wilson v. Ellis (N. Y.) 1 Denio, 462, 463.

The necessary household furniture of a debtor, which is exempted by statute from execution, may include a watch or a clock, when the daily avocations of the family are such that a timepiece is indispensable. Bitting v. Vandenberg (N. Y.) 17 How. Prac. 80, 83.

#### **Hotel or restaurant furniture.**

Within the meaning of Act Pa. April 29, 1844, providing that all household furniture owned by any person shall be valued and assessed and subject to taxation, beds and bedding, carpets, and personal property necessarily required and used in and about the keeping and management of a licensed hotel for the accommodation of strangers and travelers, is not *per se* household furniture, and is such only in case the owner resides in the hotel and occupies it as his home. As a legal term the text-books say: "Household goods will only include things in domestic use, and not what a testator has in the way of trade." In some of the cases, however, the courts have said: "Household furniture has as general a meaning as possible. It is incapable of a definition. It is capable only of a description. It comprises everything that contributes to the use or convenience of the household or ornament of the house." McWilliams v. Gable, 3 Pa. Co. Ct. R. 467, 468 (quoting Ward, Legacies, 217; 1 Roper, Legacies, 225).

Rev. St. tit. 20, § 4, providing that whenever the occupant of any dwelling house, having a family, shall mortgage the "household furniture used by him in house-keeping" by a deed in which such furniture shall be particularly described, and which shall be executed, acknowledged, and recorded in all respects as mortgages of lands are required to be, such mortgage shall be good and effectual, although the mortgagor shall retain

possession of such mortgaged property, should be construed to include the furniture of a hotel kept by the mortgagor and in which he resides with his family, so that such furniture does not lose the immunity conferred upon it by the statute, in exempting it in such case from the necessity of a change of possession. The statute should not be held to embrace only furniture which is used by the mortgagor exclusively for his own family house-keeping. It is remedial in its nature, and its design is to be mainly regarded in its construction. It is very clear that the intention was to exempt a mortgage on the articles of personal property therein specified, on its being executed and made public by its being recorded, from the general rule applicable to conveyances of personal property, by the construction that those articles are such as are constantly used by the owner, and constitute the means of livelihood, and that he would necessarily be subject to great and peculiar inconvenience and injury by being deprived of their use. *Croswell v. Allis*, 25 Conn. 301, 309.

A will bequeathing all of testator's money, household furniture, plate, books, linen, wearing apparel, etc., cannot be construed to include such articles of furniture in the house, or the tavern where the testator's tavern or victualing business was carried on, as applied to the business, and were used only for the purposes of the business. The words "household furniture" would only pass what the testator kept for his domestic and personal use. *Manning v. Purcell*, 31 Eng. Law & Eq. 452, 457.

Household and kitchen furniture, within the meaning of a statute exempting from execution to the head of a family his household and kitchen furniture, is limited to household and kitchen furniture for the use of the family, and does not include such furniture used in hotels and restaurants beyond that which is used by the family. *Heidenheimer v. Blumenkron*, 56 Tex. 308, 314; *Dodge v. Knight* (Tex.) 16 S. W. 628, 628.

#### **Jewelry and watches.**

"Household furniture" means those things provided for, appropriated to, and used in a house, as a clock, etc. A watch kept hung up for use in a house may be considered as household furniture. There may be articles which are sometimes used in a house, that are carried out by day and brought in by night, which have in fact such a fixedness as to be considered household furniture. *Gooch v. Gooch*, 33 Me. 535.

The term "household furniture" should be defined to mean those articles of usual use in the household for the benefit and comfort of the family, and as so used could not be construed to include a watch and chain habitually carried on the person of the

debtor for his own convenience, and not used by the household nor for the benefit or comfort of the family. *Brown v. Edmonds* (S. D.) 59 N. W. 731, 732.

Under Gen. St. c. 66, § 279, exempting household furniture to a certain value from execution or attachment, "household furniture" does not include a silver watch worn by a debtor, though it is the only timepiece used in the household. *Rothschild v. Boelter*, 18 Minn. 361 (Gil. 331, 332).

A devise of household furniture does not pass watches and jewelry for personal wear, or money, though contained in the house. *Ludwig v. Bungart*, 67 N. Y. Supp. 177, 179, 33 Misc. Rep. 177.

Jewelry is not included in the term "household furniture," as used in exemption statutes; nor is a mahogany cabinet, designed for ornamentation and for holding jewelry. *Towns v. Pratt*, 33 N. H. 345, 350, 66 Am. Dec. 726.

#### **Kitchen utensils.**

A statute exempting from execution the "household furniture necessary for supporting life" should be construed to include a cooking stove, which is an article of household furniture, calculated for no other use, and is not an article of ornament or luxury, and though of modern invention it is in the present state of the country as necessary as any other single article of household furniture, and when actually appropriated to the use designed falls clearly within the reason of the statute. *Oroker v. Spencer* (Vt.) 2 D. Chip. 68, 69, 15 Am. Dec. 652.

A statute exempting "household furniture necessary for upholding life," from attachment should be construed to include a cooking stove, though the use of it by the debtor has been temporarily suspended; for it is an actual or permanent necessity. *Hart v. Hyde*, 5 Vt. 328, 332.

"Household furniture" includes goods, vessels, utensils, and other articles necessary and convenient for housekeeping. *Webst. Dict.* The words as used in a policy of insurance insuring "household furniture," when not otherwise restricted, include all articles necessary and convenient for housekeeping, such as a sausage mill, churn, cook stove, dishes, kettles, etc., not particularly specified. *Reynolds v. Iowa & N. Ins. Co.*, 46 N. W. 659, 661, 80 Iowa, 563.

#### **Piano.**

A piano is an article of household furniture, within Gen. St. c. 152, § 5, providing that the household furniture of a married woman shall not be conveyed by her husband, unless she join in the conveyance. *Von Storch v. Winslow*, 13 R. I. 23, 24, 43 Am. Rep. 10.

The lease of a hotel "and the furniture and other property of the hotel," made with knowledge on the part of the lessor that its president had agreed to purchase from plaintiff a piano which had been placed in the hotel for the use of the guests, shows an intention to receive and accept the piano, and the lessor is therefore liable to plaintiff for the price. *Allen v. Grove Springs Hotel & Steamboat Co.*, 85 Hun, 537, 540, 83 N. Y. Supp. 355, 357.

A statute exempting from attachment and execution "such suitable apparel, bedding, tools, arms, and articles of household furniture as may be necessary for upholding life" does not mean that the means of an intellectual enjoyment, of gratifying refined tastes, of participating in social pleasures and hospitalities, of cultivating the affections and the moral and religious sentiments, so far as these objects may be promoted by the possession of property, shall be embraced within its provisions, and hence a pianoforte is not exempt as an article of household furniture. The object of the statute was simply to protect a poor man in the enjoyment of the necessities of his life, so that the reasonable subsistence of himself and his family might not be endangered by the exactions of creditors. It was intended to secure the fruits of industry to the primary object of labor—the maintenance of life in reasonable comfort. *Dunlap v. Edgerton*, 30 Vt. 224, 226.

A piano is not "household goods, furniture, and utensils," within the meaning of How. Ann. St. § 7686, subd. 7, classifying exempt property. *Kehl v. Dunn*, 61 N. W. 71, 102 Mich. 581, 47 Am. St. Rep. 561.

#### **Sewing machine.**

A sewing machine is an article of household furniture, within the meaning of that phrase in Gen. St. c. 152, § 5, providing that the household furniture of any married woman shall not be sold, etc., by the husband without her consent. *Von Storch v. Winslow*, 13 R. I. 23, 24, 43 Am. Rep. 10.

#### **Trunk.**

Rev. St. c. 184, exempting household furniture of a debtor to a certain value from attachment and execution, must be understood to mean those vessels, utensils, or goods which, not becoming fixtures, are designed in their manufacture originally and chiefly for use in the family as instruments in the household and for conducting and managing household affairs. The term does not include a traveling trunk. *Towns v. Pratt*, 33 N. H. 345, 350, 66 Am. Dec. 728.

#### **Wearing apparel.**

"Household furniture," as used in a policy of insurance, must be construed in its

common acceptance to mean "furnishings for the house," and as such is not to be held to exclude wearing apparel also insured in the same policy. *Longueville v. Western Assur. Co.*, 2 N. W. 394, 51 Iowa, 553, 33 Am. Rep. 146.

#### **HOUSEHOLD GOODS.**

Household goods "means every article of a permanent nature which is not consumed in its enjoyment." *Marquam v. Sengfelder*, 32 Pac. 676, 679, 24 Or. 2.

"Household goods" embrace articles of a permanent nature—that is, articles of household use which are not consumed in their enjoyment—that are used or purchased or otherwise acquired by a person for his house, but not goods in the way of his trade. Plate will pass by this term, but not articles of consumption found in a house, as malt, hops, or victuals. *Smith v. Findley*, 8 Pac. 871, 876, 34 Kan. 816 (citing 1 Bouv. Law Dict. p. 758).

"Household goods and furniture," as used in a will giving to a certain person the testator's household goods and furniture, not being connected with anything else, and no reason appearing to show that it was meant they should be confined to a particular locality, must be construed in a general signification as meaning all the household goods, etc. *Willis v. Curtols*, 1 Beavan Ch. 189, 192.

"Household goods will only include things in domestic use, and not what a testator has in way of trade." In re *Hoope's Estate* (Pa.) 1 Brewst. 462, 465.

The words "household goods," as used in Act July 7, 1889, regulating chattel mortgages, and providing that no chattel mortgage executed by a married man or married woman on household goods shall be valid, unless joined in by the husband or wife, as the case may be, means such goods as, being suitable in the condition and station in life of the mortgagor and the way he lives, are used by him in his household for personal, home, or household convenience, and do not include goods kept for mere purposes of trade or business. *Schoenhofen Brewing Co. v. Merriion*, 67 Ill. App. 123, 125.

#### **Books, paintings, etc.**

"Household goods" is "nomen generalis summo," and fairly embraces articles commonly used in a family. Other things than those which are commonly used in a household or family may be made household goods by the use which is made of them, as, for instance, books belonging to a well-filled library, paintings and statues in a large gallery, curiosities of an extensive museum, or numerous specimens belonging to a well-selected mineralogical collection, etc. *Dayton v. Tillou*, 24 N. Y. Super. Ct. (1 Rob.) 21, 27.

**Clock.**

The term "household goods" will include a clock, if not fixed to the house. *Slanning v. Style*, 3 P. Wms. 334, 335.

**Clothing, jewelry, and watches.**

A will disposing of the rest and residue of the testator's household goods and effects, including books, pictures, furniture, and the like, cannot be construed to include a watch, chain, clothing, and jewelry. In re *Kimball's Will*, 40 Atl. 847, 20 R. I. 619.

**Coal.**

A will bequeathing the testator's household goods to his widow should be construed to include coal remaining unconsumed at the testator's death. In re *Hurley's Estate* (Pa.) 12 Phila. 47.

**Gas fixtures.**

Gas fixtures are "household goods," within Laws 1886, c. 495, exempting such goods from the operation of Laws 1884, c. 315, declaring that the reservation of ownership in a contract for the conditional sale of goods, where possession is given, shall be void as to subsequent purchasers and mortgagees in good faith, unless the contract is filed as required by law. *Iden v. Sommers*, 18 N. Y. Supp. 779, 61 N. Y. Super. Ct. (29 Jones & S.) 177; *Baldinger v. Levine*, 82 N. Y. Supp. 483, 484, 83 App. Div. 130.

**Guns or pistols.**

The term "household goods," as used in a will, does not include guns or pistols, if used as arms in riding or shooting game. *Slanning v. Style*, 3 P. Wms. 334, 335.

**Hotel or hospital furniture.**

A statute exempting household goods from execution does not include furniture and goods in a hotel, which are not necessary for the accommodation of the family of the keeper thereof, but are only used for hotel purposes. *Commonwealth v. Stremback* (Pa.) 3 Rawle, 341, 344, 24 Am. Dec. 351.

"Household goods," as used in a marriage contract, by which it was agreed that the wife should have the household goods on the husband's death, extended only to the goods in the house in which he lived, and not such as were owned by him in a hospital used by the government. *Pratt v. Jackson*, 2 P. Wms. 302, 304.

**Liquors.**

The term "household goods," as used in a will by which testator gave all household goods and implements of the household, did not include the malt, hops, ale, and beer. *Slanning v. Style*, 3 P. Wms. 334, 335.

Wines in a well-stored wine cellar are embraced in the term "household furniture."

*Dayton v. Tillou*, 24 N. Y. Super. Ct. (1 Rob.) 21, 27.

**Piano.**

A piano is not "household goods, furniture, and utensils," within the meaning of How. Ann. St. § 7686, subd. 7, classifying exempt property. *Kehl v. Dunn*, 61 N. W. 71, 102 Mich. 581, 47 Am. St. Rep. 561.

**Plate.**

A bequest by a testator of his household goods includes plate which was used in the testator's house. *Snelson v. Corbet*, 3 Atk. 369, 370.

**Wheat.**

A listing and assessment of household goods, etc., did not include wheat; in other words, wheat was not listed at all. *Thompson v. Davidson*, 15 Minn. 412, 415 (Gil. 333).

**HOUSEHOLD PROPERTY.**

The term "household property," as used in a will giving to the testator's widow all of the household property in the dwelling house, is broad enough to include the coal and wood provided for the use of the family, and also a shotgun, in the absence of proof showing that it was not kept for the defense of the house. In re *Frazer*, 92 N. Y. 239-246.

**HOUSEHOLD STUFF.**

"Household stuff" comprises everything that contributes to the convenience of the householder or ornamentation of the house. *Appeal of Hoopes*, 60 Pa. 220, 227 (citing *Kelly v. Poley*, Amb. 610; *Cole v. Fitzgerald*, 1 Sim. & S. 189; *Carnagy v. Woodcock* [Va.] 2 Munf. 239).

The term "household stuff," as used by some of the old writers, is synonymous with the term "household furniture." *McMicken v. McMicken University* (Ohio) 2 Am. Law Reg. (N. S.) 489, 491.

**HOUSEHOLDER.**

See "Resident Householder"; "Substantial Householder."

A householder is defined to be a master or chief of a family, which family occupies a dwelling house. *Hutchinson v. Chamberlain*, 11 N. Y. Leg. Obs. 248, 249; *Carpenter v. Dame*, 10 Ind. 125, 130. One who keeps house with his family. *Greenwood v. Madrox*, 27 Ark. 648, 655.

The word "householder" means merely, according to Webster, a master or chief of a family; one who keeps house with his family. Mr. Anderson defines "householder" to be the head of a household, a person who has charge of a family or household.

The word conveys, with the word "family," the idea of a domestic establishment or management of a household. *Fore v. Hoke*, 48 Mo. App. 254, 261.

"Householder," as used in a statute providing that every householder having a family shall be entitled to an estate of homestead, means a person owning a dwelling house that is capable of being occupied for the purpose of a residence. *Rock v. Haas*, 110 Ill. 528, 532.

"Householder or head of the family," as used in the Constitution, where a homestead exempted from taxation is allowed a householder or head of the family, means a householder who is a citizen of the state. No such privilege or immunity was intended to be accorded to any other than citizens of the state. *Lindsay v. Murphy*, 76 Va. 428, 429.

A householder is the master of a household, and a household is a family living together; however, not necessarily wife and children. But it must be a family, small or large, for which he provides. *Fink v. Fraenkle*, 14 N. Y. Supp. 140, 141, 20 Civ. Proc. R. 402.

A householder is a person who occupies a house as a place of residence or business, without any relation to the character of the title by which the property is held. *Shepard v. City of New Orleans*, 25 South. 542, 543, 51 La. Ann. 847.

The term "householder," when used in statutes, shall be construed to mean a person of full age and owning or occupying a house as a place of residence, and not as a boarder or lodger. *Gen. St. Kan. 1901*, § 7342, subd. 25.

The word "householder," as used in the chapter relating to the assessment and collection of taxes, shall be taken to mean and include every person, married or single, who resides within the state of Washington, being the owner or holder of an estate, or having a house or place of abode, either as owner or lessee. *Ballinger's Ann. Codes & St. Wash. 1897*, § 1658.

A householder, as designated in all statutes relating to exemptions, is defined to be: (1) The husband and wife, or either; (2) every person who has residing with him or her, and under his or her care and maintenance, either (a) his or her minor child, or the minor child of his or her deceased wife or husband; (b) a minor brother or sister, or the minor child of a deceased brother or sister; (c) a father, mother, grandfather, or grandmother; (d) the father, mother, grandfather, or grandmother of a deceased husband or wife; (e) an unmarried sister and any other of the relatives mentioned in this section who have attained the age of majority and are unable to take care of and support

themselves. *Ballinger's Ann. Codes & St. Wash. 1897*, § 5248b.

#### As affected by cessation of housekeeping.

A statute exempting property of a householder from execution means the father or head of a family, whom he supports or assists in supporting; it not being necessary that the family should keep house in the ordinary sense of the word, but the family may board, and still be entitled to the benefit of the law. *Astley v. Capron*, 89 Ind. 167, 176.

"Householder," as used in a statute exempting certain property of a householder from sale on execution, means a person having and providing for a household; and the character is not lost by a temporary ceasing of housekeeping and storing of property, with a view to again returning to and renewing housekeeping, or during the removal of the family from one place of residence to another. *Griffin v. Sutherland (N. Y.)* 14 Barb. 456, 458.

4 Edm. St. p. 626, providing that the necessary household furniture of a householder, having a family for which he provides, should be exempt from execution, etc., should be construed as meaning more properly the master or head of a family, instead of being considered synonymous with "housekeeper"; and hence the mere fact that the debtor was boarding, and her goods were stored temporarily at the time of the levy, did not deprive her of the character of a householder. *Cantrell v. Conner (N. Y.)* 51 How. Prac. 45, 46, 6 Daly, 224, 225.

A householder is defined to be the head of a family which occupies a house, and as used in a statute exempting certain property of a householder from sale on execution it would include a person whose family consists of domestics; he having no wife or children. It would also include one who breaks up housekeeping for an indefinite period of time, and stores his furniture, and with his family leaves his place of residence, intending, however, to return at some future time and resume housekeeping. *Sullivan v. Canan (Ind.)* 1 Wils. 532, 534.

"Householder," as used in Act April 18, 1815, exempting from execution one cow, etc., owned by any person being a householder, includes a father and husband who has left the state, leaving his wife and children living together. The object of the statute was to confer the privilege on families, and hence an execution levied on the goods of the family exempted by the statute, while removing from one dwelling to another, is void. The word "householder," as used in this statute, does not mean that it was necessary to inhabit a dwelling house to secure the exemption. As long as the members of the household remain together as a family, without



being broken up, the privilege remains. *Woodward v. Murray* (N. Y.) 18 Johns. 400, 402.

An execution debtor, at the time of the levy of an execution on his property and at the time of the sale thereon, had left the house where he had resided with his family to avoid criminal process, and, though frequently seen in the county, his usual whereabouts were unknown. His property remained in the house he had lately occupied, but his family were temporarily at the house of his brother. Held, that these facts did not justify the conclusion that the execution debtor had ceased to be a resident householder, or had lost his right to the benefit of the exemption law. *Norman v. Bellman*, 16 Ind. 156, 157.

#### As freeholder.

That one may be a freeholder and not a householder, or a householder and not a freeholder, seems to be too plain for argument. "Householder" refers to the civil status of a person, not his property, and a man may be a householder without owning the real estate or any interest therein; whereas a "freeholder" is one who owns a freehold estate—that is, an estate in lands, tenements, or hereditaments of an indeterminate duration, other than an estate at will or by sufferance—as in fee simple, fee tail, or for life, or during coverture. One may be an extensive freeholder, and not be a householder. *Shively v. Lankford*, 74 S. W. 835, 838, 174 Mo. 535 (citing *Carpenter v. Dame*, 10 Ind. 125, 129).

"Householders," as used in a certificate of appraisers of land, reciting that it was appraised by three householders, will be construed to mean "freeholders," as the latter term is used in the statute requiring such appraisement to be made by freeholders, since the word "householders," though ambiguous, may mean "freeholders." *Exendine v. Morris*, 8 Mo. App. 383, 387.

2 Rev. St. 1852, p. 887, § 1, and Id. p. 24, § 2, providing that petit jurors shall be drawn from householders competent to serve as jurors, and that grand jurors shall be selected from freeholders or householders, means a "householder," in contradistinction to a "freeholder." A freeholder is the owner of a freehold estate, which is an estate in lands or other property for the life of the tenant, or that of some other person, or for some other period; while a householder is the occupier of a house, a housekeeper, or master of a family. Hence a man may be a freeholder and not a householder, or a householder and not a freeholder. *Bradford v. State*, 15 Ind. 347, 353.

#### As head of family.

The term "householder" means the occupier of a house, being the head or master,

and having and providing for a house. It implies in its terms the idea of a domestic establishment or the management of a household. *Katzenberg v. Lehman*, 80 Ala. 512, 514, 2 South. 272, 273; *Lane v. State*, 15 S. W. 827, 829, 29 Tex. App. 310.

The term "householder" sometimes covers the case of a man without a home, or wife, or children, who keeps up a house; but it also embraces usually the head of an actual family dependent on him, whether house-keeping or not. *Pettit v. Muskegon Booming Co.*, 74 Mich. 214, 215, 41 N. W. 900, 901.

"The term 'householder' sometimes covers the case of a man without a family, a wife, or children, who keeps up a house; but it also embraces usually the head of an actual family dependent on him, whether house-keeping or not." It is used in the latter sense in *How. Ann. St. 1882*, § 8032, which exempts from attachment debts due for personal labor for any amount not exceeding \$25, in favor of a householder, and hence the statute covers the case of a man residing in the state and supporting a family in Canada. *Pettit v. Muskegon Booming Co.*, 41 N. W. 900, 901, 74 Mich. 214.

The term "householder," as used in the statute exempting certain property of a householder from execution has a very well defined meaning, and imports the master or head of a family, who reside together and constitute a household. *Chamberlain v. Darrow*, 11 N. Y. St. Rep. 100, 102.

The word "householder," as used in the exemption statutes, means the head or person who has charge of the family, and does not apply to the subordinate members or inmates of the household. *Bowne v. Witt* (N. Y.) 19 Wend. 475; *Brokaw v. Ogle*, 48 N. E. 394, 397, 170 Ill. 115.

Within the provision of the Constitution that every householder or head of a family shall be entitled to claim an exemption, the terms "householder" and "head of a family" are convertible, and employed as explanatory, one of the other. Each signifies one who provides for a family; one who keeps house with his family; a master or a mistress of a dwelling house. In *Calhoun v. Williams* (Va.) 32 Grat. 18, 34 Am. Rep. 759, the term "householder" was held to signify one who occupies such a relationship toward persons living with him as to entitle them to a legal or moral right to look to him for support. This relation of dependence and support constitutes the one upon whom the burden is cast the head of a family. Under such definition a married woman, whose husband, though living in another country, occasionally visits her and sends her money, and all their children are of age, is not a householder or head of a family; but a widow, with two infant

children wholly dependent on her for support, is the head of a family. *Oppenheim v. Myers*, 39 S. E. 218, 99 Va. 582.

"Householder," as used in Code, § 3583, declaring that it is good ground of challenge for either party that a juror has not been a householder for one year preceding the time he is sworn, means something more than the mere occupant of a room or house. It implies the idea of a domestic establishment, the management of a household. *Aaron v. State*, 37 Ala. 106, 118; *Lane v. State*, 15 S. W. 827, 829, 29 Tex. App. 319.

As used in Code 1871, § 724, providing that male citizens who are householders shall be competent jurors, the term "householder" refers to the civil status of the person, and not to his property, and requires that he shall occupy the position of chief in a domestic establishment, though he need be neither a husband nor a father. *Nelson v. State*, 57 Miss. 286, 288, 34 Am. Rep. 444.

The word "householder," as used in the article relating to registration and elections in cities with 1,000 inhabitants or over, shall mean the chief or head of a family, who resides with the family as a family, and who supports and provides for such family as an independent family. *Rev. St. Mo. 1899*, § 7357.

#### Housekeeper synonymous.

The term "householder" does not mean simply a housekeeper, but also a master or chief of a family. *Webst. Dict. Griffin v. Sutherland* (N. Y.) 14 Barb. 456, 457.

"Householder," as used in Act Aug. 1, 1876, providing that no person shall be qualified to serve as a juror on the trial of any case, unless he be a legal voter, a citizen of the state, a freeholder in the state, or householder in the county in which he may be called to serve, etc., is "synonymous with 'housekeeper,' which is defined by Bouvier to be 'one who keeps house.'" Mr. Burrill, in his *Law Dictionary*, defines a "householder" to be "the occupier of a house." *Lester v. State*, 2 Tex. App. 432, 448.

#### Keeper of house of ill fame.

"Householder," as used in statutes exempting certain property of householders from sale on execution, includes a woman who keeps a house of ill fame, provided she has a family for which she is bound to provide, other than the inmates of the house. *Bowman v. Quackenboss* (N. Y.) 8 Code Rep. 17.

#### Married woman.

"Householder," as used in Code, § 2078, providing that all qualified electors and householders shall be competent to serve as grand jurors, does not include a married wo-

man living with her husband. *Harland v. Territory*, 13 Pac. 453, 464, 3 Wash. T. 131.

The term "householder," in the section of the Code of 1881 providing that all electors and householders shall be competent grand jurors, is to be construed in view of the fact that chapter 183 of the Code of 1801 has so changed the law as to give the wife equal control with the husband over the household, as including a wife living with her husband. *Rosencranz v. Territory*, 5 Pac. 305, 2 Wash. T. 267.

The terms "householder" and "head of a family," within the meaning of the exemption statute, may be properly used to characterize a married woman, who separates from her husband, though by agreement, and maintains herself and family without the aid of her husband. *Kenley v. Hudelson*, 99 Ill. 493, 500, 39 Am. Rep. 31.

#### Miller.

A surety upon an undertaking given on an appeal, pursuant to Code Civ. Proc. § 1326, who is engaged in the milling business, and runs and occupies a mill within the state, and owns the machinery therein, is a householder, within Code Civ. Proc. § 812, and is sufficient for the purpose of the undertaking. *Delamater v. Byrne* (N. Y.) 59 How. Prac. 71, 72.

#### Roomer.

A person is not a householder who occupies a room in another's dwelling, he and his daughter being the only occupants of such room—he not being the lessee of the room, paying no rent therefor, and having no legal right to continue its occupancy against the consent of the owner, notwithstanding he furnished it in part; the owner having the undoubted right to control its use and to require it to be vacated at any time, or to have the occupant put in another room in the house, as convenience or necessity might have required. Such acts are inconsistent with the authority of the housekeeper, who may certainly control his household affairs as he may choose, independent of the will of another. *Velle v. Koch*, 27 Ill. (17 Peck) 129, 132.

"Householder," as used in the statute which requires that jurors be either freeholders or householders, would include one who rents a room and boards. *Robles v. State*, 5 Tex. App. 346, 357.

A "householder," as used in the Code, requiring a surety for purposes of bail to be either a householder or freeholder within the state, includes a person who rents and occupies a portion of a building as an office for business purposes within the state. *Somerset & Worcester Sav. Bank v. Huyck* (N. Y.) 33 How. Prac. 323.

The fact that a juror has a rented store in which he sleeps does not constitute him a "householder," within the meaning of Code 1871, § 724, requiring a juror to be a householder. *Brown v. State*, 57 Miss. 424, 433.

#### Single man.

A bachelor, occupying a house with two sisters, who are supported by him, and with him constitute the family of which he is the head, is a householder. *Holnbeck v. Wilson*, 42 N. E. 169, 171, 159 Ill. 148; *Wilke v. Garner*, 53 N. E. 613, 614, 179 Ill. 257, 70 Am. St. Rep. 102; *Greenwood v. Maddox*, 27 Ark. 648, 655.

Where it was shown that an unmarried man under 21 years of age and his sister had lived together for several years, each owning some personal property, and each by their labor contributing toward their household expenses, he appearing to direct and control affairs, it was held that he was a "householder," within the meaning of the exemption statutes. *Graham v. Crockett*, 18 Ind. 119, 120.

An unmarried man, who has no children or other persons dependent on him, living with him, though he keeps house and has persons hired by him living with him, is not a "householder," within the meaning of the Constitution and statutes. *Calhoun v. Williams (Va.)* 32 Grat. 18, 20, 34 Am. Rep. 759; *Peterson v. Bingham*, 13 Wash. 178, 180, 43 Pac. 22, 23. Contra, see *Kelley v. McFadden*, 80 Ind. 536, 539; *Kamer v. Clatsop County*, 6 Or. 238, 241.

It is not requisite that the person should be a married man to be a householder. His family may consist of servants or others occupying the house with him, but he must be the head or master of the establishment. *Lane v. State*, 15 S. W. 827, 829, 29 Tex. App. 319. But an unmarried man, who rents and occupies a room as a sleeping apartment and takes his meals elsewhere, is not a householder, within the meaning of the statute. *Katzenberg v. Lehman*, 2 South. 272, 273, 80 Ala. 512, 514.

The term "householder" includes a party that keeps house and has boarders, though he is not married, and who hires a woman to take charge of his household affairs, giving her for her services her board and the board of her children. *Van Vechten v. Hall (N. Y.)* 14 How. Prac. 436-438.

A "householder" may be said to be a person owning or holding and occupying a house, and a "family" is a collection of individuals living under one head. A "householder having a family" may be characterized as the head of a family occupying a house and living together in one domestic establishment. But an unmarried man, occupying a house as an office and sleeping apartment,

and supporting a grandfather living in another house, is not a householder having a family. *Pearson v. Miller*, 14 South. 731, 71 Miss. 379, 42 Am. St. Rep. 470.

#### Surviving husband.

A householder is one upon whom rests the duty of supporting the members of his family or household. A judgment debtor, who after the death of his wife employs a family to keep house for him and his adopted daughter, who is dependent on him for support, is a resident householder, within the meaning of a statute exempting property of resident householders. *Bunnell v. Hay*, 73 Ind. 452, 454.

Rev. St. 1881, § 703, providing for an exemption from execution of property of a certain amount to a resident householder for the payment of his debts, should be construed to include a widower, who has no one necessarily dependent on him for support, but who lives in a house belonging to a married daughter, in which he lived at the time of his wife's death, and on which he pays taxes and keeps up improvements, without paying other rent, and who contributes to the living expenses of the daughter (who acts as his housekeeper), her husband, and himself. *Blpus v. Deer*, 5 N. E. 894, 895, 106 Ind. 135.

The term does not include a husband who by the death of a wife is left without a family, although he still continues to reside at the house in which the family resided. *Chamberlain v. Darrow (N. Y.)* 46 Hun, 48, 51.

The words "owner," "resident," or "householder," as used in the homestead statute to describe the persons entitled to the homestead exemption, are not limited to married men, and therefore a widower, whose children are all married and away from home, and who has rented the premises claimed as his homestead, but who still boards and lodges in the house, is entitled to the homestead exemption. *Myers v. Ford*, 22 Wis. 139, 141.

#### Tavern keeper.

The term "housekeeper," in Acts 1723, c. 16, § 11, which provides that no housekeeper shall sell any strong liquor on Sunday, or suffer any drunkenness, gaming, or unlawful recreations in his or her house, includes a tavern keeper. *State v. Fearson*, 2 Md. 310, 312.

#### Widow.

The term "householder," in a statute exempting from execution certain property owned by a householder, includes a widow occupying a farm left by her former husband and living with and providing for the minor children of deceased; and this is true, notwithstanding the widow marries a second

husband, who lives with her upon the farm left by the deceased, if she continues to provide for the infant children after the second marriage in the same manner as she did before. *Brigham v. Bush* (N. Y.) 33 Barb. 596, 600.

### HOUSEHOLDER HAVING A FAMILY.

Where a homestead exemption statute exempted the homestead to every household having a family, and did not require that the debtor should be the head of a family, the phrase "householder having a family" should be construed to include a married woman living with her husband, where the premises claimed to be exempt were occupied by her as a residence, and constituted the homestead of herself and family, consisting of her husband and children. *Zander v. Scott*, 48 N. E. 2, 3, 165 Ill. 51.

The term "householder having a family," in Code, § 1970, giving homestead exemptions to householders having families, does not include a widower 72 years old, living with his adult son on land to which the father has title, but who contributes nothing to the support of the son's family beyond a sum necessary for his own maintenance. *Powers v. Sample*, 16 South. 293, 294, 72 Miss. 187.

A bachelor, occupying a house with two sisters, who are supported by him and with him constitute the family of which he is the head, is a householder having a family. *Holnback v. Wilson*, 159 Ill. 148, 42 N. E. 169, 171; *Wike v. Garner*, 53 N. E. 613, 614, 179 Ill. 257, 70 Am. St. Rep. 102.

### HOUSEKEEPER.

"Housekeeper" is defined by Bouvier to be "one who keeps house." *Lester v. State*, 2 Tex. App. 432, 448.

"Housekeeper," as used in Act Feb. 21, 1849, § 4 (Scates' Comp. St. p. 1202), providing that on any person dying intestate, being a housekeeper and the head of a family, leaving no widow, there should be allowed to his children, residing with him at the time of his death, the amount of property allowed to the widow, should be construed as applying only to residents of the state. One in feeble and declining health, residing in another state, who was brought into the state, and remained with and accepted a room in the house of a person till his death, a daughter remaining with him, who sometimes ate at the table of the person in whose house they were staying, and slept at such house in a different apartment from that occupied by deceased, the meat furnished deceased being used in that person's family, the cooking being done on his stove and with his wood, and the deceased repeatedly expressing an intention of again returning to the state from

whence he came, to resume his profession of teaching music, when he should regain his health, is not a housekeeper within the meaning of the statute; for his arrangement by which he remained in the house was temporary, and not permanent, and there was apparently no design of his to reside in the state as his home. *Velle v. Koch*, 27 Ill. 129, 131.

"Housekeeper," as used in a statute exempting from execution certain property of a housekeeper, means a person having a family composed of one or many persons besides himself, whom he is under a natural or moral obligation to support, or who are dependent upon him therefore, and includes a person with a family consisting of a woman, received and treated by him as his wife, and his son by her, who are dependent on him for support. *Bell v. Keach*, 80 Ky. 42, 45.

A husband having a family is a housekeeper with a family, so as to entitle him to the benefit of the exemption laws, though in consequence of some domestic difficulty he had absented himself from home. The mere neglect or dereliction of duty on the part of the head of the family, even if it be a temporary abandonment of his home, will not be sufficient to deprive the wife and children of the rights which it was intended by the statute to secure to them. *Carrington v. Herrin*, 67 Ky. (4 Bush) 624, 628.

### Householder synonymous.

See "Householder."

### Servant.

"One of the standard English dictionaries defines a 'housekeeper' to be a woman who oversees the work and servants in a house, either as a mistress or as an upper servant." A woman employed in a small country tavern, who is required to work about the house, do the cleaning, tend bar, cook, and all other such necessary things, including the washing and ironing, and serving drinks in the parlor, was held not to be a housekeeper, but a servant. *Taylor v. Beatty*, 51 Atl. 771, 772, 202 Pa. 120.

The word "housekeeper" will generally be understood to have reference to a person who performs services in the taking care of a house in connection with the inmates residing therein; but in an action for services performed as a housekeeper the value of the services included within the term are to be decided by the duties actually performed, and the recovery is not restricted to services involving merely the control and care of the house. *Edgecomb v. Buckhout*, 40 N. E. 991, 994, 146 N. Y. 332, 28 L. R. A. 816; *Taylor v. Beatty*, 51 Atl. 771, 772, 202 Pa. 120.

### Surviving husband.

"Housekeeper with a family" means one having persons living with him, who not only

bear a dependent relation to him, but whom he is under a natural or legal obligation to support. This legal obligation, however, must exist, and a widower, who has living with him a married daughter, whose husband is not legally or actually separated from her, although he is away from her most of the time and contributes very little toward her support, is not a "housekeeper with a family," within the meaning of that phrase as used in the homestead law. *Louisville Banking Co. v. Anderson*, 44 S. W. 636, 637, 106 Ky. 744.

"Housekeepers," as used in Gen. St. c. 38, art. 13, § 16, providing for a homestead exemption for actual bona fide housekeepers with a family, should be construed in the natural import of those words, and not to include a surviving husband whose family consists of himself and a housekeeper. *Ellis v. Davis*, 14 S. W. 74, 75, 90 Ky. 183.

### HOUSEKEEPING.

As business, see "Business."

### HOVE TO.

The words "hove to," when applied to a steamer, mean that the steamer is held in such position that she takes the heaviest seas upon her quarter. *The Hugo* (U. S.) 57 Fed. 403, 411.

### HOW.

"The words 'how they should find any question of fact,' in an instruction that the jury are judges of the questions of fact, and the court does not intend to instruct how they should find any question of fact, plainly mean at what conclusion they should arrive, and do not refer to the manner of finding a fact." *South Chicago City Ry. Co. v. McDonald*, 63 N. E. 654, 196 Ill. 208.

### HOW FAR.

Under a statute for the regulation of mills, providing that a jury may be summoned to inquire of the yearly damages occasioned by the overflow of lands, and also to inquire and make return in their verdict what portion of the year the lands ought not to be flowed, in an oath of such a jury that they would make a true and faithful appraisal of the yearly damages which a landowner is entitled to recover against the millowner for the flowing of certain land, and how far the same may be necessary, the term "how far the same may be necessary" will as well apply to time as to the extent of ground which may be flowed or the height to which the water may be raised. In other words, "how far" may intend, how long in

point of duration, to what distance or extent of surface, and to what height the flowing may be necessary. *Vandusen v. Comstock*, 3 Mass. 184, 186.

### HOWEVER.

A will, giving property to the children of a certain person, provided: "If one or more of the children should happen to die before their mother, without leaving any children, the share of such child or children so dying should be equally distributed among the survivors of the brothers and sisters. If, however, such child or children so dying should leave a child or children, such child or children should be entitled to their parent's share." Held, that the word "however" indicates an alternative intention, a contrast with the previous clause, and a modification of it under other circumstances. It is thus: "I do not, however, so dispose of the survivorship in the case of those who die leaving children; but such children shall take the share which their parents, if living, would have taken." *Appeal of Lewis*, 18 Pa. 318-325.

The phrase "however that may be," or the corresponding phrase, "if it be conceded," in a judicial opinion, may generally, but not always, be taken as indicating that what is said upon the point referred to is not to be understood as the expression of an absolute, final conclusion, but as signifying that there is at least a tinge of obiter in what is thus qualified. *Chemical Nat. Bank v. Armstrong* (U. S.) 76 Fed. 339, 343.

### HUBSTONES.

Hubstones are useful appliances used in streets to keep trucks in their proper places and prevent them from sliding into places where they may receive and do damage. *Jordan v. City of New York*, 55 N. Y. Supp. 716, 718, 26 Misc. Rep. 53.

### HUCKSTER.

The term "huckster" signifies a petty dealer and retailer of small articles of provisions, nuts, etc. Webster defines it by saying that the word seems to be from "hocken," to take on the back, and to signify primarily a peddler, or one who carries goods on his back. *Mays v. City of Cincinnati*, 1 Ohio St. 268, 273.

### HUCKSTERING.

"Huckstering" is a business carried on by persons who go from house to house buying from the farmer and afterwards selling either to customers or to dealers at wholesale and retail. *Lebanon County v. Kline*, 2 Pa. Co. Ct. R. 621, 622.

## HUE AND CRY.

The statute of hue and cry was St. 13 Edw. I, cc. 1, 2, which provided, in case of robbery within the hundred, the inhabitants of the hundred should be liable for the amount of the robbery, unless they responded with the body of the criminal. *Bullard v. Bell* (U. S.) 4 Fed. Cas. 624, 639.

## HUMAN BEING.

An Indian is a "human being" and a "person," within the meaning of St. 1861, p. 58, providing: "Murder is the unlawful killing of a human being with malice aforethought," etc. The Indian girl alleged to have been murdered was a human being, and the accused is a person. *State v. McKenney*, 2 Pac. 171, 173, 18 Nev. 182.

## HUMAN CARE AND FORESIGHT.

The clause "against which human care and foresight could not guard," in an instruction in an action against a railroad company for injuries from the derailment of a car, "that if the jury should find that the injury was the result of an accident, or act against which human care and foresight could not guard, and was not the result of negligence in any degree on the part of the defendants, then the plaintiff was not entitled to recover," is equivalent to the term "utmost care and diligence," which means all the care and diligence possible in the nature of the case. *Baltimore & O. R. Co. v. Worthington*, 21 Md. 275, 282, 88 Am. Dec. 578.

## HUMAN LAW.

Human laws, as distinguished from divine laws, are those having man for their author. *Borden v. State*, 11 Ark. (6 Eng.) 519, 527, 44 Am. Dec. 217.

## HUMAN LIFE.

As property, see "Property."

## HUMANE.

Humane denotes what may rightly be expected of mankind at its best in the treatment of sentient beings. In an action for unlawful ejection from a train, the word "humane," in an instruction that it was the duty of the conductor to exercise such care to avoid unnecessary injuries to plaintiff's feelings and person as a humane person of ordinary prudence would use, the word was erroneous, as requiring a new and probably higher standard of liability than that recognized by law. *Ft. Worth & D. C. Ry. Co. v. Peterson*, 60 S. W. 275, 276, 24 Tex. Civ. App. 548.

Under Gen. St. c. 13, § 1, declaring that devises for any humane purpose shall be valid, a devise of a life estate to testator's wife, with directions that at her death the whole estate shall be converted into money and applied to the purchase of a monument to be erected over the graves of himself and wife, is valid, the devise being for a humane purpose, when made for a monument, not only for his own grave, but over that of his wife also. *Ford v. Ford's Ex'r*, 16 S. W. 451, 452, 91 Ky. 572.

## HUMBUG.

A humbug is an imposition, imposture, deception. As a verb "humbug" signifies to impose upon, to cozen, to swindle; an implied intention to misrepresent, by the assertion of what is not the actual condition, or the suppression or concealment of what is. *Nolte v. Herter*, 65 Ill. App. 430, 432, 433.

## HUND.

A complaint alleged a promissory note for "four hundred two and fifty-one one-hundredths dollars." The note as received in evidence read "four hund. two and fifty-one one-hundredths dollars," and in considering the claim that error was committed in admitting this note, because of such variance, the court said: "There would be little of merit in this argument, even if the note contained no other statement of the amount than that written in the body; and there is none at all when it is seen by a bare inspection that there are figures unmistakably exhibiting the amount. If, however, there were no such figures, we should not be willing to reverse because the three last letters of the word 'hundred' are lacking." *Glenn v. Porter*, 72 Ind. 525, 527, 528.

## HUNG.

Under a statute providing that a prisoner, being found guilty of murder in the first degree, shall suffer death or imprisonment for life at the discretion of the jury, a verdict by which the jury find the prisoner guilty of murder in the first degree and sentence him to be "hung" is sufficient. The term "hung," or sentencing a man to be hung, means to suspend him by the neck until he is dead. *Noles v. State*, 24 Ala. 672, 694.

## HUNTING DISTRICT.

A treaty with Indians authorized them to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts: It was held that "hunting districts" meant districts of country upon

which wild game exists and roams, notwithstanding the fact that there may be white settlers here and there within such districts. Any other construction would be equivalent to saying that the words, at the time they were inserted in the treaty by the parties making it, had no meaning whatever, since at the date of the treaty there were occasional white settlers located at different points within the territory included. In *re Race Horse* (U. S.) 70 Fed. 598, 605.

### HUNTING GROUNDS.

In the treaty between United States and Cherokee Indians, entered into at Hopewell on the 28th day of November, 1785, the fourth section of which, in describing the boundaries of the lands allotted to the Indians, described the lands as hunting grounds, the term "hunting grounds" is not to be so construed as to limit the use of the grounds to the purposes of hunting. *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515, 553, 8 L. Ed. 483.

### HURRICANE.

A "hurricane" is a storm or wind of extraordinary violence sufficient to throw down buildings. *Pelican Ins. Co. v. Troy Co-Op. Ass'n*, 18 S. W. 980, 981, 77 Tex. 225.

The words "tornado" and "hurricane" are synonymous, and mean a violent storm, distinguished by the vehemence of the wind and its sudden changes. It is a very high wind. *Queen Ins. Co. v. Hudnut Co.*, 35 N. E. 397, 398, 8 Ind. App. 22.

Every hurricane is a storm, but every storm is not a hurricane. A high wind, less violent than what ordinarily would be termed a "hurricane," would still be a storm, if accompanied by the destructive agencies, such as snow, hail, or excessive rain. Wind which was violent enough to pile up the snow in drifts might not inappropriately be called a hurricane, Webster's definition of which is "a violent storm," originally derived from a Carib word signifying "high wind." *Tyson v. Union Mut. Fire & Storm Co. (Pa.)* 2 Montg. Co. Law Rep'r, 17, 18.

### HURT.

Blackstone defines a nuisance as being anything to the hurt or annoyance of another. By "hurt or annoyance" here is meant, not a physical injury necessarily, but an injury to the owner or possessor of premises as respects his dealings with or his mode of enjoying them. *Rowland v. Miller*, 15 N. Y. Supp. 701, 702.

#### Mental injury.

The word "hurt" includes both physical and mental pain, and therefore an instruction,

in an action for personal injuries, that plaintiff may recover, if hurt, is sufficient to authorize recovery for mental, as well as physical, pain. *Prunk v. Brooklyn Heights R. Co.*, 74 N. Y. Supp. 375, 376, 68 App. Div. 390.

#### Physical injury.

In an application for a life policy, in which the applicant states that he has never received any wound, hurt, or serious bodily injury, "hurt" means an injury to the body causing an impairment of the health or strength, or rendering the person more liable to contract disease or less able to resist its effects. *Bancroft v. Home Benefit Ass'n*, 23 N. E. 997, 999, 120 N. Y. 14, 8 L. R. A. 68.

In an action for injuries caused by a street car, evidence that plaintiff's lung was injured and that consumption ensued is properly admitted under a declaration alleging that, when said car so struck the plaintiff, the blow and collision resulting therefrom seriously hurt, wounded, and crippled said plaintiff. *Montgomery v. Lansing City Electric Ry. Co.*, 61 N. W. 543, 547, 103 Mich. 43, 29 L. R. A. 287.

In commenting on a declaration in an action for personal injuries which contained nothing more specific as to the place, description, or extent of such injuries than that plaintiff was "hurt, bruised, and wounded," the court said: "The word 'hurt' is so general as to give no information. 'Bruised' is more definite, but does not indicate necessarily or generally more than a temporary contusion, which may be on any part of the person, light or severe, but seldom more than temporary in effect. 'Wound' is any temporary breaking of the skin, and is no more definite than the other words." *Shaddock v. Alpine Plank Road Co.*, 79 Mich. 7, 11, 44 N. W. 158, 159.

#### Injury as to religious belief.

Const. art. 2, pt. 1, providing that no subject shall be "hurt, molested, or restrained in his person or estate" for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, means "prosecution by punishing any one for his religious opinions, however erroneous they may be. But an atheist is without any religion, true or false. Disbelief in the existence of any God is not a religious, but an antireligious, sentiment. If, however, it were otherwise, the rejection of a witness for such a disbelief or sentiment as incompetent would be no violation of this article of the Constitution. It is not within its words or meaning. It would not hurt, molest, or restrain him in his person, liberty, or life." *Thurston v. Whitney*, 56 Mass. (2 Cush.) 104, 110.

A religious Jew, who believes it is his religious duty to abstain from work on Satur-

day is not "hurt, molested, or restrained" in his religious sentiments or persuasions by a statute or municipal ordinance prohibiting the sale of goods to merchants on Sunday. *Frolickstein v. Mayor of Mobile*, 40 Ala. 725, 727.

## HUSBAND.

See "Ship's Husband"; "Surviving Husband."

Code, § 4008, providing that no prosecution for adultery can be commenced but on the complaint of the husband or wife, means the spouse of the person charged with the offense. *Bush v. Workman*, 19 N. W. 910, 64 Iowa, 205.

"Husband," as used in the will of a woman who had obtained a void divorce from a legal husband, and who afterwards went through a form of marriage with another man, with whom she lived, the will reciting that the testatrix was the wife of the person with whom she had thus lived, and providing as follows: "I give and bequeath to my husband one-half of my personal property;" another clause providing, "I authorize my husband to remain in possession of my house for three months after my death," and the last clause providing, "I appoint my husband and sister O. joint executors," etc.—is construed to mean the person with whom the testatrix has been living up to the time of her death, and not her legal husband. *Hardy v. Smith*, 186 Mass. 828, 830.

Whenever in the Probate Code the word "husband" occurs, it shall be construed to apply also to wife. Gen. St. Minn. 1894, § 4731.

### Widower.

"Husband," as used in Laws 1892, c. 399, § 2, exempting from transfer tax when property passes to or for the use of any husband, wife, child, or husband of a daughter, will be held to mean the same as "widower," and hence a transfer to the husband of a deceased daughter is not liable to taxation, even though such husband has remarried before the transfer. In re *Ray's Estate*, 85 N. Y. Supp. 481, 482, 13 Misc. Rep. 480.

## HUSBAND AND WIFE.

"Husband and wife, in contemplation of law, are one person, and not a plurality." *Hardenbergh v. Hardenbergh*, 10 N. J. Law (5 Halst.) 42, 47, 18 Am. Dec. 389.

## HUSBANDRY.

"Husbandry" Webster defines to be the business of a farmer comprehending agri-

culture or tillage of the ground, the raising, managing, and fattening of cattle and other domestic animals, the management of the dairy and whatever the land produces, and is equivalent to "agriculture" in its general sense. *Simons v. Lovell*, 54 Tenn. (7 Heisk.) 510, 516.

"Husbandry," as used in Code Civ. Proc. § 690, subd. 3, exempting from execution two horses in addition to the farming utensils or implements of husbandry of a judgment debtor, means the business of a farmer comprehending the various branches of agriculture. *McCue v. Tunstead*, 4 Pac. 510, 65 Cal. 508.

The followers of this ancient and honorable occupation may call themselves horticulturalists. Horticulturalists are gardeners, but they are farmers, and their occupation is that of farming as contemplated in Code Civ. Proc. § 690, exempting the farming utensils or implements of husbandry of a judgment debtor. The law does not deal with all classes of husbandry, nor does it limit the exemptions to one particular class of husbandry out of many that may be followed by the debtor. In re *Slade's Estate*, 55 Pac. 158, 159, 122 Cal. 434.

## HYDRATE OF ALUMINA.

Hydrate of alumina (or pure alumina) is composed of aluminium, oxide, silica, carbonate of soda, and water, and is obtained by grinding the crude ore very fine, and generally bolting it. It is then mixed with at least a small quantity in weight of soda ash, and the mixture is put in a furnace, and heated to a bright red heat, until all the carbonic acid of the soda ash is expelled. When this stage is reached, it is withdrawn from the furnace, and left to cool. After cooling, it is put in a leaching apparatus, and treated with water, which will dissolve the alumina in it as an aluminate of soda, and leave behind the greater part of the silica, all of the iron, and all of the titanate acid. The mixture, then in liquid form, is placed in large cylinders with paddles in them to keep it in motion. The gaseous carbonic acid is introduced into this liquid through a pipe, and when the soda is converted into a carbonate of soda all of the alumina will fall out as a powder in a wet state. The carbonate of soda is withdrawn, the powder is washed several times and dried, and the result is the hydrate of alumina in question. In re *Irwin* (U. S.) 62 Fed. 150, 151.

## HYDRAULIC.

The charter of a canal company authorized it to construct a canal with all the necessary and usual appendages and improvements, and with all things useful for



the convenient and profitable enjoyment of such canal, and all "hydraulic works" desirable to connect therewith. Held, that the term "hydraulic works," as so used, included a grist mill, oil mill, carding machine, and woolen factory, which were about to be run by the water power furnished by the canal company. *Hankins v. Lawrence* (Ind.) 3 Blackf. 266, 267.

### HYDRAULIC INCH.

The hydraulic inch is a circle whose diameter is an inch. *Schuykill Nav. Co. v. Moore* (Pa.) 2 Whart. 476, 491.

### HYDRAULIC MINING.

"Hydraulic mining is the process by which a bank of gold-bearing earth and rock is excavated by a jet of water discharged through the converging nozzle of a pipe, under great pressure, the earth and debris being carried away by the same water, through sluices, and discharged on lower levels into the natural streams and water courses below." *Woodruff v. North Bloomfield Gravel Min. Co.* (U. S.) 18 Fed. 753, 756. See, also, *Jacob v. Day*, 44 Pac. 243, 244, 111 Cal. 571.

Hydraulic mining, within the meaning of the title relating thereto, is mining by means of the application of water under pressure, through a nozzle, against a natural bank. *Civ. Code* 1908, Cal. § 1425.

### HYDROUS.

"Hydrous" is a scientific term, indicating the presence of water. The use of the word in speaking of "hydrous lanolin," indicates lanolin containing water in the first instance. *Jaffe v. Evans & Sons*, 75 N. Y. Supp. 257, 259, 70 App. Div. 186.

### HYGEIA.

The Greek word "hygeia" means health. When the daughter of Æsculapius was deified as the goddess of health, she was named Hygeia. The Latin word "salus" means health, and this name also was given to the Roman goddess of health. Both words passed into the English language. The name of the divinity was confined to the Greek form. The derivatives of "salus" came into common use. The Greek word for health was at first appropriated mainly, if not wholly, to medical literature, but within the past century it has passed with many derivatives into common use. In the *Oxford English Dictionary* the word is defined as a system of sanitation or medical practice. During the present century, and especially during the past 40 years, the word has been freely used with an adjective meaning, as expressing

the medically healthful property or effects of places, food, clothing, etc. This means or method of preserving health it has always had in medical literature, although the transfer from medical to general literature has not been recognized by many of the standard dictionaries. Hygeia, whether used as a substantive to express a process or means of preserving health, or with an adjective sense to describe an object as resulting from the operation of hygeian method, is an English word, to the use of which, with that meaning, every one is entitled. Hygeia is a word of peculiar value. By reason of its passage into general literature from the medical it has a significance which the derivatives of "salus" fail to express. The idea conveyed by salubrity and salubrious is quite distinct from that conveyed by hygeia and hygienic. It is this meaning of the word as expressive of the modern care for health by scientific methods that has brought it into common use and makes it most valuable. A corporation therefore has a right to use the word "hygeia" in its corporate and in its business name as signifying the claim that its products of water, whether congealed or liquid, are prepared in accordance with the rules of hygeia, and any injury another may suffer in its business from such honest use is the necessary result of its choosing as a trade-mark a word which was not only a symbol which it might appropriate, but which was also a valuable word in language, which the law does not permit to be monopolized. *Hygeia Distilled Water Co. v. Hygeia Ice Co.*, 45 Atl. 957, 960, 72 Conn. 646, 49 L. R. A. 147; 40 Atl. 534, 540, 70 Conn. 516.

### HYPPOCHONDRIA.

As insanity, see "Insane—Insanity."

### HYPOTHECARY ACTION.

An hypothecary action is a real action which the creditor brings against the property which has been hypothecated to him by his debtor in order to have it seized and sold for the payment of his debt. *Code Prac. La. art. 61*. Thus, where the original bill prayed that the mortgage property be sold to pay the demand, and, if the proceeds of that sale were insufficient, that he then have execution of the balance, it is an hypothecary action. *Lovell v. Cragin*, 10 Sup. Ct. 1024, 1028, 136 U. S. 130, 34 L. Ed. 372.

### HYPOTHECATE.

The use of the term "hypothecate," in a statutory definition of a mortgage, as a contract by which specified property is hypothecated for the performance of an act, signifies that possession is not an incident

of the mortgage, and the fact of possession is entirely distinct from the contract of hypothecation. *Spect v. Spect*, 26 Pac. 203, 204, 88 Cal. 437, 13 L. R. A. 137, 22 Am. St. Rep. 314.

A general authority in a stock note to "use, transfer, or hypothecate" the pledged property, does not authorize a sale by the pledgee before maturity of the note. *Ogden v. Lathrop*, 31 N. Y. Super. Ct. (31 Sweeny) 643, 651.

#### HYPOTHECATION.

See "Maritime Hypothecation"; "Tactit Hypothecation."

As maritime contract, see "Maritime Contract."

Hypothecation is defined as "a right which a creditor has over a thing belonging to another, and which consists in the power to cause it to be sold in order to be paid his claim out of the proceeds." *Dueber Watch Case Mfg. Co. v. Daugherty*, 57 N. E. 455, 457, 62 Ohio St. 589 (citing *Bouv. Law Dict.*); *The Young Mechanic* (U. S.) 30 Fed. Cas. 873, 875; *Taylor v. Hudgins*, 42 Tex. 244, 247 (citing 1 *Bouv. Law Dict.*).

"Hypothecation" is a term of the civil law, and is that kind of pledge in which the possession of the thing pledged remains with the debtor, the obligation resting in mere contract without delivery, and in this respect distinguished from "pignus," in which possession is delivered to the creditor or pawnee. *Whitney v. Peay*, 24 Ark. 22 (citing *Burrill, Law Dict.*; *Story, Bailm.* § 288).

"In the civil law the term 'pignus' (pawn) was, in an accurate sense, applied to cases where there was a pledge of the thing and possession was actually delivered to the person for whose benefit the pledge was made, and 'hypotheca' (hypothecation) where the possession of it was retained by the owner; and 'pignus' was especially used in such cases where the thing was immovable. A pledge, in the Roman law, answered exactly to a pledge of movables in our law, where possession is indispensable; and hypothecation answered to a mortgage of real estate in our law, where title to the thing may be acquired without possession. In the French law; however, from the inconvenience growing out of the transfers of personal property, the doctrine has been constantly held that movables cannot be hypothecated—that is, transferred by way of pledge without possession—but that hypothecation is confined to movables. When, therefore, we find the term 'hypothecation' used in the French law, we are generally to understand it as used in this restricted sense, though it is sometimes used in a broader and looser sense, as we sometimes

call a mortgage a pledge and a pledge a mortgage." *The Nestor* (U. S.) 18 Fed. Cas. 9.

#### HYPOTHESIS.

See "Pertinent Hypothesis"; "With Hypothesis."

A hypothesis is a supposition; a proposition or principle which is supposed or taken for granted in order to draw a conclusion or inference for proof of the point in question; something not proved, but assumed for the purpose of argument, or to account for a fact or an occurrence. It being a mere supposition, there are no other limits to hypotheses than those of the human imagination. In law the meaning of the term does not vary from its usual significance. *People v. Ward*, 38 Pac. 945, 947, 105 Cal. 335 (citing *People v. Cronin*, 34 Cal. 202; *People v. Hardisson*, 61 Cal. 378; *People v. Eckman*, 72 Cal. 582, 14 Pac. 359; *People v. Nelson*, 85 Cal. 421, 430, 24 Pac. 1006); *People v. Gilbert*, 60 Cal. 108, 111.

"Hypothesis," to quote from *Lindsay's Ueberweg's Logic* (section 134), "is the preliminary admission of an uncertain premise, which states what is held to be a cause in order to test it by its consequences. Every single consequence which has no material truth and has been derived with formal correctness proves the falsehood of the hypothesis. Every consequence which has material truth does not prove the truth of the hypothesis, but vindicates for it a growing probability, which in case of corroboration, without exception, approaches to a position where the difference from complete certainty vanishes. The hypothesis is the more improbable in proportion as it must be propped up by artificial auxiliary hypotheses. It gains in probability by simplicity and harmony or partial identity with other probable or certain presuppositions." Subject to the conditions thus stated, the hypothesis has been of great value in the extraction of scientific truth, and, says Mr. Wharton, in his work upon *Evidence*, "is of no less value in the extraction of juridical truth." That author vindicated in a most satisfactory way the use of the hypothesis, and sums up his conclusion by saying that "juridical conviction may be, therefore, defined to be the fitting of facts to hypotheses." If, in criminal issues, there is reasonable doubt whether the facts fit the hypothesis of guilt, then there must be an acquittal. In civil issues, when there are conflicting hypotheses, the judgment must be for that for which there is a preponderance of proof. *Mudsil Min. Co. v. Watrous* (U. S.) 61 Fed. 163, 171, 9 C. C. A. 415.

In declaring a requested instruction which used the words "suppositions," "hy-

potheses," and "theories" to be faulty, the court said the words "hypotheses" and "theories" have very doubtful and indefinite significations. *Johnson v. State*, 102 Ala. 1, 16 South. 99, 104.

"Where all the evidence in the case is direct and positive, and the defendant's guilt is in no manner dependent upon an agreement of circumstances, there is no such thing as a hypothesis in the theory of the prosecution, and an instruction based on such a theory is irrelevant and immaterial." *People v. Gilbert*, 60 Cal. 108, 111.

An hypothesis is a mere supposition. The use of the word in a requested instruction in a prosecution for larceny that, if the jury can account for the loss of the pocket-book mentioned in the indictment on any other hypothesis consistent with defendant's innocence, then the jury must find him not guilty, is calculated to mislead, and renders the instruction erroneous, as the jury cannot account for the innocence of the accused by supposing facts, as the verdict must be founded on facts in evidence, and not on supposition. *Du Bois v. State*, 50 Ala. 139, 140.

An instruction in a criminal case that circumstantial evidence must exclude every other hypothesis than the guilt of defendant, is properly refused where the word "rational" is not used before "hypothesis." *People v. Ward*, 88 Pac. 945, 947, 105 Cal. 335.

## HYPOTHETICAL QUESTION.

It is well settled that when the testimony of experts is proper, counsel may assume the existence of any state of facts which the evidence fairly tends to justify. *Filer v. New York Cent. R. Co.*, 49 N. Y. 42. The very meaning of the word "hypothetical" is that it supposes—assumes—something for the time being. *Cowley v. People*, 83 N. Y. 464, 38 Am. Rep. 464. The facts are assumed for the purpose of the question. *Stearns v. Field*, 90 N. Y. 640, 641.

The fact that a question is a hypothetical one implies that the truth of some statement of facts is assumed for a particular purpose, and, if such a question could be based on undisputed facts alone, it would never be asked in any case where an issue of fact arose. *Underhill*, Ev. p. 272; *Howard v. People*, 185 Ill. 552, 57 N. E. 441. A hypothetical question may be embraced on any assumption of facts which the testimony tends to prove, according to the theory of the examining counsel. In *People v. Durrant*, 116 Cal. 216, 48 Pac. 85, the court say: "A hypothetical question need not embrace all the facts in evidence. It must be based on facts in evidence, but may be addressed to any reasonable theory which may be taken of them." *Chicago & E. I. R. Co. v. Wallace*, 66 N. E. 1096, 1098, 202 Ill. 129.

## I

1.

"An obligation which in its terms purports to be that of one person, as, 'I hereby bind myself,' etc., which is executed by more than one, may be treated as a several obligation of each person who signs it, or the joint obligation of all." *Knisely v. Shenberger* (Pa.) 7 Watts, 193.

**As creating personal or official obligation.**

The use of the words "I will come under obligations" in a contract made by the manager of ironworks, which in the signature shows that it is made for his master, is not indicative of an agreement of the manager to become personally bound. "These words constitute a clumsy, but common, form of contracting, and their generality is qualified in the particular instance by the explanation prefixed to the signature." *Campbell v. Baker* (Pa.) 2 Watts, 83, 84. A master's draft that on the arrival at a certain port "I promise" to pay a certain sum, "for which I hereby pledge," etc., is to be construed as being used by the master in an official or representative character only, and hence does not bind him personally. *Salmon v. The Serapis* (U. S.) 37 Fed. 438, 440.

The use of the words "I or we," in a note, as follows: "Sixty days after date, I or we promise to pay," etc., and signed by a corporation per its officers, does not change the legal import of the instrument so as to make it the note of the officers. For though there is no personal pronoun which is properly adapted to use by a corporation in making a note, the word "we" is frequently used by a corporation. *Williams v. Harris*, 84 N. E. 988, 990, 198 Ill. 501 (citing *New Market Sav. Bank v. Gillet*, 100 Ill. 254, 39 Am. Rep. 39).

**I. O. YOU.**

A written acknowledgment that "I. O. you the sum of," etc., is a valid acknowledgment of indebtedness. *Kinney v. Flynn*, 2 R. I. 319, 329.

**I OWN.**

"I own," as used in a contract for the exchange of horses, describing them as "one span of colts, one mare and gelding I own, now in the pasture east of Leeds, Iowa," while words of description, did not of themselves designate and identify the property intended to be conveyed, and where the terms might have applied equally well to either of two teams of horses, and the only words used in the agreement which attempted to

distinguish the one referred to from the other were the words "I own," parol evidence was properly admitted to identify the horses intended by the parties. *Martin v. Brown*, 60 N. W. 182, 183, 91 Iowa, 574.

**I PROMISE.**

These words constitute the essential difference between a bill of exchange and a promissory note, marking the form of a promissory note. *Edis v. Bury*, 6 Barn. & C. 438.

The phrase "I promise to pay," when employed in a note signed by several persons, is to be construed as the several promise of each of the signers, as well as the joint promise of all. *Salomon v. Hopkins*, 61 Conn. 47, 23 Atl. 716, 717.

**I WILL SEE YOU LATER.**

On a prosecution for assault and intent to murder it was shown that in a difficulty earlier in the day of the assault between defendant and the person thereafter assaulted defendant said, "I will see you later." Held, that the words as used in that connection import a threat. *Drake v. State*, 20 South. 450, 451, 110 Ala. 9.

**ICE.**

As part of stream, see "Stream."

As personal property, see "Personal Property."

As real property, see "Real Property."

"Ice," as used in a contract for a cargo of ice purchased by defendants, to be shipped to them, meant a merchantable article of that name, and it was proper to instruct the jury in an action on the contract that the word in the contract meant more than its bare definition in the dictionary. *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526 (citing *Warner v. Arctic Ice Co.*, 74 Me. 475; *Swett v. Shumway*, 102 Mass. 365, 369, 8 Am. Rep. 471; *Whitmore v. South Boston Iron Co.*, 84 Mass. [2 Allen] 52, 53).

**Ice when needed.**

A bill of lading providing that the carrier should not be liable for loss or damage not occurring on its road or in its proportion of the through route, etc., contained, after the description of the property, which was perishable, the statement, "Ice when needed." Held, that the carrier did not, by the use of this expression, obligate itself to see that the goods were properly iced on all connecting

*routes. Farnsworth v. New York Cent. & H. R. Co.*, 84 N. Y. Supp. 658, 660, 88 App. Div. 320.

### ICE DEALER.

As a merchant, see "Merchant."

### ICEMAN PROPRIETOR.

An accident policy provided for the payment of a specified sum for disability incurred while engaged in insured's occupation as an "iceman proprietor." Held, that it covered accidents occurring to the insured, the proprietor of an ice business, while engaged in the delivery of ice; the expression used in the policy being not that of a mere proprietor, but of an iceman, or one who might be at the same time the deliverer and also the proprietor. *Neafie v. Manufacturers' Accident Indemnity Co.* (N. Y.) 55 Hun, 111, 8 N. Y. Supp. 202.

### IDEM SONANS.

"Idem sonans" means "of the same sound," or "sounding the same." *State v. Witt*, 8 Pac. 769, 772, 84 Kan. 488.

"Idem sonans" is said to exist if the attentive ear finds difficulty in distinguishing them when pronounced, or common and long-continued usage has by corruption or abbreviation made them identical in pronunciation. *State v. Grifflie*, 23 S. W. 878, 881, 118 Mo. 188; *Robson v. Thomas*, 55 Mo. 581, 583. Thus, *Griffin* and *Grifflie* are not idem sonans. *State v. Grifflie*, 23 S. W. 878, 881, 118 Mo. 188. Nor are *Mathews* and *Mather*. *Robson v. Thomas*, 55 Mo. 581, 583. The name *Barnard Hysinger* is not idem sonans with the name *Barent Hysinger*. *Ducommun v. Hysinger*, 14 Ill. (4 Pick.) 249, 250. *Brown* and *Brown* are not idem sonans. *Brown v. Marquize & Co.*, 30 Tex. 77, 78. But *Johnson* and *Johnsen* are idem sonans. *Paul v. Johnson* (Pa.) 9 Phila. 32, 33. Likewise *Farris* and *Forris*. *Lyne v. Sanford*, 19 S. W. 847, 849, 82 Tex. 58, 27 Am. St. Rep. 852.

The rule of idem sonans is that absolute accuracy in spelling names is not required in a legal document or proceedings either civil or criminal; that if the name, as spelled in the document, though different from the correct spelling thereof, conveys to the ear, when pronounced according to the commonly accepted methods, a sound practically identical with the correct name as commonly pronounced, the name thus given is a sufficient designation of the individual referred to, and no advantage can be taken of the clerical error. Under such rule a court cannot assume that the name "Keesel" in a published summons should be understood as "Keisel,"

the defendant's real name. *Hubner v. Reickhoff*, 72 N. W. 540, 103 Iowa, 368, 64 Am. St. Rep. 191.

The doctrine of idem sonans has been much enlarged by modern decisions to conform to the growing rule that a variance, to be material, was to be such as has misled the opposite party to his prejudice. *State v. White*, 34 S. C. 59, 61, 12 S. E. 661, 27 Am. St. Rep. 783 (citing *Schooler v. Asher*, 11 Ky. [1 Litt.] 216, 217, 18 Am. Dec. 232, 233).

Where a verdict in a criminal case recited that defendant was guilty of murder in the "first" degree, it was held that the doctrine of idem sonans would not justify the court in construing "first" as meaning "first." *Woolbridge v. State*, 18 Tex. App. 443, 455, 44 Am. Rep. 708.

### IDENTICAL.

An allegation in a bill to restrain the infringement of a patent that the nails manufactured by defendant were in all respects "identical" with certain other nails was construed to import that they were the same nails; the court saying that the word "identical," when used with any approach to accuracy, has such meaning. *Empire State Nail Co. v. American Solid Leather Button Co.* (U. S.) 71 Fed. 588, 589.

### IDENTIFY.

Where, on a trial for robbery, the court in its charge stated that the person robbed "identified" defendants on the trial, the word "identified" will be understood to have been used in its colloquial sense, and meant "asserted their identity," so that the remark will not be considered objectionable as being an expression of opinion on the credibility of the witness. *Commonwealth v. Flynn*, 42 N. E. 562, 563, 165 Mass. 153.

In reference to the descriptions contained in deeds or grants of lands alleged to be conveyed thereby "identify" means to show the tract to be the same subject-matter by actual location that was agreed upon by the parties at the execution of the deeds or grants. *Higdon v. Rice*, 26 S. E. 256, 257, 119 N. C. 623.

#### As to imputation of negligence.

The word "identified," as used in negligence cases, in which a passenger or person injured is said to be "identified" with the driver of the conveyance, was said by *Pollock, B.*, in *Armstrong v. Lancashire R. Co.*, L. R. 10 Exch. 47, "to mean that the plaintiff, for the purpose of the action, shall be considered to be in the same position as the owner of the omnibus or driver; that is, for the purposes of the action, the negli-

gence of the driver or owner must be attributed to the passenger or his legal representatives who seek redress. *Wabash, St. L. & P. Ry. Co. v. Shacklet*, 105 Ill. 364, 377, 44 Am. Rep. 791.

## IDENTITY.

### Of corporation.

The identity of individuals owning or composing a company is not an essential to the identity of the company. The former may be changed from time to time until none of the original proprietors shall remain, and the latter be not impaired. In the same manner a change of name does not of necessity imply a change of identity in the company. *Princeton & K. Turnpike Co. v. Gluck*, 16 N. J. Law (1 Har.) 161, 170.

### Of design.

"Identity of design," as used in relation to design patent, means sameness of appearance, or, in other words, sameness of effect upon the eye. It is not necessary that the appearance should be the same to the eye of an expert; the test is the eye of an ordinary observer of men generally, of observers of ordinary acuteness bringing to the examination of the article upon which the design has been placed that degree of observation which men of ordinary intelligence give. *Smith v. Whitman Saddle Co.*, 13 Sup. Ct. 768, 770, 148 U. S. 674, 37 L. Ed. 606.

### Of invention.

As to the identity of an invention and an alleged infringement of a patent thereon, the law requires substance, and not form; and the question is whether the alleged infringement is in principle the same as that patented. By the term "principle," as so used, is understood the mode or manner of process of the machine, and therefore there may be two structures widely different in appearance or dimensions, and yet identically the same in principle. *Latta v. Shawk* (U. S.) 259, 14 Fed. Cas. 1188, 1190.

"To constitute 'identity of invention,' and therefore infringement, not only must the result obtained be the same, but, in case the means used for its attainment is a combination of known elements, the elements combined in both cases must be the same, and combined in the same way, so that each element shall perform the same function: provided, however, that the differences alleged are not merely colorable according to the rule forbidding the use of known equivalents." *Electric Railroad Signal Co. v. Hall Railroad Signal Co.*, 5 Sup. Ct. 1069, 114 U. S. 87, 29 L. Ed. 96.

## IDEO CONSIDERATUM EST.

"Ideo consideratum est," as used in the entry of judgments, means, "therefore it is

considered." The words were also used as a name for that portion of a record of an action at law. It is not, however, a conclusive criterion as to whether a definitive judgment has been rendered that the entry employs or omits such words, though they are generally used; and judgments are also final, and subject to review by writ of error, whether entered with or without such clause. *Whitaker v. Bramson*, 29 Fed. Cas. 947.

## IDES.

The calendar of the Romans had a peculiar arrangement. They gave particular names to three days of the month. The first was called the "calends." In the four months of March, May, July, and October the seventh day was called "nones," and in the four former the fifteenth days were called "ides," and in the last the thirteenth were thus called. *Rives v. Guthrie*, 46 N. C. 87.

## IDIOT—IDIOCY.

An idiot was said by Lord Coke (Co. Litt. 246b, 247a) to be one who, from his nativity, by a perpetual infirmity, is non compos mentis. In re Beaumont (Pa.) 1 Whart. 53, 29 Am. Dec. 33.

An idiot is one who hath no understanding from his nativity; he is a natural fool, or fool from birth. *Battle v. State*, 32 S. E. 160, 162, 105 Ga. 703; In re Anderson, 43 S. E. 649, 850, 132 N. C. 243; *Edwards v. Logan* (Ky.) 70 S. W. 852, 856; *Crosswell v. People*, 18 Mich. 427, 435, 87 Am. Dec. 774 (citing Webster).

An idiot or natural fool is one that hath no understanding of his nativity, and therefore is by law presumed never likely to obtain any. A man is not an idiot if he have any glimmering of reason, so that he can tell his parents, his age, or the like common matters. *Clark v. Robinson*, 88 Ill. 498, 502 (citing Bl. Comm. 302, 303).

In Chitty's Medical Jurisprudence an idiot is defined to be a person who has been defective in intellectual powers from the instant of his birth. *Crosswell v. People*, 18 Mich. 427, 435, 87 Am. Dec. 774.

An idiot is a person destitute of ordinary intellectual powers from any cause and dating from any time, but, in common use, a person without understanding from birth. *Hiett v. Shull*, 15 S. E. 146, 147, 36 W. Va. 563.

Idiocy is a congenital obliteration of the chief mental powers, amounting to a great insensibility to external impressions, accompanied by certain physical indications. *Thompson v. Thompson* (N. Y.) 21 Barb. 107, 128.

"Bouvier says that idiocy is that condition of mind in which the reflective or all or a part of the affected powers are either wanting or are manifested to the least possible extent. Idiocy generally depends upon organic defects." *Somers v. Pumphrey*, 24 Ind. 231, 244.

Idiocy is defined to be "that condition in which a human creature has never had from birth any or the least glimmering of reason, and is utterly destitute of all intellectual faculties for which man in general is so eminently and peculiarly distinguished. It is not a condition of a deranged mind, but that of a total absence of all mind. Hence this state of fatuity can rarely or never be mistaken by the most superficial observer. The medical profession seem to regard it as a natural defect; not as a disease itself, or as a result of disorder. In law it is also considered as a defect, and as a permanent and hopeless incapacity." In *re Owings* (Md.) 1 Bland, Ch. 370, 386, 17 Am. Dec. 311.

The term "idiot," as used in statutes relating to the care of the insane, is restricted to persons supposed to be naturally without minds. *Rev. St. Okl.* 1903, § 3985; *Cobbe's Ann. St. Neb.* 1903, § 9643; *Rev. Codes N. D.* 1899, § 1532.

The term "idiot," as used in statutes relating to the care of the insane, is restricted to persons foolish from birth, supposed to be naturally without mind. *Code Iowa*, 1897, § 2298; *Bates' Ann. St. Ohio* 1904, § 720.

#### **Deaf and dumb.**

A person is not to be deemed an idiot on the mere circumstance of being born deaf and dumb; numerous instances showing that such afflicted persons were intelligent, and capable of intellectual and moral cultivation. *Brower v. Fisher* (N. Y.) 4 Johns. Ch. 441.

#### **Imbecility distinguished.**

The term "idiot" is applied to those who, from original defect, have never had mental power. Idiocy is marked by congenital deficiency of the mental faculties. There is not here a loss or perversion of what has once been acquired, but a state in which, from defective structure of the brain, the individual has never been able to acquire any degree of intellectual power. There is a state scarcely separable from idiocy in which the mind is capable of receiving some ideas, and of profiting to a certain extent by instruction. Owing, however, either to original defect, or to one proceeding from arrested development of the brain, the minds of such persons are not capable of being brought to a healthy standard of intellect. This state is called "imbecility." *Francke v. His Wife*, 29 La. Ann. 302, 304 (citing 2 Tayl. Med. Jur. 502).

An idiot is "one that hath no understanding from his nativity." The term does not include a person who has reason and understanding, though he has an imbecile mind, and therefore the mental condition of such a person is not sufficient to avoid his deed. *Odell v. Buck* (N. Y.) 21 Wend. 141, 142.

#### **Insanity distinguished.**

"Idiocy, which is usually classed under the general designation of 'insanity,' is more properly the absence of mind than the derangement of its faculties. It is congenital—that is, existing in birth—and consists not in the loss or derangement of mental powers, but in the destitution of powers never possessed." *Hall v. Unger*, 11 Fed. Cas. 261. See, also, *Stewart's Ex'r v. Lispenard* (N. Y.) 28 Wend. 231, 314.

Mr. Locke, in his "Essay on the Human Understanding," says that the difference between idiots and madmen is that "madmen put wrong ideas together, and so make wrong propositions, but argue and reason right from them; but idiots make very few or no propositions, and reason scarcely at all." *Commonwealth v. Haskell* (Pa.) 2 Brewst. 491, 496.

An idiot has no power of mind whatever, and in this respect differs from a lunatic, who has lucid intervals. *Bicknell v. Spear*, 77 N. Y. Supp. 920, 921, 38 Misc. Rep. 389.

#### **Determined by lack of mental power.**

Baron Comyn has used the terms "idiots" and "of nonsane memory" as embracing every class of persons who are to be regarded as non compos mentis. (See *Com. Dig.*, tit. "Idiot.") The statute of wills, 34 & 35 Hen. VIII, does the same, by providing that no will of lands shall be valid if made by any "idiot or by any person of nonsane memory"; but this only shows a want of just discrimination in the use of terms. In determining a question as to the idiocy or mental imbecility of a testator it is unnecessary to inquire whether he was possessed of a sound mind or a sound memory, but only whether he retained that moderate degree of reason and understanding which is required to enable one to dispose of his property by will. It is not enough that he should be found to have possessed some degree of intelligence and mind. He must have had sufficient mind to comprehend the nature and effect of the act he was performing, the relation he held to the various individuals who might naturally be expected to become the objects of his bounty, and to be capable of making a rational selection among them. *Delafeld v. Parish*, 25 N. Y. 9, 103.

"Bouvier says that an idiot is a person who has been without understanding from his nativity, and whom the law therefore

presumes never likely to attain it. It is an imbecility or sterility of mind, and not a perversion of the understanding. When a man cannot count the number 20 nor tell his father's or mother's name, nor how old he is, having been frequently told of it, it is a fair presumption that he is devoid of understanding." This rule would seem to be a sufficient test of the want of understanding where the power to the extent indicated does not exist; but to hold that a person should be deemed of sound mind, and responsible for his acts in every case where he possesses sufficient mental capacity to count 20 and tell his father's and mother's names or his own age, would seem to fix a rather low and uncertain standard of a sound mind. Mr. Chitty, in his work on Contracts, p. 130, says: "An idiot or natural fool is one who hath had no understanding from his nativity, and who is therefore by law presumed not to be likely to attain to any. A person is not an idiot if he has any glimmering of reason so that he can tell his parents, his age, or the like common matters." *Somers v. Pumphrey*, 24 Ind. 231, 245.

"Idiot," as used in a return to an inquisition in the nature of a writ de lunatico inquirendo that the party is an idiot, imports such a deprivation of sense as renders the sufferer unfit for self-control as well as for the management of his affairs. In *re Lindsey*, 15 Atl. 1, 2, 44 N. J. Eq. (17 Stew.) 564, 6 Am. St. Rep. 913.

#### **Lunatic distinguished.**

See "Lunatic."

#### **As of unsound mind.**

Person of unsound mind distinguished, see "Unsound Mind."

To state that a party is an idiot or a lunatic has the same effect as to say that he is of unsound mind. *Sherwood v. Sanderson*, 19 Ves. 280, 285.

#### **IDIOTISM.**

Idiotism "is a total want of reasoning powers, growing from a malformation of the organ of thought at the time of birth." *People v. Lake* (N. Y.) 2 Parker, Cr. R. 215.

#### **IF.**

See "As if"; "Even if"; "Redeemed if Desired."

The use of the word "if" before each statement of fact in an instruction, stating facts but failing to show how any question thereby raised is to be solved, whether by reference or otherwise, and not even referring the solution of it to the jury, will not render the instruction free from the objec-

tion that it assumes the facts stated. *Chambers v. People*, 105 Ill. 409-413.

The use of the word "if" in an instruction that, "if the plaintiff consented to place his stock in an original pool, which pool was subsequently broken up," etc., does not operate to make the instruction erroneous as being on the facts, but is to be construed as of the same meaning as the words "and if the." *Menzies v. Kennedy*, 9 Nev. 152, 160.

The charter of the village of Blue Earth (Sp. Laws 1872, c. 36) provides that persons licensed by the village council to sell liquors shall not be required to obtain a license from the board of county commissioners, and shall not be prosecuted from selling, etc., liquors, "if having first obtained license therefor" agreeably to the provisions of Gen. St. 1866, c. 16. Held, that the word "if" should not be construed to preserve the right of license in the county board, as it and the words following can be read without violence as referring to a license by the village council. The provision should be construed to read that a person licensed by the council shall not be required to obtain a license from the county board, and he shall not be prosecuted under the provisions of Gen. St. 1866, c. 16, for selling, etc., intoxicating liquors, if he has first obtained a license to sell, etc., from the village council. *State v. Fleckenstein*, 2 N. W. 475, 476, 26 Minn. 177.

A provision in a will that executors may sell certain land "if they see fit to do so" cannot be construed to operate as an equitable conversion. *Mills v. Harris*, 10 S. E. 704, 104 N. C. 628.

#### **Condition imported.**

The word "if" is always expressive of a condition. *Baum v. Rainbow Mining, Milling & Smelting Co.*, 71 Pac. 538, 541, 42 Or. 453; *Nelson v. Combs*, 18 N. J. Law (3 Har.) 27, 36.

The words "if" and "when" in a will are ordinarily words of condition or of conditional limitation. It is equally clear that their meaning may be controlled by provisions in the will which show an intention that the legacy shall be vested. *Sutton v. West*, 77 N. C. 429, 431; *Buck v. Paine*, 75 Me. 582.

The use of "if" in an order for leather "if thoroughly tanned, made the order conditional, and when the seller shipped leather after that to the purchaser it was on the express condition that it should be thoroughly tanned. *Groetzinger v. Kann*, 30 Atl. 1043, 165 Pa. 578, 44 Am. St. Rep. 678.

"If" is a word which, used in contracts, introduces a conditional clause, so that a statement in a letter, "If you cannot do better, I will accept your offer," does not



amount to a completed contract. *Marschall v. Eisen Vineyard Co.*, 28 N. Y. Supp. 62, 63, 7 Misc. Rep. 674.

"If" always embraces a condition, and as used in a statute providing that all officers of the Revolutionary army "who are now supernumerary, and shall again enter the service if required to do so," shall receive half pay, but shall forfeit their claim to half pay if they fail to re-enter the service if required, means that, if the supernumeraries are never again called into service, they are entitled to half pay, but, if again called, they shall forfeit their claim unless they enter again into the service. *Commonwealth v. Lilly's Adm'r (Va.)* 1 Leigh, 521.

A deed conveying an easement over certain lands "if the said B. and L. shall procure from the owners of the said land a right of drain or ditch" over the terminus of a certain canal, creates a condition precedent. *Long v. Swindell*, 77 N. C. 176, 182.

"If solemnized within the state," as used in R. L. § 2346, providing that marriages prohibited by law on account of consanguinity or affinity between the parties, or on account of either of them having a former wife or husband living, shall, "if solemnized within the state," be void without a decree of divorce or other legal process, are employed to prescribe the condition upon which marriages may be treated as void without a decree. They do not relate to the causes, but they fix the condition upon which the marriage may be treated as void. *Barney v. Ouness*, 33 Atl. 897, 898, 68 Vt. 51.

The word "if" is used in common language to express condition or limitation. Thus, in a will in which testator stated that he is starting on a certain journey, and may never get back, and, "if" such should be his misfortune, he gives his property, etc., the use of the word operates to create a condition depending on his return, and in case of his return the will becomes void. In *Parsons v. Lande*, 1 Ves. Sr. 190, a case decided by Lord Hardwicke, the condition of the bequest was, "If I die before my return from my journey to London," and the words were treated as conditional upon his death at that time. In *Re Todd's Will (Pa.)* 2 Watts & S. 145, the words, "If I shall not return, what I own shall be divided as follows," were held conditional. In *Maxwell v. Maxwell*, 60 Ky. (3 Metc.) 101, the will was in the form of a letter, and the words were, "If I never get back home, I leave you everything I have in the world," etc., and it was held to be contingent upon his return, and inoperative afterwards. But in *Damon v. Damon*, 90 Mass. (8 Allen) 192, in construing a will which recited that testator was about to go to Cuba, and, knowing the danger of the voyage, made his will, which provided that if, by casualty or otherwise, he should lose

his life during the voyage, his property should go., etc., the court held that the introductory clause merely stated the motive for making the will, and hence it did not create a contingency to its becoming operative, and further held that the words, "if by casualty or otherwise I should lose my life," only attached to qualifying the first bequest, and therefore the will, being operative to the other bequest, should be admitted to probate. *Robnett v. Ashlock*, 49 Mo. 171.

The word "if," as used in a will giving to the executors an annuity to be paid to the widow of testator's son during the term of her natural life "if" she so long remain his widow unmarried, makes a condition, and not a limitation, and makes the provision equivalent to a giving of an annuity to the daughter-in-law for life, but, if she marry again, it should cease. *Hoopes v. Dundas*, 10 Pa. (10 Barr) 75-77.

The language of the donor, "If I die, or anything happen to me," accompanying the delivery of money, is but the expression of a condition, attached by implication of law to every gift *causa mortis*, that it does not take effect absolutely and irrevocably except in case of the death of the donor. It is not necessary that the donor should express the condition, but if he does so, it tends to make plain the character of the gift, rather than to cast doubt upon it, and the language "if anything happen to me" was but another mode of expressing the donor's apprehension of death, and was not intended to annex some other intention other than death to the gift. *Johnson v. Colley (Va.)* 44 S. E. 721, 722 (citing *Snellgrave v. Bailey*, 8 Atk. 214; *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848).

#### Contingency imported.

"If," as used in a will giving a person a legacy if he arrives at a certain age, means that the legacy is contingent. *Colt v. Hubbard*, 33 Conn. 281, 286.

"If," as used in a will giving to testator's wife for life the income of his estate, and authorizing the executors at her death to sell the realty and divide the proceeds between testator's two children if they be living, or the issue of such of them as may be then deceased, undoubtedly imposes a contingency. In *re Rudy's Estate*, 39 Atl. 968, 969, 185 Pa. 359, 64 Am. St. Rep. 654.

"If any shall survive," as used in a deed of trust of property to the sole and separate use of a married woman as her separate estate during her natural life, after her death the trustee to transfer and convey the premises to her children, "if any shall survive," makes the interest of the children during the mother's life contingent. *Temple v. Scott*, 32 N. E. 366, 367, 143 Ill. 290.

"If not sooner," as used in a will directing that testator's executors shall continue a certain system of leasing testator's lots until his youngest child shall be of age, or get married, at which time, "if not sooner," all the estate of every description shall be equally divided among all his children, mean that a partition might take place sooner, under some circumstances, than the time at which it was declared it should be made; as, for instance, if such youngest child should die a minor, and unmarried, all the other children being adults, they and the widow might make a partition. *Peters v. Carr*, 16 Mo. 54, 65.

Act 1841, § 38, provides that in making sales of lands to provide for the revenue of the state the collector shall not sell in any one lot more than one-eighth of a section, but, if one lot will not sell for the amount of taxes due, as many lots may be sold, etc. Held, that the use of the word "if" implies a condition or contingency, and shows that the expectation of a fulfillment of the first clause is uncertain, and presupposes that it may not occur that the sale of one-eighth of a section will liquidate the taxes due. *Hodge v. Wilson*, 20 Miss. (12 Smedes & M.) 498, 504.

Grantor possessed of a term conveyed it to trustees in trust to permit his wife to receive the term if she should so long live as to outlive the expiration of the term, and after her decease to permit him to enjoy the profits during the remainder of the term if he should so long live, and after his decease, in trust for the heirs of the body of the wife, and for default of such issue remainder in trust to H. during the residue of the term, if she should so long live, and after her decease in trust for her two sons. The grantor died, and his wife survived him, never having issue. Held, that the whole term was not vested in the wife, and the words "if she should so long live" were an affirmative, implying a negative at the same time that "if she did not live so long" the remainder of the term should go over to other parties. *Hodgesen v. Bussey*, 2 Atk. 89.

#### Limitation created.

A covenant to furnish a reasonable supply of water, "and if, by any reason, the water should not be delivered in the main pipe for the space of one year," the covenant to cease, and be thereafter void and of no effect, creates a limitation, and not a condition subsequent. *Owen v. Field*, 102 Mass. 90, 105.

#### As when.

"If," may be construed "when" in a will in order to advance the apparent intent of the testator. *Janney v. Sprigg* (Md.) 7 Gill. 197, 202, 48 Am. Dec. 557.

Where it is provided in a fire policy that "if a building shall fall, except as a result of fire, all insurance shall cease," such words are to be understood in their ordinary meaning, and hence, so long as the building remains standing, no matter how much it may be depreciated by the action of winds or other causes, the liability of the insurer continues. *Fireman's Fund Ins. Co. v. Congregation Rodeph Sholom*, 80 Ill. 558, 559.

Where an agreement provided that certain parties should receive a royalty on all ore shipped from their garnet mines in a certain township, including the mines on the property conveyed to them by a certain person "if possession thereof be obtained by H.," the word "if" is plainly equivalent to "when," or "provided," and expresses a condition, and the possession stipulated for is of the mines on the property. *Sharp v. Behr* (U. S.) 117 Fed. 864, 869.

#### IF ABLE.

See "Able."

#### IF ANY.

"If any," as used in an instruction that the jury shall hear the evidence as to the value of the land proposed to be taken, and all damages consequent upon the construction of the proposed work, etc., and shall return as their verdict the amount of damages found, "if any," in favor of the owner or owners and against the commissioners, cannot be construed so as to authorize the jury to return a verdict that the owner was entitled to no damage for the land actually taken for the ditch, and hence render the instruction erroneous. *Drainage Com'rs of Union Drainage Dist. v. Volke*, 45 N. E. 415, 417, 163 Ill. 243.

The words "if any," as used in a will directing the application of the residue of the rents and profits of the testator's estates and effects for his son during his life, and afterwards for the heirs of the son's body, if any, have a restrictive effect. In re *Wynch's Trust*, 27 Eng. Law & Eq. 375, 380.

Where a testator gave his widow a certain personal estate, and provided that, "if any remains at her decease," it should be equally divided among his children, the words "if any remains at her decease" mean that an absolute gift was intended in favor of the widow, and not that there was a trust created in favor of the heirs. *Appeal of McKenzie*, 41 Conn. 607, 608, 19 Am. Rep. 525.

#### IF ANYTHING.

A will by which testator devised all of his real estate, both real and personal, to

his wife during her lifetime, and after her death, "if there is anything left," to be divided between certain other parties, should be construed as meaning that the widow might dispose of the entire interest in the real as well as the personal property, leaving nothing, and thus gave her a power of disposition, for the words imply that there might not be anything whatever left of either real or personal property on the death of the wife. *Henderson v. Blackburn*, 104 Ill. 227, 232, 44 Am. Rep. 780.

Testator gave to his wife all his real and personal estate "for her support and benefit during her natural life," and after his wife's death, "if anything should remain" of said estate, he gave it over to third persons. Held, that the phrase, "if anything should remain," should be construed as meaning that the wife took a life estate, with a contingent power of disposition of the remainder in case she needed it for her support. *Paine v. Barnes*, 100 Mass. 470, 471.

#### IF IN FUNDS.

Acceptance of an order drawn on another "if in funds" is evidence that he had in his hands funds on which the drawer had the right to draw. *Kemble v. Lull* (U. S.) 14 Fed. Cas. 279.

#### IF IT BE CONCEDED.

The phrase, "if it be conceded," as used in a judicial opinion, may generally, though not always, be taken as indicating that what is said upon the point referred to is not to be understood as the expression of an absolute, final conclusion, but as signifying that there is at least a tinge of obiter in what is thus qualified. *Chemical Nat. Bank of New York v. Armstrong* (U. S.) 76 Fed. 339, 343.

#### IF IT SHALL SO HAPPEN.

See "Happen."

#### IF LIVING.

Under a certificate of a mutual benefit society naming two beneficiaries, and "in case of death of either the full amount to go to the survivor if living; if not living, to the heirs of said member," it is held that the phrases "if living" and "if not living" refer to living at the time of the death of the insured. *Union Mut. Ass'n v. Montgomery*, 38 N. W. 588, 592, 70 Mich. 587, 14 Am. St. Rep. 519.

#### IF NECESSARY.

Act April 2, 1866 (S. & S. 784) § 2, authorizing a county auditor to levy a tax on the property of a township, incorporated village, or city of the second class for the pur-

pose of erecting, improving, enlarging, or constructing additions to town halls, to enable the trustees of such township, or the council of such incorporated village or city of the second class, to purchase a lot, "if necessary," on which to erect the hall, clothed the trustees with an unqualified discretionary authority in reference to the purchase of a lot on which to build the hall. *Trustees of New London Township v. Miner*, 26 Ohio St. 452, 457.

#### IF NO CHILDREN.

The phrase "if no children, then at her entire disposal," in a will in which testator devises property to his daughter and the heirs of her body, "if no children, at her entire disposal," must signify that the testator either intended the daughter should have a fee simple absolute if she had no children at his death, or that she should ultimately have such estate if she had no children during her lifetime. *Smith v. Hilliard* (S. C.) 3 Strob. Eq. 211, 223.

#### IGNORATIO ELENCHI.

A mistake of the question. *Case Upon the Statute for Distribution* (Va.) *Wythe*, 302, 309.

#### IGNEOUS FUEL.

Igneous fuel means fuel having the nature of fire, or fuel on fire or in a state of combustion. *Schlicht Heat, Light & Power Co. v. Æoliptyle Co.* (U. S.) 117 Fed. 299, 304.

#### IGNOMINY.

See "Public Ignominy."

"Ignominy" is defined to be public disgrace, infamy, reproach, or dishonor. *Mananke v. Cleland*, 41 N. W. 53, 55, 76 Iowa, 401 (quoting *Bouv. Law Dict.*); *Brown v. Kingsley*, 38 Iowa, 220, 221.

#### IGNORANCE.

See "Willful Ignorance."

Ignorance of a particular fact—that is, want of knowledge of that fact—consists in this: that the mind, though sound, and capable of receiving an impression, has never acted upon that subject, because that subject has never been brought to the notice of the perceptive faculties. Ignorance is a negative condition of the mind, and that condition is communicable to others only by some act or by some declaration. Whether an individual is ignorant of a particular fact depends in no measure on the want of knowledge of some one else as to the same fact,

however closely allied the latter may be to the former; but the existence of such ignorance must, as to each individual, be sought by other methods consistent with the settled rules of evidence. *McCosker v. Banks*, 35 Atl. 935, 936, 84 Md. 292.

**Insanity distinguished.**

Ignorance is a lack of knowledge or a lack of perception of a certain fact. It is not a state of mind in the sense that sanity and insanity are, but they are similar, in that exterior manifestations must be relied on to prove both; insanity being an incapacity to act perfectly, while ignorance is the never having acted, though perfectly capable of so doing. The exterior manifestations of insanity are involuntary; those of knowledge purely voluntary. *Meeker v. Boylan*, 28 N. J. Law (4 Dutch.) 274, 279.

**Mistake distinguished.**

The terms "ignorance" and "mistake," in legal contemplation, do not import the same significance, and should not be confounded. Ignorance implies a total want of knowledge in reference to the subject-matter; mistake admits a knowledge, but implies a wrong conclusion. Where one is misled by the advice of another, he may refer his mistake to the suggestions which prompted his action, as it is said in *Lawrence v. Beaubien*, 2 Bail. 649, "it is capable of proof"; but ignorance concedes the want of all knowledge, and action under it proceeds from one's own will, not influenced by the counsel of another. *Hutton v. Edgerton*, 6 S. C. (6 Rich.) 485, 489.

**IGNORANCE OF LAW.**

Ignorance of law, within the meaning of the rule that ignorance of law will not excuse, is to be construed as meaning ignorance of the laws of one's own country or state, and not laws of foreign countries or states, which are regarded as mistakes of fact. *Marshall v. Coleman*, 58 N. E. 628, 637, 187 Ill. 556; *Haven v. Foster*, 26 Mass. (9 Pick.) 112, 130, 19 Am. Dec. 853.

**Mistake of law distinguished.**

There is a clear and practical distinction between ignorance and mistake of the law. Much of the confusion in the books and in the minds of professional men upon this subject has grown out of a confounding of the two. It may be conceded that at first view the distinction is not apparent, but it is insisted that upon close inspection it becomes quite obvious. It has been ridiculed as a quibble, but we shall see that it has been taken by able men and acted upon by eminent courts. Ignorance implies passiveness; mistake implies action. Ignorance does not pretend to knowledge, but mistake assumes to know. Ignorance may be the result of laches, which is criminal; mistake argues dili-

gence, which is commendable. Mere ignorance is no mistake, yet a mistake always involves ignorance, yet not that alone. The difference may be well illustrated by the case made in this record. If the plaintiff—the administrator—had refused to pay the distributive shares in the estate which he represented to the children of his intestate's deceased sister upon the ground that they were not entitled in law, that would have been a case of ignorance, and he would not be heard for a moment upon the plea that, being ignorant of the law, he is not liable to pay interest on their money in his hands. But the case is that he was not only ignorant of their right in law, but believed that the defendants were entitled to their exclusion, and acted upon that belief by paying the money to them. The ignorance, in this case, of their right, and the belief in the right of the defendants, and action on that belief, constitute the mistake. The distinction is a practical one, in this: that mere ignorance of the law is not susceptible of proof. Proof cannot reach the convictions of the mind undeveloped in action; whereas a mistake of the law, developed in overt acts, is capable of proof, like other facts. *Culbreath v. Culbreath*, 7 Ga. 64, 70, 50 Am. Dec. 375.

In holding that a contract will be set aside by reason of mistake of law, but not by reason of ignorance of law, it was said by *Johnson, J.*, that "all the difficulty and confusion which have grown out of the application of the maxim, 'Ignorantia juris non excusat,' appear to me to have originated in confounding the terms 'ignorance' and 'mistake.' The former is passive, and does not presume to reason, and, unless we were permitted to dive into the secret recesses of the heart, its presence is incapable of proof; but the latter presumes to know, when it does not, and supplies palpable evidence of its existence. Hence it was well remarked by Lord Rosslyn in *Fletcher v. Tollet*, 5 Ves. 14, that ignorance is not a mistake." He says further in *Ex'rs of Hopkins v. Maryck* (S. C.) 1 Hill, Eq. 250, that a mere ignorance of the law is not susceptible of proof, and therefore cannot be relieved, but that a mistake of law may be proved, and, when proved, relief may be afforded. *Lawrence v. Beaubien* (S. C.) 2 Bailey, 823, 649 (quoted and approved in *Champlin v. Laytin*, 18 Wend. 407, 423, 31 Am. Dec. 382); *Hall v. Reed* (N. Y.) 2 Barb. Ch. 500, 505.

**IGNORANT.**

"Ignorant of the name," as used in *Prac. Act*, § 69, providing that when the plaintiff is ignorant of the name of defendant such defendant may be designated by any name, means a real ignorance of the name, and not feigned. It must not be wilful ignorance, or such as might be removed by mere inquiry,

or a resort to a means of information easily accessible. *Rosencrantz v. Rogers*, 40 Cal. 489, 490.

### IGNORE.

To ignore is to throw out or reject as false or ungrounded. As used in an indorsement by a county judge on a petition for an order prohibiting the sale of intoxicating liquors, stating that such application was "ignored" entirely, the word will be considered to amount to a final order rejecting the petition. *Cleburne County v. Morton*, 60 S. W. 307, 308, 69 Ark. 48.

### ILL

"Ill" is defined to be "sick, indisposed, diseased, disordered." *Kelly v. Ancient Order of Hibernians* (N. Y.) 9 Daly, 289, 291.

### ILL CONDUCT.

The term "ill conduct" in a divorce statute providing that the defendant may prove the ill conduct of the complainant in justification, does not mean ill conduct which was the cause of the ill treatment of complainant by defendant, alleged as a ground of divorce, but means any ill conduct. *Doe v. Roe* (N. Y.) 23 Hun, 19, 26.

### ILL FAME.

See "House of Ill Fame."

"Ill fame is not necessarily criminal; therefore a witness may be compelled to testify as to her ill fame, provided the character of her ill fame is such as impeaches her veracity, but not if the ill fame is founded on a mere prejudice. If such ill fame arises from a want of veracity or chastity, then it may be shown, because those are defects that render a female witness less worthy of belief. The ill fame that may exclude from society is not necessarily such as should be allowed to impeach the veracity of a witness." *Boles v. The State*, 46 Ala. 204, 206.

### ILLEGAL—ILLEGALLY.

"Illegal" means that which lacks authority of, or support from, law. *Thompson v. Doty*, 72 Ind. 336, 338.

The word "illegally" is synonymous with "unlawfully." *State v. Haynorth*, 35 Tenn. (3 Sneed) 64, 65.

The word "illegally," as used in Code, § 3216, authorizing the granting of the writ of certiorari where an inferior tribunal, board, or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise "acting illegally,"

means proceeding in a manner contrary to law by a tribunal when determining matters before it which are within its jurisdiction; but, if a discretion is conferred on the inferior tribunal, its exercise cannot be illegal. If it be clothed with authority to decide on facts submitted to it, the decision is not illegal, whatever it may be, if the subject-matter and the parties were within its jurisdiction. Where the law prescribes proceedings to be had by an officer or tribunal in cases pending before them, the omission of such proceedings was in violation of law, and the court or officer omitting them will therefore act illegally. *Tiedt v. Carstensen*, 16 N. W. 214, 61 Iowa, 334.

### Erroneous and void distinguished.

See "Erroneous"; "Void."

### Improper distinguished.

The words "illegal" and "improper," as used in an instruction that, if a destruction of the plaintiff's property was caused by his illegal or improper conduct, etc., are not synonymous; but "illegal," as so used, means something unlawful, contrary to law, while "improper" signifies not suitable, unfit, not suited to the character, time, and place. *Chadbourn v. Town of Newcastle*, 48 N. H. 196, 199.

### As unjustly.

"Illegally" means contrary to law, and is not a convertible term with "unjustly," so as to render one of them sufficient in an attachment bond conditioned that the plaintiff will pay the defendant such damages as he may sustain in case the attachment has been illegally and unjustly sued out. *McTeer v. Young* (Tex.) 44 S. W. 194, 196.

### ILLEGAL ARREST.

"An illegal arrest is caused by the issuing and service of the order of arrest, not by the fact recited therein. There is no relation of cause and effect between an illegal act, or the determination to do one, and the excuse alleged for doing it." *Rothschild v. Whitman*, 30 N. E. 858, 859, 132 N. Y. 472.

### ILLEGAL CONTRACT.

An "illegal contract," as distinguished from those which are void from want of essentials, is an agreement with an unlawful object. It is not merely lacking in valid subject-matter, but its purpose is positively invalid. *Billingsley v. Clelland*, 41 W. Va. 234, 243, 23 S. E. 812, 815.

There is a wide distinction between that class of contracts which are unlawful in the sense that the law will not enforce them, and which we usually term "void" contracts, and that other class which are designated as

"illegal" contracts. Money paid in furtherance of an illegal contract cannot be recovered back, but it is otherwise as to money paid in furtherance of a contract which by statute is void, but not illegal, as in the case of contracts void under the statutes of frauds. An illegal contract may be repudiated by either party. *City of Los Angeles v. City Bank*, 34 Pac. 510, 512, 100 Cal. 18.

The courts sometimes call contracts in general restraint of trade "unlawful" or "illegal," but in every instance it will be found that these terms were used in the sense merely of "void" or "unenforceable" as between the parties; the law considering the disadvantage so imposed upon a contract a sufficient protection to the public. *Bohn Mfg. Co. v. Hollis*, 55 N. W. 1119, 1121, 54 Minn. 223, 21 L. R. A. 337, 40 Am. St. Rep. 319.

#### ILLEGAL EVIDENCE.

Mr. Justice White, in discussing the use of the words "illegal evidence" in the sentence, "It is elementary that the admission of illegal evidence over objection necessitates reversal," in the case of *Waldron v. Waldron*, 156 U. S. 361, 15 Sup. Ct. 883, 39 L. Ed. 453, said it undoubtedly meant such evidence as was prejudicial to the defendant, for at the close of his opinion he says: "We have not rested our decree upon the question of the admissibility of this evidence, because the mere illegal introduction of irrelevant evidence does not necessarily constitute reversible error." *Fisher v. State* (Del.) 41 Atl. 184, 185, 1 Pennewill, 388.

#### ILLEGAL GAMING.

"The term 'illegal gaming' implies gain or loss between the parties by betting, such as would excite a spirit of cupidity." *Hankins v. Ottinger*, 47 Pac. 254, 255, 115 Cal. 454, 40 L. R. A. 76 (quoting *People v. Sergeant* [N. Y.] 8 Cow. 139); *State v. Leighton*, 23 N. H. (3 Fost.) 167, 171; *Harris v. White*, 81 N. Y. 532, 539. Playing billiards under an agreement by which the loser is to pay for the use of the table does not constitute illegal gaming. *People v. Sergeant* (N. Y.) 8 Cow. 139, 141. Contra, see *State v. Leighton*, 23 N. H. (3 Fost.) 167, 171.

The words "gaming," "illegal gaming," or "unlawful gaming" shall include every act punishable under any law relative to lotteries, policy lotteries, or policy, the buying and selling of pools, or registering of bets. *Rev. Laws Mass. 1902*, p. 88, c. 8, § 5, subd. 2.

#### ILLEGAL INTEREST.

The term "illegal interest" is synonymous with and means "usury." *Parsons v. Babcock*, 58 N. W. 726, 727, 40 Neb. 119.

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#### ILLEGAL TRANSACTION.

The illegal intention must be accompanied by an act which is criminal or prohibited by law, to make the transaction illegal. *Smith v. Blachley*, 41 Atl. 619, 621, 188 Pa. 550, 68 Am. St. Rep. 887.

#### ILLEGALITY.

Illegality signifies that which is contrary to the principles of law, and denotes a complete defect in the proceedings. *People v. Kelly* (N. Y.) 1 Abb. Prac. (N. S.) 432, 437.

The term "illegality" denotes a complete defect in the legal proceedings. *Bronk v. State*, 81 South. 248, 250, 43 Fla. 461; *Ex parte Gibson*, 81 Cal. 619, 624, 91 Am. Dec. 546; *Ex parte Schwartz*, 2 Tex. App. 74.

Illegality is properly predicable of radical defects only, and signifies that which is contrary to the principles of law as distinguished from mere rules of procedure. *Barton v. Sanders*, 16 Pac. 921, 923, 16 Or. 51, 8 Am. St. Rep. 261; *Ex parte Gibson*, 81 Cal. 619, 624, 91 Am. Dec. 546; *Ex parte Schwartz*, 2 Tex. App. 74; *Ex parte Goodin*, 67 Mo. 637, 642; *Ex parte Mooney*, 26 W. Va. 36, 40, 53 Am. Rep. 59.

#### Irregularity distinguished.

An "irregularity" is a want of adherence to some prescribed rule or mode of proceeding, and consists in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable time or improper manner. An "illegality," on the other hand, is properly predicable of radical defects only, and signifies that which is contrary to the principles of law as distinguished from mere rules of procedure. It denotes a complete defect in the proceedings. It is the latter defect only which gives authority to discharge on habeas corpus. Defendant charged with assault and battery was convicted in a mayor's court, and appealed to the county court, tendering to the mayor an appeal bond, which, though defective, was approved by the mayor, who then sent up the case to the county court. The appellant then tendered to the attorney a new bond, telling him the first bond was defective, but the mayor refused to approve the new bond, and the county court dismissed the appeal for want of a sufficient bond, and awarded a procedendo to the mayor, who issued a *capias pro fine* for the defendant. Held that, while there may have been some irregularities, yet, the jurisdiction of the court not being questioned, there was nothing to show that the relator had been illegally restrained of his liberty, and hence the writ would not lie. *Ex parte Schwartz*, 2 Tex. App. 74, 80.

Mr. Hurd illustrates the distinction between mere error or irregularity, which would

render a judgment voidable, and an illegality, which would render a judgment void, thus: "It would be irregular to sentence a man to imprisonment in his absence where the absence was occasioned by the order of the court pronouncing the sentence. It would be illegality to sentence him to imprisonment for a crime which was punishable by a pecuniary fine only." *Ex parte Gibson*, 31 Cal. 619, 624, 91 Am. Dec. 546 (citing *Hurd on Habeas Corpus*, 333).

**Ultra vires distinguished.**

See "Ultra Vires."

## ILLEGITIMATE.

"The word 'illegitimate,' when used in speaking of illegitimate children, 'has by the common law and law of this state a well-defined meaning, which is begotten or born out of wedlock.'" *Miller v. Miller* (N. Y.) 18 Hun, 507, 509.

The term "illegitimate" at common law, as applied to children, meant children born out of lawful wedlock, whether the parents had sought to unite themselves in marriage which was void, or had wholly ignored every pretense of marriage. There must have been a valid marriage in order that the issue be legitimate. *Brown v. Belmarde*, 8 Kan. 41, 52.

## ILLEGITIMATE CHILD.

The term "illegitimate child," as used in Rev. St. c. 61, § 2, providing that an illegitimate child shall be considered as an heir of his mother and inherit her estate in like manner as if he had been born in lawful wedlock, cannot be construed to include grandchildren. *Curtis v. Hewins*, 52 Mass. (11 Metc.) 294.

## ILLICIT.

"The word 'illicit,' as its derivation indicates, means that which is unlawful or forbidden by the law." *State v. Miller*, 12 Atl. 526, 527, 60 Vt. 90 (citing *Bouv. Law Dict.*; *Webst. Dict.*).

## ILLICIT CONNECTION.

"Illicit connection," as used in the statute defining seduction, is equivalent to "sexual intercourse." *State v. King*, 70 N. W. 1046, 9 S. D. 628.

## ILLICIT COHABITATION.

Illicit means unlawful or forbidden, and cohabitation means the living together as man and wife. The intention of the Legislature in Act June 22, 1852 (Pen. Laws, c. 18, § 7), and chapter 5, providing in section 1:

"The fifth section of the thirteenth chapter of the Penal Code relating to illicit cohabitation shall be and is hereby repealed, and such offense shall hereafter be punished as adultery," was to do away with the distinctive offense of "lewd association and cohabitation of a man and woman not married to each other," a state of living together in which illicit sexual intercourse is inferable. The Legislature has also added that such living together is punishable as adultery. This appears to be as if the Legislature had said in terms, to wit: "The gist of the offense of illicit cohabitation is the unlawful sexual intercourse which this living together presumes. Hereafter it shall be punished as such." *Rex v. Kalailoa*, 4 Haw. 89, 41.

## ILLICIT DISTILLERY.

An illicit distillery is one carried on without a compliance with the provisions of the law relating to taxes on spirituous liquors. *United States v. Johnson* (U. S.) 26 Fed. 682, 684.

Under Civ. Code, art. 1572, providing that a will "must be signed by the testator; if he declares that he knows not how, or is not able to sign, express mention of his declaration, as also of the cause that hinders him from signing, must be made in the act"—a will to which testatrix affixed her mark, and which states "that the said testatrix, being illiterate, has made her mark," is not sufficiently executed. Such statement is not equivalent to the words that she could not write, or that she did not know how to sign. "Illiterate," says Webster, means "unlettered, ignorant of letters or books, untaught, unlearned, uninstructed in science." Bouvier defines illiterate as "unacquainted with letters." Hence it follows that very often illiterate persons can sign their names. We meet every day with persons who are illiterate, and who can sign their names. In re Succession of Mary Carroll, 28 La. Ann. 388-390.

## ILLINOIS CURRENCY.

See "Currency of the State."

## ILLNESS.

See "Last Illness"; "Serious Illness"; "Severe Illness or Sickness."

Illness is defined as a disorder of health; sickness. *Supreme Lodge K. P. v. Lapp's Adm'x*, 74 S. W. 656, 657, 25 Ky. Law Rep. 74.

"Illness," as used in an application for a life insurance policy requiring the applicant to give full particulars of any illness which he had since childhood, means a dis-

ease or ailment of such a character as to affect the general soundness and healthfulness of the system seriously, and not a mere temporary indisposition, which does not tend to undermine or weaken the constitution of the insured. *Billings v. Metropolitan Life Ins. Co.*, 41 Atl. 516, 518, 70 Vt. 477.

"Illness" is a word which may properly include an attack of a less grave and serious character than a disease. An illness may be slight or severe. In either case it is an illness. *Connecticut Mut. Life Ins. Co. v. Union Trust Co. of New York*, 5 Sup. Ct. 119, 123, 112 U. S. 250, 28 L. Ed. 708.

## ILLUSIVE.

"Illusive," as used in the rule that whether legislation respecting cities of a certain class presents a subject for judicial control depends upon whether the classification be substantial or illusive, means that the selection is extraneous from the character of the legislation. Such illusiveness results equally when a classification is created with a view of escaping the constitutional restriction and when one is adopted with a like result. *Foley v. City of Hoboken*, 38 Atl. 833, 834, 61 N. J. Law, 478.

## ILLUSORY APPOINTMENT.

"Formerly the appointment of a merely nominal share of the property to one of the objects of a power in order to escape the rule that an exclusive appointment could not be made unless it was authorized by the instrument creating the power, was considered illusory, and void in equity, but this rule was abolished in England by St. 1 Wm. IV, c. 46. This statute enacts that no appointment made after its passage in exercise of a power to appoint property, real or personal, among several objects, shall be invalid or impeached in equity on the ground that an unsubstantial, illusory, or nominal share only was thereby appointed or left unappointed to devolve upon any one or more of the objects of such power; but that the appointment shall be valid in equity as at law." (*Black's Law Dict.*) The term "illusory" is vague and indefinite, depending upon uncertain discretion and opinion of the person using it. Where the power is given by the donor to another to distribute, it is for the purpose of inequality which future and unknown events may make just and judicious. When a chancellor undertakes to decide that any degree of inequality is a fraudulent exercise of the power, he is assuming to himself a knowledge of the secret wish and intention of the donor, not expressed in the deed and undertaking, to exercise a discretionary power not intrusted to him,

but to another. *Ingraham v. Meade* (U. S.) 13 Fed. Cas. 50, 53.

## ILLUSTRATION.

An illustration is defined in the *Century Dictionary* as a pictorial representation placed in a book or other publication to elucidate the text, and the word has such meaning as used in Rev. St. § 4962, as amended by Act June 18, 1874, c. 301, § 3, 18 Stat. 79 [U. S. Comp. St. 1901, p. 3412], relating to copyrights, and providing that in the construction of such section the words "engraving," "cut," and "print" shall be applied only to illustrations or works connected with the fine arts. *Bleistein v. Donaldson Lithographing Co.* (U. S.) 98 Fed. 608, 610.

The word "illustration," as used in U. S. Comp. St. 1901, p. 3412, allowing a copyright to the author, designer, or proprietor of any engraving, cut, or print, and providing that these words shall be applied only to "pictorial illustrations" or works connected with the fine arts, does not mean that the work must illustrate the text of the book, and that the etchings of Rembrandt or Millet could not be protected if any man were able to reproduce them, and does not mean that ordinary posters are not good enough to be considered within this scope. The antithesis to "illustration or works connected with the fine arts" is not works of little merit or humble degree, or illustrations addressed to the less educated classes. It is "prints or labels designed to be used for any other articles of manufacture." Certainly works are not the less connected with fine arts because their pictorial quality attracts the crowd, and gives them a real use. A picture is none the less a picture, and none the less a subject of copyright, that it is used for an advertisement. *Bleistein v. Donaldson Lithographing Co.*, 23 Sup. Ct. 298, 300, 188 U. S. 239, 47 L. Ed. 460.

## IMAGINARY DAMAGES.

The term "imaginary damages" is used to designate damages in excess of compensatory damages, which are allowed as a punishment of the wrongdoer. It is synonymous with the terms "exemplary," "vindictive," and "punitive" damages.—*Murphy v. Hobbs*, 5 Pac. 119, 123, 7 Colo. 541, 49 Am. Rep. 366.

## IMBECILE.

An imbecile is one destitute of strength, either of body or mind; weak; feeble; impotent; decrepit. *Campbell v. Campbell*, 22 N. E. 620, 622, 130 Ill. 466, 6 L. R. A. 167 (citing *Webst. Dict.*).



Imbeciles are persons whose mental powers and resources are limited, though they may still retain some portion of their mental faculties. So a person designated as an imbecile in law may make use of his senses; may have ideas, memory, and some judgment; and may read and articulate words with more or less clearness; and even calculate, when the calculation is not difficult. *Calderon v. Martin*, 23 South. 909, 910, 50 La. Ann. 1153.

### IMBECILITY.

See "Absolute Imbecility"; "Corporal Imbecility."

Imbecility, according to Duranton, is that feebleness of mind which, without depriving the person entirely of the use of his reason, leaves only the faculty of conceiving ideas the most common, and which relate almost always to physical wants and habits. *Delafield v. Parish* (N. Y.) 1 Redf. 1, 115 (citing *Liv. 1*, tit. 11, § 713).

Imbecility may not only include general weakness of mind existing from birth, as in the case of idiots, but dementia, or the breaking down of the intellect, caused by disease or old age. *State v. Palmer*, 61 S. W. 651, 656, 161 Mo. 152.

Imbecility is defined as the quality of being imbecile; feebleness of mind; feebleness of body or mind. Absolute imbecility implies a total want of reason and a total loss of memory. An instruction that the fact that testator's mind was impaired by age or disease would not take away his legal capacity to make a will, unless his mind was impaired to the point of lunacy or absolute "imbecility," was erroneous, as there are many degrees in the weakness of mind before reaching total, or perfect, or absolute imbecility, and it must be apparent to every one that a man before reaching this point may be incapable of comprehending the extent or nature of his property, or of claimants on his bounty, and of making a rational selection among them. *Campbell v. Campbell*, 22 N. E. 620, 622, 130 Ill. 468, 6 L. R. A. 187.

### Idiocy distinguished.

Imbecility is that infirmity of mind which, as distinguished from idiocy or lunacy, is usually incident to extreme age, and is generally the result of a gradual decay of the mental faculties. The line which marks the boundary between capacity and imbecility is difficult to define. *Messenger v. Bliss*, 35 Ohio St. 587, 592.

Imbecility is idiocy in a minor degree. *Ray*, in his *Jurisprudence*, §§ 63, 121, 122, states that in imbecility the development of the moral and intellectual powers is ar-

rested at an early period of existence. It differs from idiocy in the circumstance that while, in the latter, there is an almost utter destitution of everything like reason, the subjects of the former possess some mental capacity. No cases subjected to legal inquiry are more calculated to puzzle the understandings of the courts and juries, to mock the wisdom of the learned, and baffle the acuteness of the shrewd, than those connected with questions of imbecility. The real capacity of the imbecile's mind is to be estimated, not from any single trial, but by a careful appreciation of all its powers. *Francke v. His Wife*, 29 La. Ann. 302, 304.

### As insanity.

See "Insane—Insanity."

### IMBED.

The word "imbed" does not necessarily imply entire inclosure or complete immersion. It is defined by Webster as follows: "To sink or lay, as in a bed; to deposit, as in a partly inclosing mass, as of clay or mortar." A thread may be imbedded in a sheet of rubber if it is partly inclosed by the sheet, or if sunken, so as to be partly inclosed. *Palmer Pneumatic Tire Co. v. Lozler* (U. S.) 84 Fed. 659, 667.

### IMITATION.

"Imitation," as used in a statute respecting the counterfeiting of coin in imitation of legal tender, means similarity or likeness, and does not mean a sameness of appearance and material. *State v. Harris*, 27 N. C. 287, 294.

An imitation of a trade-mark is that which so far resembles the genuine trade-mark as to be likely to induce the belief that it is genuine, whether by the use of words or letters similar in appearance, or in sound, or by any sign, device, or other means whatsoever. *Pen. Code N. Y.* 1903, § 368; *Wagner v. Daly*, 22 N. Y. Supp. 493, 496, 67 Hun, 477.

### IMITATION BUTTER.

For the purpose of the article relating to imitation butter, every article, substitute, or compound other than that produced from pure milk or cream from the same, made in the semblance of butter, and designed to be used as a substitute for butter made from pure milk or cream from the same, is declared to be imitation butter. *Rev. St.* 1899, Mo. § 4744. *Pol. Code Idaho* 1901, § 594, adds: "Provided that the use of salt and harmless coloring matter in butter the product of pure milk and cream shall not be considered to render such product an imitation."

**IMITATION JEWELRY.**

"Imitation jewelry need not necessarily be a counterfeit—that is, it need not be an exact simulation—of a particular article which it is intended to take the place of. If by a pleasing combination of appropriate materials by an attractive arrangement of parts an article is produced bearing a general resemblance to real jewelry ornaments and suitable for similar uses, it may fairly be called imitation jewelry. Nor does the fact that the original jewelry of which it is an imitation has become obsolete prevent its being considered, in the ordinary use of the English language, as imitation jewelry." *Robbins v. Robertson* (U. S.) 83 Fed. 709, 710.

**IMITATIONS OF PRECIOUS STONES.**

Imitations of pearls, made of paste or glass, mounted on wires, and used for ornamental purposes, are dutiable under paragraph 454 of the tariff act of 1890 and paragraph 338 of the tariff act of 1894, as imitations of precious stones, not set. *Lorsch v. United States* (U. S.) 119 Fed. 476, 477.

**IMMATERIAL**

Not material, essential or necessary; not important or pertinent; not decisive. *Black, Law Dict.*

**IMMATERIAL ALLEGATION OR AVERMENT.**

An immaterial averment is one alleging with needless particularity or unnecessary circumstances what is immaterial and unnecessary, and which might properly have been stated more generally and without such circumstances or particulars, or, in other words, it is a statement of unnecessary particulars in connection with, and as descriptive of, what is material. *Pharr v. Bachelor*, 3 Ala. 237, 245.

An "immaterial allegation," as the term is used with reference to pleadings, is an averment which may be stricken from the pleading without leaving it insufficient. *Whitwell v. Thomas*, 9 Cal. 499; *Green v. Palmer*, 15 Cal. 411, 416, 76 Am. Dec. 492; and, of course, need not be proved or disproved. *Green v. Palmer*, 15 Cal. 411, 416, 76 Am. Dec. 492.

**IMMATERIAL ISSUE.**

An immaterial issue is where a material allegation in the pleadings is not reversed, but an issue is taken on some other point, which, though found by verdict, will not determine the merits of the cause. *Chit. Pl.* An immaterial issue is one which, passing

by what is material in the previous adverse pleading, is joined on an immaterial point; that is, a point not decisive of the rights of the cause. *Wooden v. Waffle* (N. Y.) 1 Code Rep. (N. S.) 392, 395, 396 (citing *Gould, Pl.*).

**IMMATERIAL MATTER.**

Immaterial matter in a pleading is anything stated therein which, if established on the trial, would not entitle a party to, or aid him to obtain, the relief demanded, or sustain the defense pleaded. *Johns v. Pattee*, 8 N. W. 663, 664, 55 Iowa, 665.

**IMMEDIATE.**

Webster defines "immediate" as meaning, among other things, acting with nothing interposed or between, or without the intervention of another object as a cause. *Preferred Masonic Mut. Acc. Ass'n v. Jones*, 60 Ill. App. 106, 108.

"'Immediate' is defined as having nothing intervening, either as to place, time, or action; instantaneous. *Worcester Dict.* Webster defines 'immediate' as instant; present; without intervention of time. 'Immediate' is not a technical word, and we do not find that it has acquired a peculiar meaning in the law, different from its common and approved popular signification." *Bailey v. Commonwealth*, 74 Ky. (11 Bush) 688, 689.

The word "immediate," as defined by *Worcester*, means having nothing intervening, either as to place, time, or action. The word "immediately" means instantly; directly; without delay; forthwith; just now. In an action involving the validity of an attachment, the trial court, in construing the clause of the statute authorizing an attachment in case defendant was about to remove from the state, etc., instructed that, to authorize such an attachment, the defendant must have been preparing and intending to make an immediate removal; and the Supreme Court, on appeal, held that the use of the word "immediate" was erroneous, as tending to limit and narrow the meaning of the statute and to mislead the jury. *Elliot v. Keith*, 32 Mo. App. 579, 585.

The ordinary and general signification of the term "immediate" is "not separated from its object by any medium; directly related; nearest." *Norwegian Old People's Home Soc. v. Wilson*, 52 N. E. 41, 43, 176 Ill. 94.

In *Bouvier's Law Dictionary* it is said that the word "immediate" strictly implies not deferred by any lapse of time, but, as usually employed, it is, rather, within reasonable time, having due regard to the nature and circumstances of the case. The word is certainly no stronger than the word "forthwith" or the expression "as soon as

possible." *Fidelity & Deposit Co. v. Courtney* (U. S.) 103 Fed. 599, 607, 43 C. C. A. 331.

#### As instantaneous.

If an injury severs some of the principal blood vessels and causes the person injured to bleed to death, his death may be regarded as immediate, though not instantaneous. When it is said that the death must be immediate, it is not meant that it must follow the injury within a period of time too brief to be perceptible. If a blow upon the head produces unconsciousness, and renders the person injured incapable of intelligent thought or speech or action, and he so remains for several minutes, and then dies, his death may very properly be considered as immediate, though not instantaneous. The words "instantaneous" and "immediate," as used in reference to such death, do not mean precisely the same thing, but the word "immediate" is more comprehensive and elastic in its meaning. Of course, an instantaneous death is an immediate death, but an immediate death is not necessarily and in all cases an instantaneous death. *Sawyer v. Perry*, 33 Atl. 660, 661, 88 Me. 42.

The word "immediate" is one admitting of many variations of definition. It is defined by the *Standard Dictionary* as following without the lapse of any appreciable time; done or accruing at once; instant; as an immediate reply. The author further states that the word is sliding from its instantaneousness, so that we are fain to substitute "at once," "instantly," etc., when we would make promptness emphatic. *Employers' Liability Assur. Corp. v. Light, Heat & Power Co.*, 63 N. E. 54, 55, 28 Ind. App. 437.

#### As word of causation.

In construing a policy of insurance which indemnified the insured against all such immediate loss or damage sustained by the assured as might occur by tornadoes, cyclones, and windstorms, the court said: "The writer of this opinion is further of the belief that the word 'immediate' has much force in the interpretation of the language of the policy. It means, in his opinion, that the damage must be occasioned without the interference of any agent—must be the direct work of air in motion, and not accomplished by any intermediary; that the term is one indicating agency, not time—one of causation, not of duration." *Hartford Fire Ins. Co. v. Nelson*, 67 Pac. 440, 441, 64 Kan. 115.

#### IMMEDIATE BENEFIT.

Code 1849, § 399, authorizing the examination of a person for whose immediate benefit the action is prosecuted or defended, signifies the one for whose benefit the action is prosecuted or defended without any inter-

vening benefit, profit, or advantage to another. *Fitch v. Bates* (N. Y.) 11 Barb. 471, 473.

Code Proc. § 399, providing that a "person for whose immediate benefit the action is prosecuted" shall be incompetent as a witness, cannot be construed to include the child or next of kin of an intestate, in an action brought by the administrator to recover a demand claimed to be due the estate; the witness not being entitled to maintain an action for the money if recovered by the administrator, on proof of the fact that the mortgage debt was realized upon, and his relationship to the deceased, but only being entitled on the footing of an account, and to the amount not required for the other objects entitled to be preferred in the administration. A witness' connection with the cause of action must be such as will entitle him to bring a suit for the money recovered as soon as the nominal plaintiff has collected the money, in order to be incompetent under the statute. *Butler v. Patterson*, 13 N. Y. (3 Kern.) 292, 293.

Practice Act 1849, art. 25, § 2 (Sess. Acts 1849, p. 100), providing that a "person for whose immediate benefit it is prosecuted or defended" is not a competent witness in an action, cannot be construed to include a person who is interested in the event of the suit, in that he is bound to pay half the damages and costs in case of a recovery by the plaintiff, as the plaintiff could not exact the recovery immediately from the witness. *Laumier v. Francis*, 23 Mo. 181, 183.

#### Accommodation indorser.

Code Amend. 1857, § 399, providing that a person for whose "immediate benefit" an action is prosecuted or defended is incompetent as a witness in such action, renders incompetent a person for whose accommodation a note was made and indorsed in an action on the note, as a judgment for the plaintiff, without any other circumstances, would be sufficient to establish the liability of such person, while a successful defense would operate immediately and with all possible directness to discharge him. *Gildersleeve v. Martine*, 19 N. Y. 321, 322.

#### Stockholder.

"Immediate benefit," as used in Code, § 399, declaring that section 398, providing that no person offered as a witness shall be excluded by reason of his interest in the event of the action, shall not apply to any person for whose immediate benefit the suit is prosecuted or defended, does not include a stockholder in an incorporated company, in a suit brought in the name of the corporation. *Bush v. Miller* (N. Y.) 13 Barb. 481, 483.

"Immediate benefit it is prosecuted," as used in Code, § 399, providing that a person for whose immediate benefit it is prosecuted

or defended is incompetent as a witness in an action, cannot be construed to include a stockholder in any bank; he not being a party to the action. *Montgomery County Bank v. Marsh*, 7 N. Y. (3 Seld.) 481, 485.

Code, § 398, declares that no person offered as a witness shall be excluded by reason of his interest in the event of the action. Section 399 declares that section 398 shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended, etc. Held, that a stockholder in an incorporated company is not a person for whose immediate benefit an action by the corporation is prosecuted, as the words "immediate benefit" are used in section 399, and is therefore a competent witness in favor of the corporation. "It cannot be a correct interpretation of this phrase to apply it to every person who would be peculiarly affected by the result of the suit, for that would annul the preceding section, which admits witnesses thus interested. The words contemplate a person to whom a debt owned by the corporation has been assigned," etc. *Washington Bank of Westerly v. Palmer*, 8 N. Y. Legal Obs. 92, 93.

#### **Surety.**

Code, § 399, which declares that no person for whose immediate benefit an action is prosecuted or defended shall be a competent witness therein, would include a person who has indemnified a sheriff for taking property in an action brought against the sheriff for such taking. *Howland v. Willetts*, 9 N. Y. (5 Seld.) 170, 173.

#### **IMMEDIATE CAUSE.**

The term "immediate cause," in speaking of the contributory negligence of a plaintiff as being the immediate cause of his injury, is synonymous with the phrase "proximate cause." *Longabaugh v. Virginia City & T. Ry. Co.*, 9 Nev. 271, 272.

There is a distinction between a proximate and immediate cause of an injury and between a proximate and remote cause. If intoxication of a person drowned was a remote cause only of death, an action could not be maintained against the person furnishing him the liquor causing the intoxication; but if it was the proximate, although not the immediate, cause of the death, the action was made out. The judge, in charging the jury, illustrated the difference between an immediate and proximate cause by supposing the case of an intoxicated man falling into the water and drowning. "In such case," said the judge, "the drowning is the immediate cause, and the intoxication, if that is what caused him to fall into the water, is the proximate cause." *Davis v. Standish* (N. Y.) 26 Hun, 608, 615.

"Immediate," as relating to an injury, should be understood not in reference to the time which the act occupies, or the space through which it passes, or the place from which it is begun, or the intention with which it is done, or the instrument or agent employed, or the lawfulness or unlawfulness of the act, but in reference to the progress and termination of the act; to its being done, on the one hand, and its having been done, on the other. If the injury is inflicted by the act at any moment of its progress from the commencement to the termination thereof, then the injury is immediate; but if it arises after the act has been completed, though occasioned by the act, then it is consequential or collateral, or, more exactly, a collateral consequence. *Jordan v. Wyatt* (Va.) 4 Grat. 151, 154, 47 Am. Dec. 720.

An instruction that the proximate cause of an injury is the immediate cause is erroneous. *Delsenrieter v. Kraus-Merkel Malt-ing Co.*, 72 N. W. 735, 736, 97 Wis. 279.

#### **IMMEDIATE CONTROL.**

Articles of incorporation of an insurance company, declaring that only property under the immediate control of the assured should be subject to insurance, did not restrict the operations of the company to the insurance of property on or in the immediate vicinity of the premises occupied by the assured as his residence, but property might be under his immediate control, though situated on a part of his farm most remote from his residence and his ordinary farm buildings. *Soli v. Farmers' Mut. Ins. Co.*, 52 N. W. 979, 980, 51 Minn. 24.

#### **IMMEDIATE DANGER.**

"Immediate danger," as used in an instruction stating the person carrying concealed weapons must be found guilty thereof, unless he had reasonable ground to believe his person or property in immediate danger from violence or crime, construed to mean such danger as is then and there about to be inflicted. *Bailey v. Commonwealth*, 74 Ky. (11 Bush) 688, 689.

#### **IMMEDIATE DELIVERY.**

As used in the statute of frauds, the expression "immediate delivery" means such a delivery as the circumstances permit, taking into consideration the nature of the property, its situation at the time of the sale, the position or location of the parties at that time, their distance from the property sold, and the acts necessary to be done to complete the collection of the property. What might be regarded as an immediate delivery of one kind of property might not be an immediate delivery of another kind. *O'Gara v. Lowry*.

5 Pac. 583, 585, 5 Mont. 427. See, also, *Carpenter v. Clark*, 2 Nev. 243, 246; *Bassinger v. Spangler*, 9 Colo. 175, 189, 10 Pac. 890; *Samuels v. Gorham*, 5 Cal. 226, 227; *Parks v. Barney*, 55 Cal. 239; *Hesthal v. Myles*, 53 Cal. 623; *Redington v. Nunan*, 60 Cal. 632; *Dubois v. Spinks*, 46 Pac. 95, 114 Cal. 289.

An immediate delivery, within a statute requiring that a mortgage of personal property be followed by an immediate delivery, can only be construed as a delivery within such a reasonable time as is proper to effect it, considering the nature of the property. *Walker v. Snediker* (N. Y.) Hoff. 145, 147.

A bill of sale was executed, at 9 o'clock Saturday night, of a stock of goods situate in a town 23 miles distant. The purchaser took possession of the goods at 4 o'clock Sunday morning, and thereafter remained in continued possession until the goods were seized under the levy of an attachment on Monday morning. This was held to be an immediate delivery of the goods, within the meaning of a statute providing that "every sale of goods in the possession of the vendor, unless accompanied by immediate delivery and followed by continued change of possession, shall be conclusive evidence of fraud, as against the creditors of the vendor or subsequent purchasers in good faith." *Kleinschmidt v. McAndrews*, 6 Sup. Ct. 761, 764, 117 U. S. 282, 29 L. Ed. 905.

An instruction that a sale is prima facie fraudulent, unless it was accompanied by an immediate delivery (How. Ann. St. § 6190) of the property, was not ground for reversal, as inducing the jury to believe that an instantaneous delivery was necessary, where it appeared that the debt to the creditor attacking the sale as fraudulent was contracted on the third day after the sale, and while the seller was still in possession of the property. *Jansen v. McQueen*, 105 Mich. 199, 201, 63 N. W. 73, 74.

#### As soon as possible.

A statute providing that a chattel mortgage unaccompanied by immediate delivery should be absolutely void, as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, means a delivery consummated as quickly as the circumstances of the case and the character of the chattels will permit. *Meding v. Roe* (N. J.) 30 Atl. 587, 590.

"Immediate delivery," as used in Rev. St. c. 107, § 5, providing that if a chattel mortgage is not filed in the clerk's office, or there is no immediate delivery, there shall be a presumption of fraud, means a delivery within such convenient time as is reasonably requisite for making it. *Richardson v. End*, 43 Wis. 316, 318.

#### Affected by custom.

"Immediate delivery," when used in a contract requiring immediate delivery of goods, ordinarily means delivery forthwith; but, in a case involving a sale of coal by a miner, the expression may be explained by testimony to show that it means, among coal shippers and dealers, a delivery during the current month in which the offer is made and accepted, unless the contract is made on the last day of the month, or within such limited time that it cannot be shipped, and then the whole of the following month may be given. *Neldon v. Smith*, 36 N. J. Law (7 Vroom) 148, 153.

#### IMMEDIATE DESCENDANTS OR ISSUE.

Under Act Feb. 17, 1811 (Swan & C. Rev. St. 550), providing that no estate in fee simple, fee tail, or any lesser estate in lands or tenements in the state, should be given or granted to any person or persons but such as are in being, or to the "immediate issue or descendants" of such as are in being, at the time of making such deed or will, the children, merely, and not the grandchildren and great-grandchildren, of the person in being, will be included, though the word "issue," without the qualifying word "immediate," would undoubtedly include grandchildren and great-grandchildren of the person to whose use the bequest is made. *Turley v. Turley*, 11 Ohio St. 173, 179. So, also, under a like statute (Gen. St. § 2952). *Leake v. Watson*, 21 Atl. 1075, 1076, 60 Conn. 493.

St. Ohio, Dec. 17, 1811, provided that no estate in lands should be given by deed or will to any person or persons but such as are in being, or to the "immediate issue or descendants" of such persons as are in being, at the time of the making of a will. It was held that the limitations were not limitations of time, as in the common-law rule against perpetuities, but were descriptive of the persons who might take. Under this statute, a devise of their parents' share to the children of any grandchild deceased before the time of division would be valid as to those great grandchildren whose parent, a grandchild of the testator, was living at the time of his death, because they would be immediate issue of a person in being at that time, and would also be valid as to any great-grandchildren whose parent, though born after the testator's death, had died before their grandparent, a child of the testator, because they would be, if not immediate issue, certainly immediate descendants, of that child who was in being at that time, and would be invalid as to those great-grandchildren only whose parent, born since the death of the testator, died after their parent, the children's grandparent, and who, therefore, by reason of the interposition of the life of their

parent, were neither immediate issue nor immediate descendants of a person in being when the testator died. *McArthur v. Scott*, 5 Sup. Ct. 652, 663, 118 U. S. 340, 28 L. Ed. 1015.

#### IMMEDIATE DESCENT.

"A descent may be said to be mediate or immediate in regard to the mediate or immediate descent of the estate or right, or it may be said to be mediate or immediate in regard to the mediateness or immediateness of the degree or degrees of consanguinity." *Levy v. McCartee*, 31 U. S. (6 Pet.) 102, 112, 8 L. Ed. 334.

#### IMMEDIATE FAMILY.

Where the object of an association, as stated in its charter and constitution, was to create a fund for the benefit of its members or their "immediate families," a married daughter of a member, not living with her father, and a brother of such member residing with him, were included in the designation "immediate family." *Danielson v. Willson*, 73 Ill. App. 287, 299.

Under the charter of a benefit association, stating its object to be the relief of its distressed, injured, sick, or disabled members, and "their immediate families," and a constitutional provision that, when any beneficiary shall be unable to take, then such beneficiary fund shall be payable to the heirs at law of the deceased, according to the laws of descent, where the beneficiary was incompetent to take the benefit, the only child of deceased (his wife being divorced for her fault) should be paid the fund as the beneficiary's "immediate family," in preference to deceased's brother, who lived in deceased's household. *Norwegian Old People's Home Soc. v. Wilson*, 52 N. E. 41, 43, 176 Ill. 94.

A declaration of a trust for the support and maintenance of the immediate family, etc., is of doubtful import, and is difficult to define with precision, and therefore, to determine who shall be considered as rightfully embraced in it, the term "immediate family" would seem to imply that they were intended to apply to the household of the beneficiary, and to those bearing the relation to him of dependents for support. *Warner v. Rice*, 86 Md. 436, 442, 8 Atl. 84.

#### IMMEDIATE NECESSITY.

The immediate and urgent necessity under which the payment of an illegal tax must be made, in order to entitle the payer to recover, means something less than an actual or threatened seizure of goods. Payment to avoid the levy of a warrant already

issued and in the hands of the collector, and just as sure to be levied, if the money is not paid, as night to follow day, is just as much a payment to preserve one's goods as though the levy had actually been threatened or made. *Rumford Chemical Works v. Ray*, 34 Atl. 814, 815, 19 R. L. 456.

#### IMMEDIATE NEIGHBORHOOD.

"Immediate neighborhood," as used in a contract in which defendant, on the sale of a lot to plaintiff, agrees not to construct or erect any flats in plaintiff's immediate neighborhood, includes the locality of the lot sold. *Lewis v. Gollner*, 29 N. E. 81, 82, 129 N. Y. 227, 26 Am. St. Rep. 516.

#### IMMEDIATE NOTICE.

##### Of appeal.

The word "immediately," as used in the statute providing that, immediately upon the filing of a notice of appeal and undertaking, the clerk shall mail to the justice a written notice thereof, etc., means "without interval of time"; "without delay." *Eldridge v. Knight*, 93 N. W. 860, 862, 11 N. D. 552.

"Immediate notice," as used in St. 1 Geo. IV, c. 56, § 5, relating to malicious trespass, and giving an appeal on condition that the party should give immediate notice thereof, was not satisfied by notice of appeal seven days after conviction. *Rex v. Huntingdonshire*, 5 Dow. & Ry. 588.

##### Of default of employé.

The phrase "immediate notice," in an employé's surety bond, requiring the employer to give immediate notice to the company of any acts of dishonesty on the part of the employé, means within a reasonable time, with due diligence under the circumstances of the particular case, and without unnecessary or unreasonable delay. *Remington v. Fidelity & Deposit Co.*, 67 Pac. 989, 992, 27 Wash. 429.

"Immediate" is defined as without any time intervening; without any delay. It is often used, like similar expressions, with less strictness than the literal meaning requires, as "an immediate answer." Thus, in a bond requiring immediate notice of an accident, it is evident that the word was not used in its literal sense. It would generally be impossible to give notice in writing of the fact that the incident had occurred, and, as immediate was understood by the parties, it allowed the intervention of a period of time between the occurrence of a fact and of notice more or less lengthy, according to the circumstances. The object of the notice was one of the circumstances to be considered. If it was to enable the defendants to

take steps for their protection that must necessarily be taken soon after the occurrence of the fact of which notice was to be given, a briefer time would be required to render the notice immediate than would be required if the object were equally well attained after considerable delay. If a notice is given with due diligence under the circumstances of the case, without unnecessary and unreasonable delay, it will answer the requirements of the contract. *Ward v. Maryland Casualty Co.*, 51 Atl. 900, 71 N. H. 262, 93 Am. St. Rep. 514. Hence the requirement of a bond to indemnify an employer against loss by the fraud of his employé that immediate notice must be given of the default is fulfilled by giving notice as soon as reasonable and practicable under the circumstances of the case. Notice that a bank official was a defaulter, giving within from 10 to 17 days after the first discovery of the default, cannot be said, as a matter of law, not to have been given as soon as reasonable and practicable. *Fidelity & Deposit Co. of Maryland v. Courtney*, 22 Sup. Ct. 833, 835, 186 U. S. 342, 46 L. Ed. 1193.

"Immediately" is defined to be without unnecessary or unexcusable delay, under all the circumstances. As used in an indemnity bond requiring immediate notice of any defalcation, a delay of six or eight days, where no prejudice resulted, is not, as a matter of law, other than immediate notice. In a case of such a character some time may elapse after a well-grounded suspicion before the employer ought, in prudence, to make any charge of fraud or dishonesty. Mere laches or inefficiency in business is not enough. Knowledge of a defalcation frequently depends upon a long train of events, or the examination of extended accounts. Unjust inferences and false accusations are always to be avoided. It is only of acts which may create a loss for which the surety is responsible—that is, a loss arising from fraud or dishonesty—that immediate notice is exacted. *Perpetual Building & Loan Ass'n v. United States Fidelity & Guarantee Co.* (Iowa) 92 N. W. 685, 688 (citing *Pacific Fire Ins. Co. of New York v. Pacific Surety Co.*, 28 Pac. 842, 93 Cal. 7; *Ætna Life Ins. Co. v. American Surety Co.* [U. S.] 34 Fed. 291, 298).

#### **Of failure of machine.**

The question whether immediate notice is given, within the meaning of a contract for the sale of a machine, providing that if, upon one day's trial, it does not work well, the purchaser shall give immediate notice to the sellers or their agents, by a notice given two days after the trial, is for the jury. "Immediately," in such connection, demands that the defendant act promptly in giving his notice after the time for trial has passed. *McCormick Harvesting Mach. Co. v. Brower*, 55 N. W. 537, 539, 88 Iowa, 607.

#### **Of loss or accident.**

"The word 'immediate,' when relating to time, is defined in the *Century Dictionary* as follows: 'Without any time intervening; without any delay; present; instant; often used, like similar absolute expressions, with less strictness than the literal meaning requires, as 'an immediate answer.'" The word is not used in its literal sense in an employers' liability insurance policy providing that on occurrence of an accident, and likewise if thereafter suit for damages is brought, immediate notice shall be given the insurer, but it means with due diligence under the circumstances of the case, and without unnecessary delay; and whether notice is so given is a question of fact. *Ward v. Maryland Casualty Co.*, 51 Atl. 900, 902, 71 N. H. 262, 93 Am. St. Rep. 514.

The word "immediate," as used in an accident or fire policy, requiring that the insured shall give the insurer immediate notice of loss, is not always to be taken literally; but it will meet the requirement if the notice is given with due diligence under the circumstances of the case, and without unnecessary or unreasonable delay. To give the word a literal interpretation would in most cases strip the insured of all hope of indemnity, and the policy of insurance would become an engine of fraud. *Konrad v. Union Casualty & Surety Co.*, 21 South. 721, 722, 49 La. Ann. 636; *Lyon v. Railway Pass. Assur. Co.*, 46 Iowa, 631, 635; *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644, 648; *Woody v. Old Dominion Ins. Co.* (Va.) 31 Grat. 362, 376, 31 Am. Rep. 732; *New York Cent. Ins. Co. v. National Protection Ins. Co.* (N. Y.) 20 Barb. 468, 475.

A condition in an insurance policy requiring insured, in case of fire, to give immediate notice of his loss, means with due diligence, and in as reasonably prompt a time as the circumstances of a particular case will admit of. *Continental Ins. Co. of New York v. Lippold*, 3 Neb. 391, 392. See, also, *Oakland Home Ins. Co. v. Davis* (Tex.) 33 S. W. 587, 588; *Woodmen's Acc. Ass'n v. Byers*, 87 N. W. 546, 549, 62 Neb. 673, 55 L. R. A. 291, 89 Am. St. Rep. 777; *Carey v. Farmers' Ins. Co.*, 40 Pac. 91, 92, 27 Or. 146. And so such a condition in a policy was complied with where plaintiff, who was absent at the time of the fire, on the day following notified the defendant's agent thereof, who immediately telegraphed defendant concerning it. *Oakland Home Ins. Co. v. Davis* (Tex.) 33 S. W. 587, 588.

#### **Same—Reasonable time.**

The word "immediate," in a fire policy requiring the insured to give immediate notice in case of loss, does not mean instantly, but means within a reasonable time. *Solomon v. Continental Fire Ins. Co.*, 55 N. E.

279, 280, 160 N. Y. 595, 46 L. R. A. 682, 73 Am. St. Rep. 707; *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553, 566; *Rokes v. Amazon Ins. Co.*, 51 Md. 512, 519, 84 Am. Rep. 823; *McFarland v. United States Mut. Acc. Ass'n*, 27 S. W. 436, 459, 124 Mo. 204; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388, 391; *Chamberlain v. New Hampshire Fire Ins. Co.*, 55 N. H. 249-265; *Foster v. Fidelity & Casualty Co.*, 75 N. W. 69, 70, 99 Wis. 447, 40 L. R. A. 833; *People's Mut. Acc. Ins. Co. v. Smith*, 17 Atl. 605, 606, 126 Pa. 317, 12 Am. St. Rep. 870.

A requirement of immediate notice in an insurance policy in case of loss means notice within a reasonable time, which, when the facts are not in dispute, is a question of law for the court. *Travelers' Ins. Co. v. Myers*, 57 N. E. 458, 459, 62 Ohio St. 529, 49 L. R. A. 760.

The word "immediate," in an accident policy requiring immediate notice of an accidental injury, must be construed to mean within a reasonable time under all the facts and circumstances of the case. What is a reasonable time is to be decided by the jury, unless the delay in giving notice has been so great that the court may rule it as a question of law. *People's Mut. Acc. Ass'n v. Smith*, 17 Atl. 605, 606, 126 Pa. 317, 24 Wkly. Notes Cas. 83, 35, 12 Am. St. Rep. 870.

The word "immediate," as used in an accident policy requiring immediate notice of any accident, is not to be construed lightly, but is to be construed to mean in such time as, under all the circumstances of the case, is reasonable; and what is a reasonable time is ordinarily a question of fact for the jury, unless, upon the undisputed facts, the delay has been so great that the court can rule upon it as a matter of law. *Coldham v. Pacific Mut. Life Ins. Co.*, 2 Ohio Dec. 314.

"Immediate notice," as required by the terms of an accident policy, ordinarily means within a reasonable time, and with due diligence under the circumstances of the particular case, of which the jury are ordinarily the judges. *Horsfall v. Pacific Mut. Life Ins. Co.*, 72 Pac. 1028, 1029, 32 Wash. 132, 63 L. R. A. 425 (citing *Remington v. Fidelity & Deposit Co.*, 27 Wash. 429, 67 Pac. 989; *Western Commercial Travelers' Ass'n v. Smith* (U. S.) 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653).

The term "immediate notice," as used in an accident policy requiring immediate notice of injury, means notice within a reasonable time under all the circumstances of each particular case; and, no doubt, ordinarily, unless there are circumstances excusing delay, the notice should be given at once. It would, however, be both unreasonable and unfair to hold that the word "immediate" required the doing of a thing impossible for

the beneficiary to do. *Munz v. Standard Life & Acc. Ins. Co.*, 72 Pac. 182, 183, 26 Utah, 69, 62 L. R. A. 485 (citing *Kentzler v. American Mut. Acc. Ass'n*, 88 Wis. 589, 60 N. W. 1002, 43 Am. St. Rep. 934).

Under insurance policies requiring "immediate notice" of accident or loss, the question as to whether the time taken was reasonable or not is a question peculiarly within the province of the jury. *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553, 566; *Lyon v. Railway Passenger Assur. Co.*, 46 Iowa, 631, 635; *Crane v. Standard Life & Acc. Ins. Co.*, 6 Ohio Dec. 118, 122.

The word "immediately," as used in an accident insurance policy providing that, in case of death or injury, notice of claim should be given to the secretary of the company immediately after the accident, must be construed to mean such convenient time as is reasonably requisite for doing the thing required, i. e., upon the discovery of the death of the insured, notice thereof is to be given in such convenient time as is reasonably requisite for doing so under the circumstances. *Kentzler v. American Mut. Acc. Ass'n*, 88 Wis. 589, 60 N. W. 1002, 43 Am. St. Rep. 934.

The word "immediately," in an employers' liability insurance policy, provided that notice of any accident shall be immediately given by the employer to the insured, and that, if the accident is sufficiently serious to necessitate immediate medical assistance, such assistance may be rendered at the cost of the insurer, is to be construed as meaning within a reasonable time. *Employers' Liability Assur. Corp. v. Light, Heat & Power Co.*, 68 N. E. 54, 55, 28 Ind. App. 437.

#### Same—Two to six days.

"Immediate," as used in a stipulation in a fire policy requiring the insured to give immediate notice of loss, is not to be construed in its strictest sense, as requiring notice in the shortest possible time after the loss, but a provision requiring immediate notice is held to be satisfied by notice given not more than two days after loss. *Taber v. Royal Ins. Co.*, 26 South. 252, 260, 124 Ala. 681.

In an accident insurance policy requiring immediate notice of any accident, the meaning of the term "immediate notice" depends on the particular circumstances of each case, it being held that six days' delay was noncompliance with a requirement for immediate notice. *Railway Pass. Assur. Co. of Hartford v. Burwell*, 44 Ind. 460, 464.

A condition in a fire policy requiring the insured to give immediate notice of loss was complied with where plaintiff, who was absent at the time of the fire, on the day following notified defendant's agent thereof, who immediately telegraphed defendant concerning it. *Oakland Home Ins. Co. v. Davis* (Tex.) 33 S. W. 587.



Where the office of the defendants was in New York, but the insurance was made in Buffalo, where the plaintiff resided, by the defendants' agent in Buffalo, and the loss happened on the night of Saturday, on the Hudson river, between New York and Albany, and the plaintiff, being notified by telegraph, gave notice to the agent at Buffalo on Monday, and by him the defendants in New York were notified on Tuesday, this was held sufficient to satisfy a requirement in the policy that "immediate notice of the occurrence of all losses shall be given to the company." *Savage v. Corn Exchange Fire & Inland Nav. Ins. Co.*, 17 N. Y. Super. Ct. (4 Bosw.) 1, 2.

**Same—Ten to thirty days.**

A notice given within 10 days after the death of insured is a sufficient compliance therewith. *McFarland v. United States Mut. Acc. Ass'n*, 27 S. W. 436, 459, 124 Mo. 204 (citing *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, 289).

A by-law of a fire insurance company requiring that the insured should give the company notice of any loss that occurred immediately, which was annexed as a condition to the policy, requires that the notice be given within 11 days after it occurred, where no sufficient excuse is shown for the delay. *Trask v. State Fire & Marine Ins. Co. of Pennsylvania*, 29 Pa. (5 Casey) 193, 200, 72 Am. Dec. 622.

A notice given 22 days after the fire was in time, where the insured testified that the policy was in the custody of a mortgage company, and just as soon as he could be about he gave the notice. *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644, 648.

A requirement in a life policy of immediate notice of the cause of death was satisfied by notice not given until two weeks after the death of insured, and after an autopsy had been made and the body interred; the cause of the death not being known until after the autopsy. *Ewing v. Commercial Travelers' Mut. Acc. Ass'n of America*, 66 N. Y. Supp. 1056, 55 App. Div. 241.

The policy issued by a casualty company to a person engaged in the business of transporting merchandise in the city of Boston, to indemnify him against liability for injuries resulting from accidents caused by the horses and vehicles used by him in such business, provided that "upon the occurrence of the accident, and also upon receiving information of the claim on account of the accident, he should give the company notice in writing of such accident or claim. An accident occurred on October 22d. On November 5th the insured received a letter stating that the claim against him had been placed in the writer's hands, and on the next day he called upon the writer to ascertain what the claim was, but did not find him, and did not learn

until a few days later that the claimant had been run over by one of insured's drivers, when he immediately ascertained the circumstances, and on November 9th notified the casualty company. The court said: "The construction of the policy adopted at the trial was that, to comply with its requirements, the plaintiff was bound to exercise ordinary diligence and care in adopting such measures as would lead to knowledge on his part of the occurrence of accidents, and of claims for damages, by proper instructions to his employes and otherwise, and that he must give notice upon his earliest receipt of knowledge of the accident, or on information that a claim for damages was made, and that, if he did not know of the accident when it happened, he would not be required to give notice of its occurrence until immediately after he received information of it. This is a reasonable construction, having regard to the situation of the parties and the nature of the contract." *Mandell v. Fidelity & Casualty Co.*, 49 N. E. 110, 111, 170 Mass. 173, 64 Am. St. Rep. 291.

**Same—One to two months.**

A clause in a fire policy requiring an immediate notice of loss was held to be satisfied, in view of the great derangement in all kinds of business, by a notice given November 13, 1871, of a loss in the great Chicago fire of October 9, 1871. *Knickerbocker Ins. Co. v. McGinnis*, 87 Ill. 70.

An insurance policy requiring immediate notice of an accident, means a notice within a reasonable time, but does not include a notice given a month after the accident, where the only excuse for not giving it sooner is that, because of a strike of the employes of the insured (a corporation), its manager was so occupied as to forget to give the notice sooner. *Smith & Dove Mfg. Co. v. Travelers' Ins. Co.*, 50 N. E. 516, 171 Mass. 357.

A notice given by a beneficiary of a policy requiring immediate written notice of the injury, 29 days after she learned of the accident causing insured's death, was held not a sufficient compliance with the policy. *Foster v. Fidelity & Casualty Co.*, 75 N. W. 69, 70, 99 Wis. 447, 40 L. R. A. 833 (citing *Kentzler v. American Mut. Acc. Ass'n*, 88 Wis. 589, 596, 60 N. W. 1002, 43 Am. St. Rep. 934).

Where the eye of insured was injured on September 4th, but the injury was not considered dangerous until some days after, it was held, under all the facts and circumstances, that it was not erroneous to refuse to charge that the giving of the notice on October 1st was not a compliance with the terms of the policy, requiring an immediate notice of the injury. *People's Mut. Acc. Ass'n v. Smith*, 17 Atl. 605, 606, 126 Pa. 317, 24 Wkly. Notes Cas. 33, 35, 12 Am. St. Rep. 870.

The word "immediate," in an insurance policy requiring proof of loss to be made

Immediately, means within a reasonable time, considering the circumstances of each case; and the question whether a delay of 53 days in giving such notice after a loss under a fire policy is within a reasonable time is for the jury, where it appears that the policy was in the safe of the insured, the contents of which when opened, six days after the fire, were placed in the vault of the building where plaintiff had his office, and where the latter testifies that he searched among the papers for policies of insurance, but failed to find any, but afterwards, by chance, found the policy, which had slipped between the framework of the pigeonholes and the wall of the vault, whereupon notice was given, and that he could procure no information from the insurance agents through whom his assignor procured his insurance, or from his assignor, who was dead at the time of the trial. *Solomon v. Continental Fire Ins. Co.*, 32 N. Y. Supp. 759, 762, 11 Misc. Rep. 513; *Id.*, 50 N. Y. Supp. 922, 923, 28 App. Div. 213.

A policy of accident insurance which required that immediate notice of accidents should be given to the insurance company means within a reasonable time after the accident, considering all the facts and circumstances of the case. Thus a notice given on October 1st of a claim for the loss of an eye, resulting from an accident which occurred September 1st, was held in time, where it appeared that, at the time of the accident, plaintiff did not regard it as dangerous, and did not become convinced that he would lose his eyesight until some time after sending such notice. *People's Acc. Ins. Co. v. Smith*, 17 Atl. 605, 606, 126 Pa. 317, 12 Am. St. Rep. 870.

Where a loss occurred on the 8th or 9th of October, and notice and proof of loss were given on November 13th following, but the office of the insurance company was also destroyed, so that assured did not know where to find its officers, and the conflagration was so general as to suspend all business transactions, and the insured held many other policies under which he sustained losses, it was held that the court could not say that the delay, under the circumstances, was unreasonable. *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388, 391.

Notice was held to have been given immediately, within the meaning of an accident policy, of a death by drowning occurring on February 26th, by a notice given on or after April 20, 1896; the body of deceased not having been found until 15 days after his death, and the beneficiary having no notice of the existence of the policy till April 20th. *Konrad v. Union Casualty & Surety Co.*, 21 South. 721, 722, 49 La. Ann. 636.

Failure to give notice of loss for nearly 60 days after the fire constituted, as a matter of law, a breach of a condition requiring the giving of immediate notice. *Ermentrout*

*v. Girard Fire & Marine Ins. Co.*, 65 N. W. 635, 636, 63 Minn. 305, 30 L. R. A. 346, 56 Am. St. Rep. 481.

#### Same—Four or more months.

A policy of insurance requiring a notice of loss to be given immediately requires the exercise of reasonable diligence, where it could be measured by the ability to make the necessary proof at any given time; and where such proof was not made until over four months after fire, and there was nothing in the pleadings to show that it could have been made sooner, it was held that the question of reasonable time was for the jury. If insured could by the exercise of reasonable diligence have made proof prior to such date, and such fact had been admitted by the pleadings, the court could, as a matter of law, have said that the proof of loss had not been made immediately. *Carey v. Farmers' Ins. Co.*, 40 Pac. 91, 92, 27 Or. 146.

"Immediately," as used in a contract of insurance requiring notice of loss to be given immediately, has been held by the great weight of authority to mean that due diligence and reasonable effort on the part of the insured must be exercised. Thus a provision in an accident policy requiring the giving of immediate notice of an accident is sufficiently complied with by giving notice over four months after the happening of the accident, where the insured was so mentally deranged and injured by the accident that he was wholly unable to attend to or transact any kind of business, or give any directions in reference thereto, and neither his wife nor any of his family knew of the existence of the policy until it was discovered, immediately before the notice was given. *Woodmen's Acc. Ass'n v. Pratt*, 87 N. W. 546, 549, 62 Neb. 673, 55 L. R. A. 291, 89 Am. St. Rep. 777.

Where insured, a tugboat engineer, disappeared on November 9th, and his body was found in the water, near the tugboat, on the succeeding April 19th a notice of death furnished on the following May 26th was a reasonable compliance with the terms of the policy, requiring immediate notice of death. *Kentzler v. American Mut. Acc. Ass'n*, 60 N. W. 1002, 1004, 88 Wis. 589, 43 Am. St. Rep. 934.

Where manufacturers holding an employers' indemnity policy made an assignment, and on November 17th the assignee first received notice of an accident which occurred on July 13th, before the assignment, and that the employé injured claimed damages therefor, and forthwith notified the insurance company, the court held that the question as to whether the notice was in time should have been submitted to the jury. *Crane v. Standard Life & Acc. Ins. Co.*, 6 Ohio Dec. 118, 122.

Failure to give notice of loss in five months avoids a policy providing that "in case of loss the assured shall give immediate notice thereof to the company." *Sherwood v. Agricultural Ins. Co. (N. Y.)* 10 Hun, 593, 595.

#### **Of vacancy of property.**

An insurance policy providing that immediate notice of the property insured becoming vacant should be given to the insurance company means a reasonable time, and does not imply that the policy shall be void immediately upon the house becoming vacant. *East Texas Fire Ins. Co. v. Kempner*, 34 S. W. 393, 398, 12 Tex. Civ. App. 533 (citing *Strunk v. Fireman's Ins. Co.*, 23 Atl. 779, 160 Pa. 345, 40 Am. St. Rep. 721).

#### **IMMEDIATE PARTIES.**

In the statement of the rule that a sale made on default in a deed of trust is invalid as between the immediate parties, if made by the trustee's agent in the absence of the trustee, "immediate parties" means the owners of the equity of redemption of the security and the purchaser at the sale. *Grover v. Hale*, 107 Ill. 638, 639, 642.

#### **IMMEDIATE PAYMENT.**

In construing a contract for the sale of land, in the absence of special words or circumstances indicating a different intent, a stipulation for "immediate payment" or "payment down" will be held to mean payment at the time when the deed is made out and executed. *Bruner v. Wheaton*, 46 Mo. 363, 367.

#### **IMMEDIATE PURSUIT.**

The words "immediate pursuit," as used in Laws 1851, p. 226, § 137, providing that a private person may arrest one who has committed a felony, without a warrant, provided such arrest be made on an immediate pursuit after the commission of the offense, mean fresh pursuit. The word "immediate" is a word of relation, and, as a measure of time, is itself governed in degree by the offense and circumstances to which it stands in a qualifying connection. *People v. Pool*, 27 Cal. 572, 579.

#### **IMMEDIATE RESULT.**

"Immediate result," as used in the statement that the diseased mental condition of accused in a prosecution for murder was the direct and immediate result of voluntary drunkenness, means that such mental condition arose during a condition of drunkenness, and pending a single, continuous, voluntary, drunken debauch, which, at its origin, started with the accused in a condition of

sanity. *State v. Haab*, 29 South. 725, 728, 105 La. 230.

#### **IMMEDIATE RIGHT OF POSSESSION.**

Comp. Laws, § 2592, defining an estate in possession as one to which the owner has the immediate right of possession, "does not mean the absolute right of possession as against all possible rights or powers given for special purposes, and which have not been, but may or may not be, exercised or required for the accomplishment of such special purposes." *Campau v. Campau*, 19 Mich. 116, 123.

#### **IMMEDIATE VICINITY.**

A reservation in a deed of the right to build a dam across a river at any point against the land, and also reserving a piece of land fronting on the river in the immediate vicinity of one end of the dam, did not exclude the greatest degree of proximity, and the end of the dam might adjoin the measured land or stand upon it. *Smith v. Furbish*, 44 Atl. 398, 406, 68 N. H. 123, 47 L. R. A. 228.

The term "immediate vicinity," as used in the article relating to offenses against the lives and persons of individuals, shall be construed and held to mean a distance not exceeding 200 yards. *Rev. St. Mo. 1899*, § 1866.

#### **IMMEDIATE VIEW AND PRESENCE.**

The refusal of a prisoner to give testimony in answer to a question made in the face of the court is a contempt committed in the immediate view and presence of the court, authorizing it to act without further evidence. *People v. Kelly*, 24 N. Y. 74, 80.

"Immediate view and presence," as used in How. St. § 7234, subd. 1, providing that every court of record shall have power to punish as for criminal contempt persons guilty of contemptuous, etc., behavior committed during its sitting, in its "immediate view and presence," are words of limitation, and exclude the idea of constructive presence. The immediate view and presence, within the meaning of the statute, does not extend beyond the range of vision of the judge, and the term applies only to such contempts as are committed in the face of the court. The act of an attorney in indorsing on the back of a check given in payment of a fine imposed for a previous contempt that it was illegal and unjust, which indorsement the judge subsequently saw, was not committed within the immediate view and presence of the court, within the meaning of the statute. *In re Wood*, 45 N. W. 1113, 1115, 82 Mich. 75.

**IMMEDIATELY.**

The use of the word "immediately," in an authority to an agent to sell land at a certain price in case it can be sold immediately, does not authorize a sale by an agent after he had written his principal for permission to sell for considerable less or to let the matter drop; the principal refusing to sell at a lower price. *Matthews v. Sowle*, 11 N. W. 857, 858, 12 Neb. 398.

The use of the word "immediately" in an instruction in an action for damages received in a collision, in which plaintiff charged defendant with negligently driving his carriage on a city street, so that it collided with plaintiff's buggy, that, if defendant's driver was exercising due care immediately before the time of the collision, it would be classed, under the law, as an unavoidable accident, might permit the jury to assume that the negligence of defendant's driver just previous to the collision was eliminated. The word "immediately" implied that there was no appreciable interval of time between the cause and the act. Webster, in this sense, defines the word as meaning instantly; without interval of time. The jury would doubtless take the words "immediately before" as "just before," and as excluding from their consideration acts of the driver on the way to the crossing where the collision occurred, before the collision was imminent. *McGee v. West* (Tex.) 57 S. W. 928, 929.

The ordinary import of the word "immediately" is directly, or without any intervening time or space; and such is its meaning in Laws 1896, c. 747, § 147, giving a common council power to construct sewers and determine the proportions to be paid by special assessment against property immediately benefited thereby. *People v. Common Council of City of Kingston*, 65 N. Y. Supp. 590, 591, 53 App. Div. 58.

**As soon as practicable.**

"Immediately," as used in a statute requiring the Secretary of State, immediately after any general law shall be deposited with him, to furnish a copy thereof to the public printer, who shall immediately publish the same, etc., should not receive a strict, literal construction. It would be a physical impossibility to publish laws in a newspaper immediately after copies thereof were handed down. The word "immediately" means as soon as practicable—as soon as the business of the office would permit—but the publication of a law several months after its passage, and after the time for the publication of the law in the bound volume of laws has expired, is not a compliance with the statute. *State v. Lean*, 9 Wis. 279, 300.

"Immediately," as used in 1 Rev. Laws, p. 450, § 23, which provides that an order

shall, immediately after the making thereof, be published for four weeks successively in two or more papers, etc., will be construed to mean "as soon as conveniently may be." Thus a publication on the 27th day of the month of an order made on the 6th day was held to be a sufficient compliance with the statute. *Sheldon v. Wright* (N. Y.) 7 Barb. 89, 46.

**As forthwith or instantly.**

"Immediately" means on the moment; directly; quickly; at once; instant. *State v. Yarbrough*, 18 Pac. 474, 478, 39 Kan. 581.

"Immediately" is defined to be instantly; at the present time; without delay; without intervention of any other event. *Shove v. Dow*, 13 Mass. 529, 533; *Eldridge v. Knight*, 93 N. W. 860, 862, 11 N. D. 552; *National Surety Co. v. Long*, 125 Fed. 887, 890, 60 C. C. A. 623.

The legal signification of the word "immediately" is much the same as that of "forthwith." *Gates v. Knosby*, 77 N. W. 863, 864, 107 Iowa, 239 (citing *Davis v. Simma*, 14 Iowa, 154, 81 Am. Dec. 462).

In an agreement between a husband and wife, on separation, that he will deliver up possession of the residence premises to her immediately upon the execution by her to him of certain notes, "immediately" should be construed as meaning instantly; without any intervention of time; directly; without any diversion of attention; and it should not be construed in this connection to be synonymous with "practicably." *Streeter v. Streeter*, 43 Ill. 155, 165.

The word "immediate," which is defined by Bouvier as implying, strictly, not deferred by any lapse of time, but, as usually employed, meaning, rather, within a reasonable time, having due regard to the nature and circumstances of the case, is no stronger than the word "forthwith," or the expression "as soon as possible." *Fidelity & Deposit Co. of Maryland v. Courtney* (U. S.) 103 Fed. 599, 607, 43 C. C. A. 331.

"Immediately," as used in Code Prac. art. 63, providing that when hypothecated property is in the hands of the debtor, and when the creditor, besides his hypothecated right, has against his debtor a title importing a confession of judgment, he shall be entitled to have the hypothecated property seized immediately and sold for the payment of the debt, means instantly; without delay; at any time, whether within or without term. *Folger v. Roosa*, 4 South. 457, 458, 40 La. Ann. 602.

"Immediately," is a relative term, and has relation to the course of business with reference to which it is used. As used in Code 1880, § 527, declaring that, if a pur-

chaser at a tax sale shall not immediately pay, the collector shall offer the land again, the term is directory, and not mandatory, and does not require the payment of the bid on the instant. *Judah v. Brothers*, 17 South. 752, 754, 72 Miss. 616, 83 L. R. A. 481.

"Immediately" means without the intervention of any other cause or event; instantly; etc.; and an allegation in a bill to redeem from an execution sale that the purchaser "immediately thereafter, with the consent of your orator, took possession of the lands aforesaid," is equivalent to an allegation "that instantly after the sale, without the intervention of any other cause or event, with the consent of the debtor, the purchaser took possession of the lands." *Bondurant v. Sibley's Heirs*, 29 Ala. 570, 571.

In the case of *Rex v. Francis*, Hardw. Cas. Temp. 114, Lord Hardwicke says: "It was said that the word 'immediately' excludes all intermediate time and action, but it will appear that it has not necessarily so strict a signification. Stephens, in his *The-saurus*, expounds the word 'immediately,' 'Cito et celeriter'; so Cooper's Dictionary renders, in English, 'immediately,' 'Forthwith; by and by'; and Minshew gives it as various meanings, and refers it to the word 'presently.'" *Thompson v. Gibson*, 8 Mees. & W. 281, 287.

"Immediately" is a relative term. Strictly defined, it means not separated by an interval of time; present; instant. But when used in Laws 1882, c. 410, § 916, requiring the city comptroller to give public notice by advertisements immediately after the confirmation of any assessment for a local improvement, such was not the meaning intended to be given to the word, as it would be an impossibility to publish such a notice instantly or without the intervention of time. *People v. McFadden*, 77 N. Y. Supp. 605, 607, 74 App. Div. 248.

#### As indefinite word.

"Immediately," as used in an indictment for murder, charging that of the mortal wounds the said A. did immediately languish, and languishing did die, does not show when and how long after the wounding the death occurred. *State v. Sides*, 64 Mo. 683, 685.

#### As next in order.

"Immediately" denotes closeness of connection or being next in order. *Missouri, K. & T. Ry. Co. v. Lyons* (Tex.) 53 S. W. 96, 97.

"Immediately," as used in Code Ala. § 246, providing that it is the duty of all inspectors of elections in the election precincts "immediately" on the closing of the polls to count out the votes so polled, is "to receive a reasonable construction, and does

not mean that on the instant or moment of time when the polls are closed the counting shall begin, because that would be impossible and impracticable. It clearly does mean that there is to be no unnecessary delay; that, on the closing of the polls, the next thing to be done is to count the votes. It means that no other business shall intervene to occupy and detract the attention of the officers in charge until the matter in hand shall be consummated. This view of the matter rests on reason as well as the letter of the law." *United States v. Baldrige* (U. S.) 11 Fed. 552, 553.

#### As promptly.

"Immediately," as used in a letter relating to the purchase of land, and stating that the purchaser would pay down a certain amount immediately, only means that the payment would be prompt, and is in contradistinction to a credit payment. *Fitzhugh v. Jones* (Va.) 6 Munf. 83, 86.

#### As within reasonable time.

The term "Immediately," when used in speaking of an act required to be immediately performed, is stronger than the expression "within a reasonable time"; yet many circumstances might arise where an act to be done within a reasonable time must be done immediately. *Hexamer v. Sonthal*, 10 Atl. 281, 49 N. J. Law (2 Vroom) 682 (citing Reg. v. Justices of Berkshire, 4 Q. B. Div. 469).

The word "Immediately" ordinarily signifies without interval of time, but where used in a statute requiring railroad companies to place in each passenger depot where there is a telegraph office a blackboard, and note thereon a certain time before the time for arrival of each train the fact as to whether such train is on time, etc., and providing that such act shall take effect immediately after the passage of the act, will be construed to mean immediately after the companies have had a reasonable time after the passage of the act before it took effect in which to prepare for compliance therewith, and therefore, when such act is passed on the 9th of March, and is not to go into effect until May 10th, there is reasonable time given after the passage of the act for the companies to prepare for a compliance therewith. *Pennsylvania Co. v. State*, 41 N. E. 937, 939, 142 Ind. 428.

The word "Immediately," in a contract requiring plaintiff to bring suit immediately on certain notes received thereunder, was construed to mean within a reasonable time, or as soon as suit could conveniently be brought, and not as showing the intent that, if suit was not brought, the instant the contract was executed the defendant should be discharged from the judgment of the note to that extent. Or, if the defendant was not.

discharged by the failure to bring the suit instantly, he was not discharged by the failure to do so at any particular point of time thereafter. This being true, it necessarily follows that the defendant is not discharged at all unless he has been admitted, and the burden is on him in an action on plaintiff's note to show damages by reason of plaintiff's failure to sue on the first note. *First Nat. Bank v. Haug*, 3 N. W. 627, 629, 52 Iowa, 538.

A will directing the testamentary trustee to immediately pay over, transfer, and convey the estate to certain beneficiaries on the happening of a certain event, means within a reasonable time, or as soon as may be, after the happening of that event. *Rhode Island Hospital Trust Co. v. Harris*, 37 Atl. 701, 702, 20 R. I. 160.

"Immediately," as used in an insurance policy providing that the loss shall be paid immediately after due notice and satisfactory proof of the same, means a reasonable time under the circumstances. *Cashau v. Northwestern Nat. Ins. Co. (U. S.)* 5 Fed. Cas. 270, 271.

In a contract for shipment of potatoes, the statement, "will fill your order immediately," implied readiness to ship, and did not mean shipment within a reasonable time. *Woods v. Miller*, 7 N. W. 484, 485, 55 Iowa, 168, 39 Am. Rep. 170.

"Immediately," within the meaning of a building contractor's bond, providing that notice should be given immediately to the surety of any acts involving its liability, should be construed as meaning within a reasonable time. *Fidelity & Deposit Co. v. Robertson*, 34 South. 933, 944, 136 Ala. 379.

The word "immediately," as used in a statute requiring the school board to make provision for the furnishing of text-books immediately after having selected a teacher and provided for the opening of school, is construed not to mean instantly—without any interval of time—but within a reasonable time. *Maloney v. Rogers (Pa.)* 6 Kulp, 289, 291.

Where a contract provides that the work shall commence "immediately on the signing of this agreement," the word "immediately" must be construed as such convenient time as is reasonably requisite to do the thing, for the word has a relative meaning, and will imply a longer or shorter period, according to the nature of the thing done. *Ephrata Water Co. v. Borough of Ephrata*, 20 Pa. Super. Ct. 149, 154.

The word "immediately" means such convenient time as is reasonably requisite for doing a thing; as the word is used in Rev. St. 1889, § 1565, permitting a person convicted before a justice of the peace for

any misdemeanor, etc., to appeal to the circuit court if he shall, "immediately after judgment is rendered, file an affidavit" stating that he is aggrieved by the verdict, etc. *City of De Soto v. Merciel*, 53 Mo. App. 57, 60.

#### As a relative term determined by use.

"Immediately," as used in an order for goods to be shipped immediately, undoubtedly has a relative meaning, and must be read in the light of surrounding circumstances. It being understood that the goods were ordered for use on Memorial Day, and were not shipped until May 18th, 18 days after the receipt of the order, so that they did not reach the purchaser until after Memorial Day, they were not shipped immediately, within the meaning of the order. *Rhoades v. Cotton*, 38 Atl. 367, 368, 90 Me. 453.

"Immediately" is a term of relative signification, and never designates an exact portion of time, and is used with more or less latitude by universal consent, according to the subject to which it is applied. As used in a deposition by a county judge, relating to the approval of a bond, that "it struck him the same day it was signed, immediately after signing," that objections had been raised to such a bond, it means that the bond had been filed before his doubt originated. *McLure v. Colclough*, 17 Ala. 89, 107.

#### As then and there.

An indictment for murder, stating that deceased did immediately die, should not be construed as synonymous with the allegation that he then and there died. *State v. Reakey*, 1 Mo. App. 3, 6.

Text-writers attempt to distinguish between "immediately" and the greater precision requisite when time is an element of the offense. "Then and there," referring to the commission of an offense, cannot be substituted by such a word as "immediately." *State v. Hinton*, 22 South. 617, 618, 49 La. Ann. 1354.

#### As word of time not causation.

"Immediately," as used in an accident insurance policy insuring one against loss of time resulting from bodily injuries effected through external, violent, and accidental means, which should, independently of all other causes, immediately, wholly, and continuously disable him from transacting any and every kind of business pertaining to his occupation, does not mean immediately in point of causation, but immediately in point of time. "The word 'immediately' has two distinct significations—one of time, and the other of cause and effect. In the former sense, it is synonymous with 'instantly, quickly, and presently'; in the latter, with

'approximately,' as opposed to 'immediately.' The word 'immediately,' as a word of time, does not express the same thing as the words 'reasonable time,' though, when referring to something to be done voluntarily by human agency, it may mean within a reasonable time or as soon as practicable; but, being used with reference to a consequence resulting from a physical cause, independently of the will or control of the insured, it cannot, when manifestly used as a word of time, have the meaning of 'within a reasonable time' or 'as soon as practicable.' It does not mean precisely the same thing as 'instantly' or 'momentarily,' but it necessarily implies that the injury must be such that the insured cannot proceed regularly and in due course with his occupation; that he cannot go on with his work or business as if he had received no injury, and then, upon becoming worse, cease the transaction of his business or labor, and hold the company responsible for the loss of his time." *Williams v. Preferred Mut. Acc. Ass'n*, 17 S. E. 982, 91 Ga. 698.

The word "immediately," in the constitution and laws of a beneficiary association, providing that if a member shall sustain accidental injury which shall, independently of all other causes, immediately, wholly, and continuously disable him, is not used in the sense of "directly," as opposed to "indirectly," as relating to the cause, but, being used in connection with the words "wholly and continuously disabled," refers to the time, and means that the disability shall follow within a very short time of receiving the injury. *Pepper v. Order of United Commercial Travelers of America* (Ky.) 69 S. W. 956, 957 (citing *Williams v. Preferred Mut. Acc. Ass'n*, 91 Ga. 698, 17 S. E. 982; *Merrill v. Travelers Ins. Co.*, 91 Wis. 324, 64 N. W. 1039).

#### In instructions to sell.

A direction to a factor to sell goods immediately is not shown to be broken by a delay of 15 days, where nothing is proved as to the state of the market. *Symington v. McLin*, 18 N. C. 291, 295.

In *Courcier v. Ritter* (U. S.) 6 Fed. Cas. 644, it was held that it was the duty of an agent, who was instructed to make sale of the article consigned for sale immediately on arrival, to sell immediately on arrival, no matter at what loss. *Evans v. Root*, 7 N. Y. (3 Seld.) 186, 189, 57 Am. Dec. 512.

"Immediate sale," within the meaning of a direction to a factor to sell goods immediately upon arrival, is to be construed as requiring a sale immediately on arrival, no matter at what loss, if the sale can then be made, or as soon as it can be made. Such instruction precludes the factor from exer-

cising any discretion. *Courcier v. Ritter* (U. S.) 6 Fed. Cas. 644, 645.

The word "immediately," in a direction by the owner of property to his factor to sell it immediately, renders the factor liable for any loss resulting to the owner from the failure of the former to refuse the first offer made for the goods, although he refuses it in the expectation of a more favorable offer. *Bell v. Palmer* (N. Y.) 6 Cow. 128-133.

#### In relation to appeal.

"Immediately," as used in Rev. St. 1879, § 2058, providing that any person convicted before a justice of the peace of a misdemeanor may appeal to the circuit court, "if he shall, immediately after judgment is rendered, file an affidavit stating that he is aggrieved by the verdict and judgment, \* \* \* and shall also enter into a recognizance in such sum," etc., refers to the affidavit for appeal, and not to the giving of the bond, and requires the party desiring an appeal to file his affidavit at once, and then perfect the appeal and file the bond before execution of the sentence. *State v. Anderson*, 84 Mo. 524, 528.

The word "immediately," when used in a statute, is not synonymous with "then and there," but means such convenient time as is reasonably necessary for doing the thing. Taken alone, it excludes all meane times. Legal lexicographers define it as being synonymous with "within twenty-four hours." 1 Bouv. Law Dict. 682; 1 Abb. Law Dict. 581. The word "immediately," in a statute providing that any person convicted before a justice of the peace may appeal, if he shall, "immediately" after judgment is rendered, file an affidavit, etc., was construed not to mean then and there, but to be equivalent to the words "with all convenient speed"; and it was held that an appeal perfected within the next succeeding day after the rendition of the judgment was a prima facie compliance with the statute, and that the burden would be on the state to show that it was not taken with all convenient speed. *State v. Clevenger*, 20 Mo. App. 626, 627.

The word "immediately," in Rev. St. § 2058, requiring that appeal shall be taken immediately after the rendition of a judgment of a justice of the peace, is not to be so literally construed as to have the effect of denying defendant's right of appeal. Thus, where defendant in a criminal case was convicted late at night, and was immediately arrested on another charge, his demand for an appeal on the following day was held not to be too late. *State v. Herman*, 20 Mo. App. 548, 551.

In *Lydick v. Korner*, 12 N. W. 838, 13 Neb. 10, it was held that a statute fixing a time within which an appeal might be taken

was properly an extension of the time in which to appeal, and that an appeal from the decision of the city council overruling the remonstrance against the issuance of a license to sell liquor must be taken immediately after the order was made, in order to confer jurisdiction upon an appellate term; the term "immediately" being defined to be as soon as a transcript could with reasonable diligence be prepared. *State v. Bonsfield*, 89 N. W. 427, 24 Neb. 517.

"Immediately," in its strict significance, excludes the lapse of any interval of time. The use of the word in various statutes has called for construction by the courts. In the old special jury act (24 Geo. II, c. 18) the law required the party applying for a special jury to pay the costs unless the judge shall immediately after the trial certify in open court that the cause was a proper one to be tried by a special jury. In *Waggett v. Shaw*, 3 Camp. 816, on these words, Lord Ellenborough held that an application for a certificate by the judge the day after the trial was too late. In *Thompson v. Gibson*, 8 Mees. & W. 281, the court was called upon to construe the words "immediately afterwards," found in 3 & 4 Vict. c. 24, § 2, which provides that, unless the plaintiff in an action for trespass or trespass on the case shall recover more than 40 shillings, he shall not recover any costs, unless the judge shall immediately afterwards certify on the back of the record that the action was really brought to try a right besides the mere right to damages. The verdict was given at the close of the last day of the assizes, and the court immediately adjourned to the judge's lodgings. No application was made in open court to the judge for the certificate for costs, but the plaintiff's counsel, within a quarter of an hour after the verdict, obtained the certificate from the judge. This was held sufficient, the court holding the words to mean "within such convenient time as is requisite for doing the thing." To the same effect, see *Richardson v. End*, 48 Wis. 316. As a matter of judicial construction, it can be said that the word immediately is much in subjection to its grammatical connection, and is of relative significance. We think no better definition has been given than that which ascribes to it the meaning "within such convenient time as is requisite for doing the thing." Under a statute requiring an affidavit for an appeal to be filed immediately after judgment, an affidavit filed the following day is too late, *prima facie*, and does not give the appellate court jurisdiction, unless good cause is shown for the delay. *City of St. Louis v. R. J. Gunning Co.*, 39 S. W. 788, 789, 138 Mo. 347.

#### **In relation to devise from and after.**

The use of "immediately" in a will providing that "immediately after the death of

my wife I give all of my estate to my children," does not take the property out from under the rule that words such as "from and after the decease of a life tenant," in devising a remainder, do not furnish sufficient grounds for holding that the remainder is contingent and not vested. In *re Lange's Estate*, 55 N. Y. Supp. 750.

#### **In relation to distance.**

Where the evidence showed that deceased stepped on a railway track about 100 yards in advance of an approaching train, an instruction that deceased did enter upon the track immediately in front of the train, was objectionable in respect to the use of the term "immediately"—its sense, in the place where it was used, being that there was no appreciable distance or interval of time intervening between the moment at which deceased stepped on the track and that in which she was struck by the train. *Missouri, K. & T. Ry. Co. v. Cardena*, 54 S. W. 812, 813, 22 Tex. Civ. App. 800.

#### **In relation to entry of satisfaction of mortgage.**

"Immediately," as used in Comp. Laws, c. 68, § 16, prescribing a penalty for the failure to enter satisfaction of a paid mortgage on the record immediately on demand of the mortgagor, cannot be construed to mean 10 months after demand. "The word 'immediately,' as used in the statute, should receive very liberal interpretation. In any case, the next day after the actual satisfaction of the mortgage would probably be amply sufficient, and in some cases it might be several days. We might, indeed, imagine cases where two or three weeks, or possibly a month or more, would answer, but no imaginable case could cover this case." *Hall v. Hurd*, 21 Pac. 585, 586, 40 Kan. 740.

#### **In relation to entry or rendition of judgment.**

The word "immediately," in a statute requiring a justice of the peace, on the receipt of the verdict in a replevin suit for plaintiff, to immediately enter an order in his docket requiring the officer to deliver the same goods and chattels mentioned in the verdict to plaintiff, and adjudging that he may recover such damages and the costs of the action, means instant. *Smith v. Bahr*, 22 N. W. 438, 439, 62 Wis. 244.

Code, § 1002, provides that upon a verdict the justice must immediately render judgment accordingly, and that, when the trial is by a justice, judgment must be entered immediately after the close of the trial, if the defendant has been arrested or his property attached. In an action by attachment before a justice, the trial was commenced on the 28th of September at 1 o'clock p. m., a jury being waived. On the



conclusion of the trial, the justice took the case under advisement until the following morning at 8:30 o'clock, when judgment was rendered. Held, that the judgment was rendered immediately, within the meaning of the statute. The Legislature did not intend a literal construction to be given to the statute, because such a construction would require a justice to render a judgment instantly on the conclusion of the trial. The word "immediately" is to be construed in a reasonable manner, and to mean that the justice is to render judgment in a short time, and before taking up new business; but the justice may require time to consider the evidence before rendering a judgment, and it may be necessary for him to do so before he is prepared to decide. A delay of a few hours in such case, in rendering the judgment, will not prevent the rendering of the judgment from being a compliance with the statute. *Huff v. Babbott*, 15 N. W. 230, 14 Neb. 150.

In Code Civ. Proc. § 1002, providing that a justice of the peace must render judgment on a verdict immediately, "immediately" is to be taken in its ordinary, well-known, and generally accepted sense, of at once, and cannot be construed to mean the next day after the verdict is returned. The word "immediately," when used in connection with the discharge of a duty by a justice which consists of but a half dozen strokes of the pen, all of which have been unalterably fixed and set before his eyes by another and independent event, must be given its ordinary meaning. *Austin v. Brock*, 21 N. W. 437, 438, 16 Neb. 642; *Worley v. Shong*, 53 N. W. 72, 35 Neb. 311.

"Immediately" as used in Code Civ. Proc. § 794, providing that on a verdict by a jury the justice shall immediately render judgment accordingly, will not be construed to embrace so long a period as eight days. *State v. Case*, 37 Pac. 95, 97, 14 Mont. 520.

The word "immediately," in Rev. St. 1881, § 1489, requiring justices of the peace, when a suit shall be dismissed, judgment confessed, or the verdict of the jury returned, to enter and sign the judgment immediately, does not require its rendition forthwith; but a delay of six days in entering judgment, though a violation of the statute, does not affect the validity of the judgment. If we are to apply to the word "immediately" the meaning as defined by lexicographers, then the justice, upon return of the verdict, was required to enter judgment without the intervention of any other cause or event. He would have been required to disregard the appellee's motion for a new trial, and, before doing anything else, to enter judgment, but we are not inclined to the belief that the Legislature used the word with this meaning. The construction given generally by courts to the words "immediately"

and "forthwith," when they occur in contracts or in statutes, is that the act referred to should be performed within such time as is reasonably requisite. In *Pybus v. Mitford*, 2 Lev. 75, decided more than two centuries ago, it was said, "The word 'immediately,' although, in strictness, it excludes all mean-times, yet, to make good the deeds and intents of parties, it shall be construed such convenient time as is reasonably requisite for doing the thing." *Martin v. Pifer*, 96 Ind. 245, 248.

St. 6 Geo. IV, c. 50, § 34, providing that the judge shall, immediately after the verdict, certify, etc., means that the judge shall certify within a reasonable time after. *Christie v. Richardson*, 10 Mees. & W. 688.

#### In relation to judicial proceedings.

In construing a statute providing that a certain certificate should be made "immediately after verdict," it was held that the words "immediately afterwards," as used in the statute, could not be construed literally, but meant within a reasonable time, especially as, in the particular case of indorsement of a certificate, eo instanti was not necessary. *Page v. Pearce*, 8 Mees. & W. 677, 678. Thus, when court was adjourned to the court's lodgings immediately after the rendition of the verdict, an application made by plaintiff's counsel at the lodgings of the court within a quarter of an hour after the delivery of the verdict was made immediately, within the meaning of the statute. *Thompson v. Gibson*, 8 Mees. & W. 281, 286.

An award directing payment of costs immediately after the execution of the award means within a reasonable time after such notice. *Hoggins v. Gordon*, 3 Adol. & E. (N. S.) 466, 472.

A contract stipulating that the transcript of a certain judgment should be filed immediately in a county where the debtor had land meant that the transcript should be filed immediately after the judgment was rendered—not instantly, perhaps, but within a reasonable time; and it was a reasonable inference that the parties meant that a transcript should be filed so as to constitute a first lien on the land. *Perry v. Miller*, 6 N. W. 302, 54 Iowa, 277.

A judgment docket which shows an interval of one day between the return day and the judgment, without showing any continuance, but which recites that judgment was rendered immediately, is not sufficient to import a continuance, and can be held to signify no more than the justice did, in what he considered a reasonable time, that which the statute required him to do on the day of the return. *Hepler v. State*, 43 Wis. 479, 481.

St. Geo. IV, § 129, providing that a prisoner shall on conviction immediately enter

into recognizances before the convicting justices, means within a reasonable time. The entering into recognizances on the Friday first succeeding the Saturday of a conviction was held to be within a reasonable time. *In re Blues*, 5 El. & Bl. 290, 297.

"Immediately," as used in Gen. St. 1878, c. 66, § 204, providing that the application for an injunction to restrain a mortgage foreclosure shall be made immediately on receiving notice of the publication of the notice of sale, will not be construed to mean without any delay, but only to require promptness of action. Thus it was held that the granting of an application a month after receiving notice of the publication of sale, even when the delay was not explained, would not be cause for the reversal of an order granting an injunction, though perhaps the trial court might have refused the application for the reason that the delay was unexplained. *O'Brien v. Oswald*, 47 N. W. 816, 317, 45 Minn. 59.

The word "immediately," in Code 1873, § 3549, providing that a justice shall immediately issue a new precept for another jury on the discharge of the jury which has failed to agree, means without delay; and a delay of two days to issue such precept is unreasonable, and defeats the jurisdiction of the justice. *Gates v. Knosby*, 77 N. W. 863, 864, 107 Iowa, 239.

In some statutes the word "immediate" may mean "as soon as convenient," but in St. 9 Geo. IV, c. 31, § 27, empowering the justices to commit if the fine and costs shall not be paid either immediately after the conviction, or within such period as the justices shall at the time of the conviction appoint, the conviction orders immediate payment, and the legislature clearly meant that in that case there should be immediate commitment on default of payment. *Arnold v. Dimsdale*, 2 El. & Bl. 580, 601.

#### In relation to official action.

"Immediately" does not, in legal proceedings or in statutes, necessarily import the exclusion of any interval of time. It is a word of no very definite signification, and it is much in subjection to its grammatical and other connections. Citing *Howell v. Gaddis*, 31 N. J. Law (2 Vroom) 313. Laws 1897, c. 79, § 1, requiring the treasurer to make out the list of delinquent personal taxes on the 1st of April, and to immediately certify and file it with the clerk, is to be given a rational construction, and means within a reasonable time, because it would be impossible for the treasurer to make out his list and certify and file it in the same day, except, perhaps, in one of the smaller counties. *Elmund v. St. Paul Trust Co.*, 79 N. W. 545, 545, 76 Minn. 423.

"Immediately," as used in Consolidation Act, § 916, requiring the comptroller to give

10 days' notice by advertisement immediately before the confirmation of special assessments for local improvements, is to be construed as synonymous with the words "without delay." While the word "immediately" may not mean instantly, the intention of the statute was to give to the parties assessed notice of the confirmation of the assessment lists as soon as possible, and without unnecessary delay. A notice first given on August 6th, and completed on August 19th, of an assessment confirmed on July 22d, was not immediate notice, within the meaning of the statute. *People v. Coler*, 65 N. Y. Supp. 44, 47, 31 Misc. Rep. 211.

"Immediately," as used in an ordinance requiring that advertisement of impounded animals be made immediately, does not mean instantaneously; and a delay of five days, in order to discover the owner of the animals, was not so unreasonable as to invalidate a sale under the advertisement. *Mincey v. Bradburn*, 56 S. W. 273, 274, 103 Tenn. 407.

#### In relation to shipment of goods sold.

In an order for goods to be shipped immediately, the court, in construing this order, charged that "to ship immediately" would mean without any delay except such as would be necessary in the usual course of the particular business in hand; and where the court had instructed that, if the purchasers had reason to believe that the articles were kept in stock, it was incumbent on the seller to set about shipping his goods as soon as the order was received, and to ship them without any delay not necessary in the usual course of shipping such goods from stock, but, if the buyers had notice that the goods had to be manufactured, then the order made it incumbent on the seller not to ship immediately, but to manufacture and ship the goods without any delay except such as was necessary in the usual course of manufacturing and shipping such goods, such construction was not error. *Inman v. Barnum*, 41 S. E. 244, 245, 115 Ga. 117.

Where, in a contract made by telegraph for potatoes, the seller agreed to fill the order immediately, and did not fill it until several days thereafter, evidence that at the time the contract was made the seller did not have the potatoes on hand, and that the delay was caused by the fact of his inability to obtain and ship them before they were actually shipped, was not admissible to vary the contract as actually made. *Woods v. Miller*, 7 N. W. 484, 485, 55 Iowa, 168, 39 Am. Rep. 170.

#### In relation to taking effect of statute.

"Immediately," as used in Laws 1887, c. 713, exempting legacies to adopted children from the collateral inheritance tax, and declaring that this act shall take place immediately, does not mean immediately on the

passage of the act by both houses, but immediately on its becoming a law in the constitutional way. In *re Kemey's Estate*, 9 N. Y. Supp. 182, 183, 66 Hun, 117.

#### In service of process or notice.

The term "immediately," in a statute providing that process on tenants holding over should be executed immediately, was, by construction or custom, interpreted to allow 24 hours for the service of the process. *Millen v. Guerrard*, 67 Ga. 319, 325.

The word "immediately," in Code Civ. Proc. § 644, requiring the sheriff to immediately execute a warrant of attachment placed in his hands, cannot be construed to require service done without regard to other matters. In *Whitney v. Butterfield*, 13 Cal. 335, 340, 73 Am. Dec. 584, it was held that the statutory command to execute process without delay does not mean that the sheriff must needs lay aside all other business the instant he receives the process, and proceed to execute it, in the absence of special need for urgency or haste. The same is true of the direction that the sheriff shall immediately execute the warrant of attachment. But it does mean that the sheriff is bound to use all reasonable endeavors seasonably to execute the process. This duty may include the exercise of his official functions after nightfall, and hence after the sheriff's regular office hours. The measure of the sheriff's duty in such cases is his obligation to act reasonably, and it is unreasonable to refuse to receive an attachment between 3 and 4 o'clock on a Saturday afternoon in a village where the property to be seized is situated, as the half-holiday law does not deprive him of his official powers, or relieve him from his obligations to perform official duties. *Dailey v. Fenton*, 62 N. Y. Supp. 337, 338, 47 App. Div. 418.

"Immediately" is a term not necessarily importing the exclusion of any interval of time—a word of not very definite significance—and is governed by its grammatical connections. The word "immediately," in a statute directing the giving of a certain notice of the seizure of vessels thereupon immediately, does not require the giving of the notice on the same day on which the seizure is made. *Howell v. Gaddis*, 31 N. J. Law (2 Vroom) 313, 316.

### IMMEMORIAL POSSESSION.

Immemorial possession is that of which no man living has seen the beginning, and the existence of which he has learned from his elders. Civ. Code La. 1900, art. 766.

### IMMEMORIAL USE.

"Immemorial use is a use time out of mind, or from a time whereof the memory

of man is not to be contrary." *Miller v. Garlock* (N. Y.) 8 Barb. 153, 154 (quoting 3 Bl. Comm. 264); *Kripp v. Curtiss*, 11 Pac. 879, 880, 71 Cal. 62; *Gross v. McNutt*, 38 Pac. 935, 937, 4 Idaho, 286, 300.

### IMMIGRANT.

See "Alien Immigrant."

### IMMINENT.

The word "imminent" conveys usually some idea of "immediate"—of something to happen upon the instant. But conceding this to be so in a general sense, yet it does not mean an instant consummation. The *Queen of the Pacific* (U. S.) 25 Fed. 610, 612.

"Imminent" denotes something that is ready to fall or happen on the instant, as imminent danger of one's life; but the fact that Asiatic cholera had touched the ports of southern Europe, some 3,000 miles away, will not constitute imminent peril to the people of Buffalo, so as to authorize the board of health to take extraordinary measures to protect the public health, under section 236 of the charter of the city of Buffalo, authorizing such measures in the presence of great and imminent peril by reason of impending pestilence. *Eckhardt v. City of Buffalo*, 46 N. Y. Supp. 204, 211, 19 App. Div. 1.

### IMMINENT DANGER.

"Imminent danger," sufficient to justify the taking of life in self-defense, means such an overt, actual demonstration as makes killing necessary to self-preservation, though it is not necessary that danger should in fact exist. There must be such danger as might appear to defendant's comprehension, as a reasonable man, to require the taking of life. The apprehension of danger by the accused must be on grounds sufficient to satisfy a reasonable man that his life or limbs were in peril, or that great bodily harm was about to be inflicted on him. *State v. Fontenot*, 23 South. 634, 635, 50 La. Ann. 537, 69 Am. St. Rep. 455.

2 Rev. St. 660, § 3, subd. 2, providing that homicide in self-defense is justifiable where there shall be a reasonable ground to apprehend a design to commit a felony, and there shall be an imminent danger of such design being accomplished, does not mean that there must in fact be an impending evil, which is ready to fall, but only that there is a threatened evil, or one that appears as if it were ready to fall. There must be reasonable ground to apprehend such danger, and that such design will be accomplished. *Shorter v. People*, 2 N. Y. (2 Comst.) 193, 201, 51 Am. Dec. 286.

"Imminent" means such danger as must be instantly met, and cannot be guarded against by calling on others for assistance, or on the law for protection. *State v. West*, 12 South. 7, 9, 45 La. Ann. 14.

In *United States v. Outerbridge* (U. S.) 27 Fed. Cas. 390, Mr. Justice Field, in defining "imminent danger," says: "By 'imminent danger' is meant immediate danger; one that must be instantly met; one that cannot be guarded against by calling on the assistance of others or the protection of the law. And if a defendant did not, as a reasonably prudent man, apprehend the presence of immediate danger from the apparently probable execution of threats, he was not justified, on the ground of self-defense, in resorting to the use of force to an extent causing death. *State v. Smith*, 71 Pac. 973, 975, 43 Or. 109.

## IMMORAL.

See "Gross Immorality."

"Immoral," as defined in the Standard Dictionary, is hostile to the welfare of the general public; and Bouvier defines "immorality" to be that which is *contra bonos mores*, and an agreement to suppress the prosecution of a criminal offense, whether a felony or a misdemeanor, is an immoral contract. *Jones v. Dannenberg Co.*, 37 S. E. 729, 731, 112 Ga. 426, 52 L. R. A. 271.

## IMMOVABLE.

Real or immovable property consists of (1) land; (2) that which is affixed to land; (3) that which is incidental or appurtenant to land; (4) that which is immovable by law. *Mt. Carmel Fruit Co. v. Webster*, 73 Pac. 823, 823, 140 Cal. 183.

A right to have water flow upon lands through an artificial water way, being appurtenant to real estate, is therefore real or immovable property. *Standart v. Round Valley Water Co.*, 19 Pac. 689, 690, 77 Cal. 399.

Immovable things are, in general, such as cannot either move themselves or be removed from one place to another. But this definition, strictly speaking, is applicable only to such things as are immovable by their own nature, and not to such as are so only by the disposition of the law. Civ. Code La. 1900, art. 462.

Immovables, in the Spanish Civil Law, applies to those things which can neither move naturally by themselves, nor be moved by man. *Sullivan v. Richardson*, 14 South. 692, 708, 33 Fla. 1.

## IMMOVABLE BY DESTINATION.

Things which the owner of a tract of land has placed upon it for its service and

improvement are "immovable by destination." Thus the following things are immovable by destination when they have been placed by the owner for the service and improvement of a tract of land, to wit: Cattle intended for cultivation; implements of husbandry; seeds, plants, fodder, and manure; pigeons in a pigeon house; beehives; mills, kettles, alembics, vats, and other machinery made use of in carrying on the plantation works; the utensils necessary for working cotton and saw mills, taffia distilleries, sugar refineries, and other manufactures. All such immovables as the owner has attached permanently to the tenement or to the building are likewise immovable by destination. Civ. Code La. 1900, art. 468.

## IMMUNITY.

See "Exclusive Privilege, Immunity, or Franchise."

See, also, "Privileges and Immunities."

An immunity is a right peculiar to some individual or body; an exemption from some general duty or burden; a personal benefit or favor granted by law contrary to the general rule. *Ex parte Levy*, 43 Ark. 42, 54, 51 Am. Rep. 550.

Immunities are rights of exemption only; freedom from what otherwise would be a duty or burden. *Lonas v. State*, 50 Tenn. (3 Helsk.) 287, 306 (citing *Bates*, *Citizenship*, 22).

"An immunity has been defined as an exemption from any charge, duty, tax, or imposition." *Dike v. State*, 38 N. W. 95, 96, 38 Minn. 366.

The word "immunity," in Const. U. S. art. 4, § 2, providing that the citizens of every state shall be entitled to all the privileges and immunities of the citizens in the several states, signifies exemption, privilege, and is nearly synonymous with privilege. *Douglass v. Stephens*, 1 Del. Ch. 465, 476.

The term "immunity," as used in Judiciary Act Feb. 5, 1867, authorizing the Supreme Court of the United States to re-examine the decision of the highest court of the state in certain cases where any title, right, privilege, or immunity is claimed under any statute of the United States, is synonymous with the word "exemption," as used in the judiciary act of 1789 authorizing the Supreme Court of the United States to re-examine the decisions of the highest court of the state in certain cases where any title, right, privilege, or exemption is claimed under any statute of the United States. *Long v. Converse*, 91 U. S. 105, 113, 23 L. Ed. 233.

## Exemption from taxation.

The term "immunity" is an apt one to describe an exemption from taxation. Bu-

chanan v. Knoxville & O. R. Co. (U. S.) 71 Fed. 324, 334, 18 C. O. A. 122. See, also, State Board of Assessors v. Morris & E. R. Co., 7 Atl. 826, 834, 49 N. J. Law (20 Vroom) 193.

The word "immunities," as used in Code Gen. Laws Md. art. 23, §§ 187, 188, providing that, on the sale of any railroad under mortgage, the purchaser shall possess all the powers, immunities, and franchises of the road that has been sold, includes an immunity from taxation. Bancroft v. Wilcomico County Com'rs (U. S.) 121 Fed. 874, 879.

In a grant of a charter to the D. Insurance Company, with all the rights, privileges, and immunities of the B. Company, the words "rights, privileges, and immunities" are certainly full and ample for the purpose of granting an exemption from taxation; but the word "immunity" expresses more clearly and definitely an intention to include therein an exemption from taxation than does either of the other words. Exemption from taxation is more accurately described as an immunity than as a privilege, although it is not to be denied that the latter word may sometimes and under some circumstances include such exemption. So that where an act was passed incorporating the W. Insurance Company, giving it all the rights and privileges of the D. Company, the omission of the word "immunities" implied that the W. Company was not to be exempt from taxation. Phoenix Fire & Marine Ins. Co. v. State of Tennessee, 16 Sup. Ct. 471, 472, 161 U. S. 174, 40 L. Ed. 660.

#### Special corporate privileges.

The United States Constitution, in providing that citizens of each state shall be entitled to all the immunities of the citizens of the several states, meant such privileges as are common to the citizens of the latter states under their laws, and does not embrace special privileges created by the citizen's local law, and enjoyed by him at home. "A corporation is but a creature of the local law. It has no absolute right of recognition in any state save that of its creation. It has no extraterritorial operation, save by comity. The validity of its action, the exercise of any right whatever by it, indeed, even the recognition of its existence, in any other state, depend altogether upon its will and consent. One state cannot force its artificial creature into another. It may forbid its presence altogether, and it therefore follows, of course, that it may impose such restrictions as it chooses, provided they are not open to constitutional objection. Woodward v. Commonwealth (Ky.) 7 S. W. 613, 615.

## IMPAIR.

"Impair" means to make worse; to diminish in quality, value, excellence, or

strength; to deteriorate. Swinburne v. Mills, 50 Pac. 489, 490, 17 Wash. 611, 61 Am. St. Rep. 932; Gladney v. Sydnor, 72 S. W. 554, 557, 172 Mo. 318, 60 L. R. A. 890, 95 Am. St. Rep. 517.

The word "impair" means to make worse; to diminish in quantity, value, or excellence; to weaken; to enfeeble. Webster. Dict. To make or become worse or less; to lessen, reduce or diminish the quantity or quality. State v. Carew (S. C.) 13 Rich. Law, 498, 541, 91 Am. Dec. 245 (citing Richardson).

A life policy providing that, if the insured should become so far intemperate as to impair his health, it should be void, should be construed as meaning that the impairment of health contemplated is not necessarily permanent or irremediable, nor is it the temporary disposition or disturbance usually resulting from a drunken debauch, but it is the development of disease or the impairment of constitutional vigor by the use of intoxicating beverages in such a degree and for such a time as is ordinarily understood to constitute intemperance. Impairment of health is to be taken in its ordinary sense, and need not be permanent. A habitual intemperance is not necessary, so long as the insured's health is impaired. Davey v. Aetna Life Ins. Co. (U. S.) 20 Fed. 482.

## IMPAIRING OBLIGATION OF CONTRACT.

See, also, "Obligation of Contract."

The word "impair" is familiar to every one, and means, according to the standard writers in our language, by which we teach our children in our own tongue, simply "to diminish; to injure; to make worse," etc. It is remarkable that in framing the provision of the federal Constitution providing that no law should be passed, "impairing the obligation of any contract," the convention did not use the term "lessen" or "decrease" or "destroy," but one more comprehensive, which prohibited making worse in any respect a contract legitimate in its creation. The object, then, of its provision, may have been to establish an important principle, and that was the entire inviolability of contracts. Blair v. Williams, 14 Ky. (4 Litt.) 34, 35; Lapsley v. Brashears, 14 Ky. (4 Litt.) 47, 69.

The word "impairing," in the federal Constitution, prohibiting the passage by the states of any laws impairing the obligations of contracts, does not mean destroy. Consequently every state law which weakens the obligations of contracts previously made, or renders them less operative, is a violation of the provision against the impairment of the obligations of contracts. Lapsley v. Brashears, 14 Ky. (4 Litt.) 47, 53.

Whatever enactment abrogates or lessens the means of the enforcement of a con-

tract impairs its obligation. *State v. Jumel*, 2 Sup. Ct. 128, 147, 107 U. S. 711, 27 L. Ed. 448; *Holland v. Dickerson*, 41 Iowa, 367, 371.

A law which impairs the obligation of a contract is one which renders the contract in itself less valuable or less enforceable, whether by changing its terms and stipulations, its legal qualities and conditions, or by regulating the remedy for its enforcement. *Rutland v. Copes*, 15 Rich. Law, 84, 105; *Edwards v. Kearzey*, 96 U. S. 595, 600, 24 L. Ed. 793.

A law which changes the influence and legal effect of an existing contract as between the original parties thereto, or as between parties claiming under it, giving to one a greater and to the other a less interest or benefit in the subject-matter of the contract than by its terms or legal operation they would be entitled to, is a law impairing its obligation. *Berdan v. Van Riper*, 16 N. J. Law (1 Har.) 7, 11.

Any law which enlarges or changes the intention of the parties necessarily impairs the contract. The name or degree in which it is changed or affected can in no respect influence the conclusion. *Woodruff v. State*, 3 Ark. (3 Pike) 285; *Commercial Bank of Rodney v. State*, 12 Miss. (4 Smedes & M.) 439.

#### Abolition of imprisonment for debt.

Statutes abolishing imprisonment for debt, as to existing contracts, impair only the creditor's remedy, and not the obligation of the contract; hence are not unconstitutional. *Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 122, 4 L. Ed. 529; *Mason v. Haile*, 25 U. S. (12 Wheat.) 370, 6 L. Ed. 660; *Lee v. Gamble* (U. S.) 15 Fed. Cas. 157; *Beers v. Haughton* (U. S.) 3 Fed. Cas. 65, affirmed in 34 U. S. (9 Pet.) 329, 9 L. Ed. 145; *Gray v. Munroe* (U. S.) 10 Fed. Cas. 1032; *Newton v. Tibbatts*, 7 Ark. (2 Eng.) 150; *Taylor v. Keeler*, 30 Conn. 324; *Fisher v. Lacky* (Ind.) 6 Blackf. 373; *Ray v. Cannon* (La.) 2 Mart. (N. S.) 26; *Bronson v. Newberry* (Mich.) 2 Doug. 38; *Brown v. Dillahunt*, 12 Miss. (4 Smedes & M.) 713, 43 Am. Dec. 499; *Donnelly v. Corbett*, 7 N. Y. (3 Seld.) 500; *Ware v. Miller*, 9 S. C. (9 Rich.) 18; *Woodfin v. Hooper*, 23 Tenn. (4 Humph.) 13.

In *Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 122, 4 L. Ed. 529, this court, speaking by Mr. Chief Justice Marshall, said: "The distinction between the obligation of a contract, and the remedy given by the Legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract,

or may be allowed as a means of inducing him to perform it, but the state may refuse to inflict this punishment, or may withhold it, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation." *Vial v. Penniman*, 103 U. S. 714, 717, 26 L. Ed. 602.

#### Bankruptcy and insolvency laws.

What is the obligation of a contract? It is to do or not to do a certain thing, and this may be either absolutely, or under some condition immediately or at some future time or times, and at some specified place or generally. A law, therefore, which authorizes the discharge of a contract by a smaller sum or at a different time or in a different manner than the parties have stipulated, impairs its obligation by substituting for the contract of the parties one which they never entered into, and to the performance of which they, of course, had never consented. The old contract is completely annulled, and a legislative contract imposed upon the parties in lieu of it. A statute of a state providing for the discharge of the debtor in case of his bankruptcy or assignment, without full payment of the debt, is such a law, and unconstitutional and void. *Golden v. Prince* (U. S.) 10 Fed. Cas. 542, 544.

A state bankrupt or insolvent law which discharges a debtor from all liability for any debt contracted before such law was passed on his surrendering his property in the manner it prescribes is void, as it impairs the obligation of the contract. *Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 122, 4 L. Ed. 529; *Farmers' & Mechanics' Bank v. Smith*, 19 U. S. (6 Wheat.) 131, 5 L. Ed. 224; *Smith v. Mead*, 3 Conn. 253, 8 Am. Dec. 183; *Hammett v. Anderson*, 3 Conn. 304; *Medbury v. Hopkins*, Id. 472; *Boardman v. De Forest*, 5 Conn. 1; *Schwartz v. Drinkwater*, 70 Me. 409; *Kimberly v. Ely*, 23 Mass. (6 Pick.) 440; *Vanuxem v. Hazlehurst*, 4 N. J. Law (1 Southard) 192, 7 Am. Dec. 582; *Olden v. Hallet*, 5 N. J. Law (2 Southard) 466; *Roosevelt v. Cebra* (N. Y.) 17 Johns. 108; *Hicks v. Hotchkiss* (N. Y.) 7 Johns. Ch. 297, 11 Am. Dec. 472. Contra, see *Adams v. Storey* (U. S.) 1 Fed. Cas. 141; *Hempstead v. Reed*, 6 Conn. 480; *Farmers' & Mechanics' Bank v. Smith* (Pa.) 3 Serg. & R. 63.

Insolvent laws are not in contravention of the Constitution of the United States, so far as they operate to discharge the person and after-acquired property of the debtor from liability for any contract made subsequently to their enactment with citizens of the state. *Ogden v. Saunders*, 25 U. S. (12 Wheat.) 213, 6 L. Ed. 606; *Shaw v. Robbins*, 25 U. S. (12 Wheat.) 369, 6 L. Ed. 660; *Cook v. Moffat*, 46 U. S. (5 How.) 295, 316, 12 L. Ed. 159; *Wilson v. Matthews*, 32 Ala. 332; *Hawley v. Hunt*, 27 Iowa, 303, 1 Am. Rep.

278; *Frey v. Kirk* (Md.) 4 Gill & J. 509, 23 Am. Dec. 581; *Betts v. Bagley*, 29 Mass. (12 Pick.) 572; *Mather v. Bush* (N. Y.) 16 Johns. 233, 4 City H. Rec. 97, 8 Am. Dec. 313; *Jacques v. Marquand* (N. Y.) 6 Cow. 497; *Sebring v. Mersereau* (N. Y.) 9 Cow. 344; *Donnelly v. Corbett*, 7 N. Y. (3 Seld.) 500; *Smith v. Parsons*, 1 Ohio (1 Ham.) 236, 13 Am. Dec. 608.

#### Change of medium of payment.

A contract to pay a certain sum of money is legally performed if paid in currency which is lawful money at the time payment becomes due or is demanded; and therefore Act Cong. Feb. 25, 1862, making treasury notes a legal tender, does not impair the obligation of contracts, although applied to obligations existing before that time. *Knox v. Lee*, 79 U. S. (12 Wall.) 457, 20 L. Ed. 287; *Parker v. Davis*, Id.; *Legal-Tender Cases*, Id.; *Troy v. Bland*, 58 Ala. 197; *Belloc v. Davis*, 38 Cal. 242; *Jones v. Harker*, 37 Ga. 503; *Black v. Lusk*, 69 Ill. 70; *Hintrager v. Bates*, 18 Iowa, 174; *Wilson v. Triplecock*, 23 Iowa, 331; *George v. Concord*, 45 N. H. 434; *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400; *Shollenberger v. Brinton*, 52 Pa. (2 P. F. Smith) 9; *Johnson v. Ivey*, 44 Tenn. (4 Cold.) 608, 94 Am. Dec. 206. Contra, see *Hepburn v. Griswold*, 75 U. S. (8 Wall.) 603, 19 L. Ed. 513; *Griswold v. Hepburn*, 63 Ky. (2 Duv.) 20; *Martin v. Martin*, 20 N. J. Eq. (5 C. E. Green) 421.

#### Change in remedy.

Const. U. S. art. 1, § 10, providing that no state shall pass any law impairing the obligation of a contract, necessarily refers to an executory contract, or one under which something remains to be done, and under which there is an obligation on one or both of the parties to do it, and that no law of a state shall impair this obligation by altering it in any material part. The prohibition does not apply to the remedy, but to terms used by the parties to the agreement, and which fix their respective rights and obligations. A modification of the remedy for a breach of contract does not impair its obligation, since the thing to be done and the time of performance remain on the face of the contract in all their binding force on the parties, and these are shielded by the Constitution from legislative interference. *Charles River Bridge v. Warner Bridge*, 36 U. S. (11 Pet.) 420, 573, 9 L. Ed. 773; *Crawford v. Branch Bank of Mobile*, 48 U. S. (7 How.) 279, 282, 12 L. Ed. 700.

An alteration by law of a remedy to such extent as to materially affect a right vested under a prior contract is unconstitutional. *Gordon v. South Fork Canal Co.* (U. S.) 10 Fed. Cas. 817, reversed in 73 U. S. (6 Wall.) 561, 18 L. Ed. 894; *Burton v. Town of Koshkonong* (U. S.) 4 Fed. 373; *Wood-*

*ruff v. Scruggs*, 27 Ark. 26, 11 Am. Rep. 777; *McCreary v. State*, 27 Ark. 425; *Smith v. Morse*, 2 Cal. 524; *Watkins v. Glenn*, 55 Kan. 417, 40 Pac. 316; *Lapsley v. Brashears*, 14 Ky. (4 Litt.) 47; *Webster v. Rose*, 53 Tenn. (6 Heisk.) 93, 19 Am. Rep. 533; *McLane v. Paschal*, 62 Tex. 102; *Roberts v. Cocke* (Va.) 28 Grat. 207.

The power of the Legislature to regulate the remedy and modes of proceeding in relation to past as well as future contracts is subject only to the restriction that it cannot be exercised so as to take away all remedy upon the contract, or to impose upon its enforcement new burdens and restrictions which materially impair the value and benefit of the contract. *Tennessee v. Sneed*, 96 U. S. 69, 24 L. Ed. 610; *Briscoe v. Anketell*, 28 Miss. (6 Cushman) 361, 61 Am. Dec. 553; *Van Rensselaer v. Read*, 26 N. Y. 558; *Huntzinger v. Brock* (Pa.) 3 Grant, Cas. 243; *Umbenhauer v. Miller* (Pa.) 1 Woodw. Dec. 69; *Ward v. Hubbard*, 62 Tex. 559. The law of the remedy is no part of the contract. *Wood v. Child*, 20 Ill. (10 Peck) 209; *Templeton v. Horne*, 82 Ill. 491; *Ray v. Cannon* (La.) 2 Mart. (N. S.) 14; *Edwards v. Kearzey*, 96 U. S. 595, 600, 24 L. Ed. 793.

The Legislature cannot so regulate the remedy as to destroy the contract by denying all means of enforcing it. *Johnson v. Bond* (U. S.) 13 Fed. Cas. 734; *Scarborough v. Dugan*, 10 Cal. 305; *Bruce v. Schuyler*, 9 Ill. (4 Gilman) 221, 46 Am. Dec. 447; *Commonwealth Bank v. Patton*, 27 Ky. (4 J. J. Marsh.) 190; *Scalne v. Inhabitants of Belleville*, 39 N. J. Law (10 Vroom) 526; *Planters' Bank v. Sharp*, 47 U. S. (6 How.) 301, 330, 12 L. Ed. 447.

The Legislature has the power to change the remedy for the enforcement of contracts, if the obligation be not thereby impaired. *Gordon v. South Fork Canal Co.* (U. S.) 10 Fed. Cas. 817, reversed in 73 U. S. (6 Wall.) 561, 18 L. Ed. 894; *Bronson v. Kinzie*, 42 U. S. (1 How.) 311, 315, 11 L. Ed. 143; *Bloodgood v. Cammack* (Ala.) 5 Stew. & P. 276; *Carey v. Giles*, 9 Ga. 253; *State v. Bennett*, 24 Ind. 383; *Watts v. Everett*, 47 Iowa, 269; *Howard v. Kentucky & Louisville Mut. Ins. Co.*, 52 Ky. (13 B. Mon.) 282; *Baldwin v. City of Newark*, 38 N. J. Law (9 Vroom) 158; *Neass v. Mercer* (N. Y.) 15 Barb. 318; *People v. Carpenter* (N. Y.) 46 Barb. 619.

Existing remedies for the enforcement of a contract at the time of its execution are part of its obligation, which the state may not so change as to impair a substantial right. *Walker v. Whitehead*, 83 U. S. (16 Wall.) 314, 21 L. Ed. 357; *Cochran v. Darcy*, 5 S. C. (5 Rich.) 125.

Statutes of limitation affect the remedy, merely, and are not within the scope of the inhibition against laws impairing the obliga-

tion of contracts, unless they entirely take away the remedy, or so incumber it with conditions as to render it impracticable. *Barker v. Jackson* (U. S.) 2 Fed. Cas. 811; *Farmers' & Mechanics' Bank v. Smith*, 19 U. S. (6 Wheat.) 131, 5 L. Ed. 224; *Le Roy v. Crowninshield* (U. S.) 15 Fed. Cas. 362; *Bronson v. Kinzie*, 42 U. S. (1 How.) 311, 315, 11 L. Ed. 143; *Blackford v. Peltier* (Ind.) 1 Blackf. 36; *State v. Jones*, 21 Md. 432; *Waltermire v. Westover*, 14 N. Y. (4 Kern.) 16; *De Couche v. Savetier* (N. Y.) 3 Johns. Ch. 190, 8 Am. Dec. 478; *De Cordova v. City of Galveston*, 4 Tex. 470.

A law which establishes a rule of evidence respecting certain past transactions cannot be said to impair the obligation of contracts. Laws which change the rules of evidence relate to the remedy only. *Herbert v. Easton*, 43 Ala. 547; *Rich v. Flanders*, 39 N. H. 304; *Tabor v. Ward*, 83 N. C. 291.

An act directing sales on credit, under decrees in chancery, longer than the law allowed at the date of the contracts between the respective parties, was held constitutional. *Austin v. Andrews*, Dall. Dig. 447; *Garland v. Brown* (Va.) 23 Grat. 173. Contra, see *January v. January*, 23 Ky. (7 T. B. Mon.) 542, 18 Am. Dec. 211.

An act suspending the enforcement of a judgment for a limited time is unconstitutional, as applied to judgments rendered before its passage. *Blair v. Williams*, 14 Ky. (4 Litt.) 35; *Grayson v. Lilly*, 23 Ky. (7 T. B. Mon.) 6; *Stephenson v. Barnett*, Id. 50; *Brown v. Ward*, 1 Mo. 209; *Bumgardner v. Circuit Court of Howard County*, 4 Mo. 50; *Stevens v. Andrews*, 31 Mo. 205; *Jones v. Crittenden*, 4 N. C. 55, 6 Am. Dec. 531; *Webster v. Rose*, 53 Tenn. (6 Heisk.) 98.

#### Degree of impairment.

The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of a change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not embraced in the contract, or dispensing with the performance of those which are, however, minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. *Green v. Biddle*, 21 U. S. (8 Wheat.) 1, 84, 5 L. Ed. 547; *VonHoffman v. City of Quincy*, 71 U. S. (4 Wall.) 535, 552, 18 L. Ed. 403; *Berdan v. Van Riper*, 16 N. J. Law (1 Har.) 7, 11; *Woodruff v. State*, 3 Ark. (3 Pike) 285; *Commercial Bank of Rodney v. State*, 12 Miss. (4 Smedes & M.) 439; *Bates v. Gregory*, 26 Pac. 891, 893, 89 Cal. 387.

#### Eminent domain as affecting.

Though a charter granting special privileges to a corporation is a contract, within

the meaning of the Federal Constitution, prohibiting the states from passing any law impairing the obligation of a contract, the right of eminent domain which condemns the property of such corporation for use as a public utility or conveyance does not interfere with the inviolability of contracts. All property is held by tenure from the state, and all contracts are subject to the right of eminent domain. *West River Bridge Co. v. Dix*, 47 U. S. (6 How.) 507, 518, 12 L. Ed. 535.

#### Exemption and homestead laws.

An act exempting certain property from levy on executions or attachment to satisfy debts contracted before its passage does not conflict with that clause of the Constitution of the United States which prohibits any state from passing a law impairing the obligation of contracts. *Sneider v. Heidelberger*, 45 Ala. 126; *Hardeman v. Downer*, 39 Ga. 425; *Grimes v. Bryne*, 2 Minn. 89 (Gil. 72); *Stephenson v. Osborne*, 41 Miss. 119, 90 Am. Dec. 358; *Morse v. Goold*, 11 N. Y. (1 Kern.) 281, 62 Am. Dec. 103; *Mather v. Bush* (N. Y.) 16 Johns. 233, 244, 8 Am. Dec. 313.

A constitutional or statutory provision establishing or enlarging a homestead exemption is within the federal prohibition of laws impairing the obligation of contracts, in so far as it relates to debts contracted before its adoption. *Gunn v. Barry*, 82 U. S. (15 Wall.) 610, 21 L. Ed. 212; *Wilson v. Brown*, 58 Ala. 62, 29 Am. Rep. 727; *Jones v. Brandon*, 48 Ga. 598; *Cochran v. Darcy*, 5 S. C. (5 Rich.) 125; *Ex parte Hewett*, Id. 409; *Douglas v. Craig*, 13 S. C. 871; *Bull v. Rowe*, Id. 355; *Charles v. Charles*, Id. 385; *Hannum v. McInturf*, 58 Tenn. (11 Heisk.) 48, note; Id., 65 Tenn. (6 Baxt.) 225.

Laws extending exemptions from attachment or execution are, so far as they relate to previously contracted debts, unconstitutional, as impairing the obligation of contracts by destroying the remedy in material respects. *Gunn v. Barry*, 82 U. S. (15 Wall.) 610, 21 L. Ed. 212; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793; *Toulumne Redemption Co. v. Sedgwick*, 15 Cal. 516; *Forsyth v. Marbury* (Ga.) R. M. Charlt. 324; *New Orleans Canal & Banking Co. v. City of New Orleans*, 30 La. Ann. 1371; *Dorrington v. Myers*, 11 Neb. 388, 9 N. W. 555; *Danks v. Quackenbush*, 1 N. Y. (1 Comst.) 129; *Hannum v. McInturf*, 65 Tenn. (6 Baxt.) 225.

#### Grant of like franchise to another.

A charter by which the state grants to a bridge company the right to construct and maintain a bridge is not impaired, within the meaning of the federal Constitution, by the grant by the state to another bridge company of the right to maintain another bridge over the same river, in the absence of an express provision in the original charter giv-



ing the first bridge company exclusive privileges. Corporation charters, as taking away rights of the public, are to be strictly construed, and the contract in question cannot be construed as granting an exclusive privilege implication. *Charles River Bridge v. Warren Bridge*, 36 U. S. (11 Pet.) 420, 573, 9 L. Ed. 773.

#### **Imposition of liability on municipality.**

The charter of a city is so far a contract between the state and the corporation that its right to hold and enjoy its property cannot be impaired or destroyed by subsequent legislation, but the Constitution does not exempt municipal charters from remedial legislation or general laws. The state may make laws concerning chartered corporations so long as they remain publici juris. Consequently Laws 1855, c. 428, providing for the recovery of damages against a city by those whose property had been destroyed by a mob within the city, but making no provision for the collection of such judgment, save by the exercise of the taxing power, did not impair the obligation of any contract existing between the state and city. *Davidson v. City of New York*, 25 N. Y. Super. Ct. (2 Rob.) 230, 247.

#### **License to practice law.**

Though a lawyer's license is not a naked privilege, revocable at pleasure by the state, but constitutes, rather, a vested right, yet he may be taxed by the state for the privilege of exercising such right, without impairing the obligation of a contract. The license is presumed to have been accepted subject to the power of the state to impose upon its exercise a share of the public burden. *Ex parte Williams*, 20 S. W. 580, 582, 31 Tex. Cr. R. 262, 21 L. R. A. 783.

#### **Police regulations.**

The act of Gen. Assembly, 1860, approved June 6th, and taking effect July 4th of that year, adding the 1st day of January to the list of legal holidays, and providing that notes in terms falling due on that day should be deemed to fall due on the last secular day preceding such date, does not impair the obligation of the contract in a promissory note dated on June 29, 1860, and payable six months after date, if such note was properly presented for payment and protested for nonpayment on the 31st day of December. The constitutional prohibition against the enactment of laws impairing obligations of contracts applies only to laws aimed at contracts, and intended to operate upon some of the stipulations which such contracts contain, and it was not the intention of the framers of the Constitution to interfere in any manner with the Legislation of the states with relation to their internal police. It certainly was not the design

of our legislators by the act of 1860 to curtail the term of credit agreed upon between creditors and their debtors, or in any other way to affect existing contracts, or the obligations which such contracts impose. Their object obviously was to promote the public health, public morals, or public welfare in some other respect, by enabling a portion of our people for a season to shake off the cares of business, and devote another day to recreation and the cultivation of the social affections. With the wisdom or expediency of the enactment we have nothing to do. Our inquiry regards only the constitutional authority of the Legislature to adopt it. We are satisfied that it possessed that power. The statute in question is of the character of a police regulation, and for that reason, if for no other, is beyond the purview of the constitutional prohibition. *Barlow v. Gregory*, 81 Conn. 261 264, 265.

#### **Recording acts.**

The prohibition of the federal Constitution relative to impairing the obligation of contracts does not extend to all legislation about contracts. States may pass recording acts by which an elder grantee shall be postponed to a younger, if the prior deed be not recorded within a limited time, and this whether the deed be dated before or after the act. Acts of limitation also giving peace and confidence to the actual possessor of the soil, and refusing the aid of courts of justice in the enforcement of contracts after a certain time, have received judicial sanction. Such acts may be said to effect a complete divestiture or even a transfer of right, yet as reasons of sound policy having led to their adoption, their validity cannot be questioned. *Phalen v. Virginia*, 49 U. S. (8 How.) 163, 168, 12 L. Ed. 1030.

#### **Reduction of interest rate on judgment.**

The provision of the federal Constitution that no law impairing the obligation of contracts shall ever be passed, does not forbid a state from legislating, within its discretion, to reduce the rate of interest upon judgments previously obtained in its courts, as the judgment creditor has no contract whatever in that respect with the judgment debtor, and as the former's right to receive, and the latter's obligation to pay, exist only as to such an amount of interest as the state chooses to prescribe as a penalty or liquidated damages for the nonpayment of the judgment. *Read v. Mississippi County*, 63 S. W. 807, 808, 69 Ark. 365, 86 Am. St. Rep. 202.

#### **Release from liability.**

The word "impair," in the clause of the federal Constitution prohibiting the states from impairing the obligation of contracts, describes the act of a state which has chartered a bank with usual banking powers

of discount, deposit, and circulation, which, on the bank becoming insolvent, passes an act diverting the assets of the bank from the payment of its outstanding bills. Thus statutes requiring such a corporation to distribute its property among its stockholders, leaving its bills unredeemed, impairs the obligation of the contracts contained in such bills. *Curran v. Arkansas*, 56 U. S. (15 How.) 304, 309, 14 L. Ed. 705.

The obligation of a contract is impaired, within the meaning of the federal and state Constitutions prohibiting state statutes impairing the obligation of contracts, by the passage of an act by which a town created by a former act from a part of another town, and required by the former act to pay its proportion towards the support of all paupers then on expense in the original town, is relieved from such liability. *Bowdoinham v. Richmond*, 6 Me. (6 Greenl.) 112, 19 Am. Dec. 197.

A state statute repealing a former statute which made the stock of stockholders in a chartered company liable to the corporation's debts is, as respects creditors of the corporation existing at the time of the repeal, a law impairing the obligation of contracts, and void; and this is so, even though the liability of the stock is in some respects conditional only, and though the stockholder was not made, by the statute repealed, liable in any way in his person or property generally for the corporation's debts. *Hawthorne v. Calef*, 69 U. S. (2 Wall.) 10, 17 L. Ed. 776.

#### Taxation of municipal obligations.

The term "impairment of the obligation of contracts," within the meaning of the federal Constitution, prohibiting the impairment of the obligation of contracts by the states, includes statutes and ordinances by which a municipal corporation contemplates to tax its own interest-bearing obligations by directing the retention of certain portion of the interest as taxes. A state may undoubtedly tax any of its creditors within its jurisdiction for the debt due to him, and regulate the amount of the tax by the rate of interest the debt bears, if its promise be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched. But until payment of the debt or interest has been made as stipulated, we think no act of state sovereignty can work an exoneration from what has been promised to the creditor, namely, payment to him, without a violation of the Constitution. The true rule of every case of property founded on contract with the government is this: It must first be reduced into possession, and then it will become subject, in common with other similar property, to the right of the government to raise contributions upon it. It may be said that the government may ful-

fill this principle by paying the interest with one hand, and taking the amount of the tax with the other. But to this the answer is that, to comply truly with the rule, the tax must be upon all the money of the community, not upon the particular portion of it which is paid to the public creditors, and it ought, besides, to be so regulated as not to include a lien of a tax upon the fund. *Murray v. Charleston*, 96 U. S. 432, 441, 24 L. Ed. 760.

#### Validation of defective acknowledgments.

There is no impairment of a contract, within the meaning of the clause of the federal Constitution prohibiting the states from impairing contracts, in a statute validating defective acknowledgments of deeds. So far as it has any legal operation, it goes to confirm and not to impair the contract. *Watson v. Mercer*, 83 U. S. (8 Pet.) 88, 110, 8 L. Ed. 876.

#### Validation of void contract.

A statute expressly giving validity to a contract which had been held void by the courts is not a law impairing the obligation of contracts. *Satterlee v. Matthewson*, 27 U. S. (2 Pet.) 380, 385, 7 L. Ed. 458; *Welch v. Wadsworth*, 80 Conn. 149, 154, 155, 79 Am. Dec. 239.

A contract which has become void by force of its inherent conditions cannot be reinstated by a legislative act. *Plankroad Co. v. Davidson*, 89 Pa. (3 Wright) 435; *Bywaters v. Paris & G. N. Ry. Co.*, 78 Tex. 624, 11 S. W. 856.

## IMPANEL

"Impanel" means the right to enter the names of the jury on a list or piece of parchment called a "panel"; to form or enroll as a list of jurors in a court of justice. *Porter v. People* (N. Y.) 7 How. Prac. 441, 443 (citing *Bouv. Law Dict.*).

*Bouvier* says to "impanel" meant the writing of the names of a jury on the schedule by the sheriff or other officer lawfully authorized. *Lyman v. People*, 7 Ill. App. (7 Bradw.) 345, 348.

In American practice, the word impaneled is used of a jury drawn for trial of a particular case by the clerk, as well as a general list of jurors returned by the sheriff. *Rich v. State*, 1 Tex. App. 206, 209, 210.

A jury is impaneled when it is ready to try the case. *Whart. Cr. Law*, § 590; *State v. Cardoza*, 11 S. C. 195, 258.

#### As swearing jury.

Impaneling has nothing to do with drawing, selecting, or swearing jurors, but means

simply making a list of those who have been selected. *Zapf v. State*, 17 South. 225, 35 Fla. 210.

2 Rev. St. p. 509, § 8, provided that in actions for forcible entry and detainer the jurors should be summoned, returned, and impaneled as provided in civil actions before justices. Held, that "impaneling" referred to the panel to be made by the officer summoning the jury, and had no reference to any drawing or swearing of the jury by the judge. *Porter v. People* (N. Y.) 7 How. Prac. 441, 443.

The word "impanel," as used in the statute giving the right to peremptory challenge jurors summoned and impaneled, does not mean the jury sworn to try the case, so that until sworn the jury are not impaneled, but a jury is said to be impaneled when the sheriff has entered their names into the panel. *State v. Potter*, 18 Conn. 166, 175.

The statement in a record that the court impaneled the jury does not necessarily imply that the jury was sworn. *Rich v. State*, 1 Tex. App. 206, 209, 210; *Lyman v. People*, 7 Ill. App. (7 Bradw.) 345, 348. And such record is therefore fatally defective. *Zapf v. State*, 17 South. 225, 35 Fla. 210.

A grand juror is said to be impaneled after his qualifications have been tried and he has been sworn. Code Cr. Proc. Tex. 1895, art. 399.

## IMPARLANCE.

See "General Imparlance."

## IMPARTIAL.

"According to the definition of our standard lexicographer, a man who is impartial is one who is not biased in favor of one party more than another; who is indifferent, unprejudiced, disinterested; as an impartial judge or arbitrator. The primary idea contained in this definition is freedom from personal bias, indifference between the parties as persons; not prejudiced against one or the other; disinterested as between them." *Eason v. State*, 65 Tenn. (6 Baxt.) 466, 469.

"Impartial" means not partial; not favoring one party more than another; unprejudiced; disinterested; equitable; just. *Randle v. State*, 23 S. W. 953, 954, 34 Tex. Cr. R. 43 (citing Webst. Dict.); *Curry v. State*, 5 Neb. 412, 413; *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493, 498, 16 Atl. 554; *Cole v. Curtis*, 16 Minn. 182, 194 (Gil. 161).

The word "impartial," in the definition of probable cause for instituting a criminal prosecution to be such a state of facts known in prosecuting the action as would lead a man of ordinary caution and prudence, act-

ing conscientiously, impartially, reasonably, and without prejudice, upon the facts within the party's knowledge, to believe or entertain an honest and strong suspicion that the person accused is guilty, is not used in an absolutely unqualified sense, but is intended to mean that the impartiality and absence of prejudice are to be such as would characterize a man of ordinary prudence, acting under the same circumstances, and with the same knowledge of facts and circumstances. *Cole v. Curtis*, 16 Minn. 182, 194 (Gil. 161, 171).

The words "impartial" and "reasonable" are held to be practically synonymous, so that it is held that, in a suit for malicious prosecution, a definition of "probable cause" as the existence of such facts and circumstances as would excite in a reasonable mind the belief of the guilt of the person charged is not erroneous because of the use of the word "reasonable" instead of "impartial." *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493, 498, 16 Atl. 554.

## IMPARTIAL JUROR.

"A juror, to be impartial, must, to use the language of Lord Coke, be indifferent as he stands unsworn." *Reynolds v. United States*, 98 U. S. 145, 154, 25 L. Ed. 244 (quoting Co. Litt. 155b).

The term "impartial juror" means an impartial man; "one who extends to his fellow men the humane presumptions of the law, and keeps his mind in such condition with reference to the accused that guilt must be affirmatively and conclusively shown before he is willing to convict." *State v. Beatty*, 25 Pac. 899, 902, 45 Kan. 492.

As used in Const. § 9, art. 1, securing to the accused in all criminal prosecutions a public trial by an impartial jury, the word is not used exclusively in its primary sense, but in its secondary or more general sense, as freedom from any bias, or indifference or disinterestedness. An impartial juror is one who enters the box indifferent in feeling and in opinion. *Eason v. State*, 65 Tenn. (6 Baxt.) 466, 469.

The words "impartial juror," at the time they were employed in the Constitution, had no such fixed meaning as to preclude legislation defining in some measure what should constitute such a juror. There was no intention to exclude persons who read newspapers, and it was never intended that an opinion formed from such information should necessarily disqualify such a person as a juror. The mere fact that a juror has a settled impression as to the prisoner's guilt, resulting from information from almost any source, except personal knowledge of the facts, does not necessarily render the juror incompetent. Ordinarily, where a juror testifies that he believes, and the court finds as a fact, that he

would, if selected, render an impartial verdict upon the evidence, he is an impartial juror. Consequently a statute is not unconstitutional which provides that the court may, if satisfied that a juror is impartial, admit him to serve, though he has formed an opinion based upon reading newspaper statements or reports, or upon hearsay, but not upon conversations with witnesses, or reading reports of their testimony or hearing them testify, provided he further state on oath that he feels able, notwithstanding his opinion, to render an impartial verdict. *McHugh v. State*, 42 Ohio St. 154, 161.

### IMPARTIAL JURY.

The constitutional guaranty that in all criminal prosecutions the accused shall have the right of trial by an impartial jury means a jury not biased in favor of one party more than another; indifferent; unprejudiced; disinterested. This right to have an impartial jury cannot be abridged, and therefore the body of the triers should be composed of men indifferent between the parties, and otherwise capable of discharging the duty of jurors. Whether in the practical administration of justice the right is infringed is necessarily a judicial question, and whether, in a particular case, a proposed juror has the state of mind which will render him impartial, is a question of fact which it is the duty of the court trying the case to decide. *Curry v. State*, 5 Neb. 412, 413.

"Impartial," as applied to a jury, means not favoring a party or an individual because of the emotions of the human mind, heart, or affections. It means that, to be impartial, the party, his cause, or the issues involved in his cause, should not, must not, be prejudged. *Randle v. State*, 28 S. W. 953, 954, 34 Tex. Cr. R. 43.

### IMPARTIALITY.

Rev. St. § 3462, as amended by Act April 15, 1880, providing that telegraph companies, etc., shall receive despatches from or for any individual, and they must be transmitted with impartiality, means without discrimination, either in respect to persons, or in the time and manner of transmission. *American Union Telegraph Co. v. Bell Telephone Co.*, 36 Ohio St. 296, 310, 38 Am. Rep. 583.

Const. art. 8, § 9, providing that, in prosecutions by indictment or information, the accused shall be entitled to a speedy trial by an impartial jury, means a jury which shall be free from impressions unfavorable to the party's rights, and from malice or ill will towards his person. *Smith v. Eams*, 4 Ill. (3 Scam.) 76, 82, 36 Am. Dec. 515.

The term "impartial jury" as used in the Constitution, guarantying to the accused

"a speedy public trial by an impartial jury," means that the jurors shall stand indifferent between the parties. It is essential that every jurymen should be wholly free even from the suspicion of bias. *Coughlin v. People*, 144 Ill. 140, 163, 33 N. E. 1, 8, 19 L. R. A. 57.

Within the provision of the Constitution declaring that the accused in every final proceeding shall enjoy the right of trial by an impartial jury, an impartial jury is one that is composed of twelve impartial men. The presence of one partial man on the jury destroys the impartiality of the body and renders it partial. *Woods v. State*, 41 S. W. 811, 812, 99 Tenn. 182.

### IMPARTIALLY.

The word "impartially" is included in the term "faithfully." *City of Hoboken v. Evans*, 31 N. J. Law (2 Vroom) 342, 343.

It was held that the words "faithfully, fairly, and impartially" meant more than faithfully alone, and its use in their place was insufficient. *Perry v. Thompson*, 16 N. J. Law (1 Har.) 72, 73.

The word "impartially," in the statutory requirement that a road viewer's oath shall be for the performance of his duties impartially, must necessarily be used, and the use of the word "faithfully" in lieu thereof is insufficient. *In re Cambria St.*, 75 Pa. (25 P. F. Smith) 357, 360; *In re Nice Town Lane (Pa.)* 32 Leg. Int. 28.

The word "impartially" in the statute requiring viewers appointed to vacate and re-lay a public road to take an oath that they will perform the duties of their appointment "impartially and according to the best of their ability" is not of the same meaning as the term "with fidelity," and therefore the latter term cannot be substituted in the oath. *In re Road of Jefferson Tp. (Pa.)* 2 Lack. Leg. N. 328.

### IMPEACH—IMPEACHMENT.

Of officer as judicial proceeding, see "Judicial Proceeding."

"To impeach, as applied to a person, is to accuse, to blame, to censure him. It includes the imputation of wrongdoing. To impeach his official report or conduct is to show that it was occasioned by some partiality, bias, prejudice, inattention or unfaithfulness in the discharge of that duty, or that it was based on such error that the existence of such influence may be justly inferred from the extraordinary character or grossness of the error." *Bryant v. Glidden*, 36 Me. 36, 47.

The object of prosecutions of impeachment in England and the United States is to reach high and potent offenders—such as

might be presumed to escape punishment in the ordinary tribunals, either from their own extraordinary influence, or from the imperfect organization and powers of those tribunals. These prosecutions are therefore conducted by the representatives of the nation, in their public capacity, in the face of the nation, and on a responsibility which is at once felt and revered by the whole community. *State v. Buckley*, 54 Ala. 599, 618 (citing *Story*, Const. § 688).

An impeachment is like an indictment, in that, when once preferred, it remains pending before the court until decided. *Wetmore v. Storey* (N. Y.) 22 Barb. 414, 494.

#### IMPEACHMENT OF ANNUITIES.

"Anything that operates as a hindrance, let, impediment, or obstruction to the making of the profits out of which the annuity is to arise amounts to an impeachment thereof." *Pitt v. Williams*, 4 Adol. & E. 885.

#### IMPEACHMENT OF WASTE.

"Waste" and "impeachment of waste" are technical terms, and are only found in conveyances of real estate. They are entirely inapplicable to personality. "Waste," says Blackstone, "is a spoil or destruction of houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that has the remainder or reversion in fee simple or fee tail. 'Impeachment of waste' signifies a restraint from committing waste upon lands or tenements, or a demand or compensation for waste done by a tenant, who has but a particular estate in the lands granted, and therefore no right to commit waste. All tenants for life or any less estate are liable to be impeached for waste, unless they hold without impeachment of waste. In the latter case they may commit waste without being questioned, or any demand for compensation for the waste done." *Sanderson v. Jones*, 6 Fla. 430, 430, 481, 63 Am. Dec. 217.

#### IMPEACHMENT OF WITNESS.

The word "impeach," when used in reference to a witness, signifies to discredit, or to show or prove that he is unreliable or unworthy of belief. "Where he has been successfully impeached, and his evidence has not been, either in whole or in part, corroborated by other credible testimony in the cause, it is within the province of the court or jury trying the issue to entirely disregard his testimony." *White & New York C. & St. L. R. Co.*, 42 N. E. 456, 458, 142 Ind. 648.

"Impeach," as applied to the contradiction of a witness in a legal proceeding, is capable of two significations. One is the charge or accusation of want of veracity, and the other is the establishment of the charge. The last sense is shown in the common phras-

es "attempt to impeach," or "a failure to impeach," which imply that, though the charge has been made, it has not reached a result. As used in an instruction that, if the jury shall find that a certain witness is impeached, then they should give no consideration to his deposition, it refers to the establishment of the charge. *White v. McLean* (N. Y.) 47 How. Prac. 193, 199.

#### As attempt to impeach.

Strictly speaking, the word "impeach" imports a successful attempt to establish the charge of want of veracity. It imports destruction of the witness' testimony, but, as generally used, it comprehends also the attempt to establish such a charge, whether unsuccessful or successful in whole or in part. It not only means destruction, but it means attack, and it includes disparagement and discredit, which may be considered degrees of impeachment. A provision of Civ. Code Prac. § 597, that a witness shall not be impeached by evidence of particular wrongful acts, applies to the cross-examination of a defendant in a criminal case where he offers himself as a witness—cross-examination as to credibility being a method of impeachment. *Commonwealth v. Welch*, 63 S. W. 984, 986, 110 Ky. 530.

The word "impeach," in its strictly proper signification, as applied to witnesses, refers to witnesses whose unworthiness of credit is absolutely established in the minds of the jury. The word "impeach," as used in Civ. Code, § 5295, providing that it is for the jury to determine the credit to be given to a witness' testimony where impeached for general bad character, is not used in the strict sense, but as being synonymous with "attacked." *Smith v. State*, 35 S. E. 59, 60, 109 Ga. 479.

Impeachment, in evidence, is "an allegation, supported by proof, that a witness who has been examined is unworthy of credit." It is a solecism to say that a witness has been successfully impeached. It is altogether proper to say that an attempt to impeach the credibility of a witness has proved successful. *Powell v. State*, 29 S. E. 309, 317, 101 Ga. 9, 65 Am. St. Rep. 277.

#### Conflict of evidence.

"Impeachment," as applied to the impeachment of a witness in a legal proceeding, means an attack on the person's credibility as a witness. A mere conflict between a witness' testimony and the testimony of another witness in regard to some fact is not an impeachment of the former. *Baker v. Robinson*, 49 Ill. 299, 301.

#### IMPEDE

"Impede" is not synonymous with "obstruct." An obstacle, which renders access

to an inclosure inconvenient, impedes the entrance thereto, but does not obstruct it, if sufficient room be left to pass in and out. "Obstruct" means "to prevent, to close up." *Keeler v. Green*, 21 N. J. Eq. (6 C. E. Green) 27, 30.

"Impede," as used in Act Feb. 19, 1849, § 12, requiring railroad crossings to be made so as not to impede the passage or transportation of persons or property along the highway, means so as not to unnecessarily interfere with the highway. *Appeal of North Manheim Tp. (Pa.)* 14 Atl. 187, 145.

#### IMPEDIMENT.

See "Legal Impediment."

In the act of incorporation of a railroad company, providing that such railroad should be so constructed as not to obstruct or impede the free use of any public road, street, lane, or bridge, "impediment" is almost synonymous with "obstruction," except that it is seldom, if ever, used to signify an entire blocking up of the way. It is an obstacle, not an impassable barrier. An obstruction is anything set in the way, whether it totally closes the passage or only hinders and retards passage. Understanding these words in their ordinary import, a railroad is an obstruction per se, or impediment to the free use of a street by the public. Under the charter, a railroad cannot be built on a street in such a manner as to cause any material obstruction. *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. (3 Casey) 339, 355, 67 Am. Dec. 471.

#### IMPENDING.

"Impending" denotes something that hangs suspended over us, and may remain so indefinitely; but the fact that Asiatic cholera had touched the ports of Southern Europe, some 3,000 miles away, does not constitute impending danger, so as to authorize extraordinary caution for the protection of public health, under section 236 of the charter of the city of Buffalo, authorizing such measures in the presence of great and imminent peril by reason of impending pestilence. *Eckhardt v. City of Buffalo*, 46 N. Y. Supp. 204, 211, 19 App. Div. 1.

#### IMPERATIVE STATUTE.

The distinction between "directory statute" and "imperative statute" is that a clause is directory when the provisions contain mere matters of deduction, and nothing more, but not so when they are followed by such words as are used here, "that anything done contrary to such provision shall be null and void to all intents"; these words giving direct, positive, and absolute prohibition. A

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statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute. *Nelms v. Vaughan*, 5 S. E. 704, 84 Va. 696 (citing *Pearse v. Morrice*, 2 Adol. & El. 94); *State v. Holmes*, 40 Pac. 785, 787, 12 Wash. 169.

#### IMPERCEPTIBLE.

"Imperceptible," as used in a rule of law which gives to the riparian owner of land accretions which accrue by small and imperceptible degrees (2 Bl. Comm. 261), refers only to the manner of accretion. It means imperceptible in progress, and not imperceptible after a long lapse of time. *Linthicum v. Coan*, 2 Atl. 826, 828, 64 Md. 439, 54 Am. Rep. 775.

In considering the rule that land formed upon the shore of the sea by accretion, if slow and "imperceptible," belongs to and is added to the estate of the owner of the shore line, the court said: "An accretion extremely minute, so minute as to be imperceptible even by known antecedent marks or limits at the end of 5 or 6 years, may become by gradual increase perceptible by such marks or limits at the end of a century, or even of 40 or 50 years; for it is to be remembered that if the limit on one side be land, or something growing or placed thereon, as a tree, a house, or a bank, the limit on the other side will be the sea, which rises to a height varying almost at every tide, and of which the variations do not depend merely upon the ordinary course of nature at fixed and ascertained periods, but depend also upon the strength and direction of the wind, which are different almost from day to day, and, considering the word 'imperceptible' in this issue as connected with the words 'slow and gradual,' we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time." *Rex v. Yarborough*, 3 Barn. & C. 19, 23.

#### IMPERFECT.

Not perfect; not complete in all its parts; wanting a part; defective; deficient. *Webst. Dict.*

#### IMPERFECT MORTGAGE.

Where a vendor holds the legal title under an unexecuted contract for the conveyance of the land upon the payment of the purchase money, the vendor's security is something stronger than a mortgage, because the legal title is retained as security. It has been called an imperfect or equitable mort-

gage, which is a more appropriate term than vendor's lien. In many of the best considered cases it is treated as if it had the similitude of a mortgage, subject to foreclosure in the same way as a mortgage is foreclosed. *Gessner v. Peimateer*, 26 Pac. 789, 790, 89 Cal. 89, 13 L. R. A. 187.

#### IMPERFECT OBLIGATION.

An imperfect obligation arises where the duty assumed by the contracting parties, respectively, to perform the stipulations of the contract, is a duty which is recognized and enforced by municipal law. *Barlow v. Greogory*, 31 Conn. 261, 265.

The term "imperfect obligation" is used to designate obligations which depend for their fulfillment upon the will and conscience of those upon whom they rest. *Edwards v. Kearzey*, 96 U. S. 595, 600, 24 L. Ed. 793.

If the duty created by the obligation operates only on the moral sense, without being enforced by any positive law, it is called an "imperfect obligation," and creates no right of action, nor has it any legal operation. The duty of exercising gratitude, charity, and the other merely moral duties is an example of this kind of obligation. Civ. Code La. 1900, art. 1757.

#### IMPERFECT OWNERSHIP.

Ownership is imperfect when it is to terminate at a certain time on a condition, or if the thing which is the object of it, being an immovable, is charged with any real right toward a third person, as a usufruct, use, or servitude. Civ. Code La. 1900, art. 490; *Maestri v. Board of Assessors*, 34 South. 658, 661, 110 La. 517.

#### IMPERFECT RIGHT OF SELF-DEFENSE.

It is said that the right of self-defense may be divided into two general classes, to wit, perfect and imperfect right of self-defense. A perfect right of self-defense can only be obtained where the party pleading it acted from necessity and was wholly free from wrong or blame. If, however, he was in the wrong, if he was himself violating or in the act of violating the law, but on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against attack superinduced or created by his own wrong, and regulates it according to the magnitude of his own wrong, such a state of the case may be said to illustrate and determine what in law would be denominated an "imperfect right of self-defense." *Wallace v. United States*, 18 Sup. Ct. 859, 863, 162 U. S. 466, 40 L. Ed. 1039.

#### IMPERFECT TITLE.

An imperfect title is one which requires a further exercise of the granting power to pass the fee in land, which does not convey full and absolute dominion, not only as against all private persons, but as against the government, and which may, consequently, be affirmed or disavowed by the political or granting authority. *Paschal v. Perez*, 7 Tex. 348, 367; *Same v. Dangerfield*, 37 Tex. 273, 300.

An imperfect title to land under the government is one where something remains to be done by the government or its officers in passing over an unrestricted right to the lands, and, until it receives the sanction of the political authority, cannot claim judicial cognizance. *Hancock v. McKinney*, 7 Tex. 384, 457.

#### IMPERFECT USUFRUCT.

Imperfect or quasi usufruct is that which is of things which would be useless to the usufructuary, if he did not consume or expend them, or change the substance of them, as money, grain, and liquors. Civ. Code La. 1900, art. 584.

#### IMPERFECT WAR.

The "imperfect war" is that which does not entirely destroy the public tranquillity, but interrupts it only in some particulars, as in the case of reprisals. *Miller v. The Resolution*, 2 U. S. (2 Dall.) 19, 21, 1 L. Ed. 271.

Every contention by force between two nations in external matters under authority of their respective governments is war. If it be declared in form, it is called "solemn," and is of the perfect kind, because one whole nation is at war with another whole nation, and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other in every place and under every circumstance. In such a war all the members act under general authority, and all the rights and consequences of war attach to their condition. But hostilities may exist between two nations, more confined in nature and extent, being limited as to places, persons, and things; and this is more properly termed "imperfect war," because not solemn, and because those who are authorized to commit hostilities act under special authority and can go no further than the extent of their commission. Still, however, it is a public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. *Bas v. Tingy*, 4 U. S. (4 Dall.) 37, 42, 1 L. Ed. 731.

## IMPERIAL

The primary signification of "imperial" was "pertaining to supreme authority; royal; sovereign; supreme." It had like meaning with the adjectives "royal," "kingly," "princely," indicating, however, a more exalted authority. Like those terms, it has also come to be employed to designate that which is of imposing size or of great excellence. The *Imperial*, *Encyclopædic*, *Standard*, *Century*, and *Webster's Dictionaries* also give one definition of the term as "of superior size or quality." One illustration given in the *Standard Dictionary* is "Imperial tea," indicating a tea of superior excellence, or tea fit for an emperor. So one speaks of a dinner as a "royal," "kingly," "princely," "lordly," or "imperial" feast, to indicate its great excellence or quality. The word is so far the designation of quality as to be incapable of adoption as a trade-mark for beer. *Beadleston & Woerz v. Cook Brewing Co.* (U. S.) 74 Fed. 229, 232, 20 C. C. A. 405.

## IMPERIOUS NECESSITY.

The fact that the traffic on one railroad is so great that the crossings of such railroad across another are not sufficient to enable the former to quickly move its cars across the latter does not constitute such an "imperious necessity," within Act June 19, 1871, as would entitle the former company to additional grade crossings on the latter. *Chester Traction Co. v. Philadelphia, W. & B. R. Co.*, 41 Atl. 449, 451, 188 Pa. 105, 44 L. R. A. 269.

## IMPERTINENCE—IMPERTINENT.

Impertinence is described by Lord Chief Baron Gilbert to be where the records of the court are stuffed with long recitals or any digressions of the matter of fact which are altogether unnecessary and totally immaterial to the matter in hand. *Harrison v. Perea*, 18 Sup. Ct. 129, 132, 168 U. S. 311, 42 L. Ed. 478 (citing 1 Daniell, Ch. Prac. [5th Am. Ed.] marg. p. 349).

The complainant may state any matter of evidence in the bill, or any collateral fact, the admission of which by the defendant may be material in establishing the general allegations of the bill as a pleading, or in ascertaining or determining the nature or extent, or the kind of relief to which the complainant may be entitled, consistently with the case made by the bill, or which may legally influence the court in determining the question of costs; and where any allegation or statement contained in the bill will thus affect the decision of the cause, if admitted by the defendant or established by proof, it is relevant, and cannot be except-

ed to as impertinent. *Camden & A. R. & Transp. Co. v. Stewart*, 21 N. J. Eq. (6 C. E. Green) 484, 485; *Wilkinson v. Dodd*, 7 Atl. 327, 331, 42 N. J. Eq. (15 Stew.) 234.

"Impertinence" consists in setting forth what is not necessary to be set forth. An answer or a bill ought not ordinarily to set forth deeds in full, but only so much thereof as is material to the point in question. *Hood v. Inman* (N. Y.) 4 Johns. Ch. 437, 438.

An answer ought not to go outside of the bill and state what is not material or relevant to the case stated in the bill. Long recitals, stories, conversations, and insinuations tending to scandal are impertinent. So facts not material to the decision are impertinent, and, if reproachful, are scandalous. *Woods v. Morrell* (N. Y.) 1 Johns. Ch. 103, 106; *Hutchinson v. Van Voorhis*, 35 Atl. 371, 373, 54 N. J. Eq. 439.

Perhaps the best test by which to ascertain whether the matter be impertinent is to try whether the subject of the allegation could be put in issue and would be matter proper to be given in evidence between the parties. *Woods v. Morrell* (N. Y.) 1 Johns. Ch. 103, 106; *Wilmington & W. R. Co. v. Board of Railroad Com'rs* (U. S.) 90 Fed. 33, 34; *Harrison v. Perea*, 18 Sup. Ct. 129, 132, 168 U. S. 311, 42 L. Ed. 478; *Wilkinson v. Dodd*, 7 Atl. 327, 331, 42 N. J. Eq. (15 Stew.) 234.

"Impertinences are any matters not pertinent or relevant to the points which, in the particular stage of the proceedings in which the cause then is, can properly come before the court for decision. If the cause is at issue on a general answer purporting to be to the merits, any matter not going to the merits is properly to be deemed an impertinence." *Wood v. Mann* (U. S.) 30 Fed. Cas. 447, 451; *Harrison v. Perea*, 18 Sup. Ct. 129, 132, 168 U. S. 311, 42 L. Ed. 478.

Matters in a bill are impertinent when they do not affect or concern the issues involved, when they cannot be sustained by proof which would be relevant, or when no evidence with regard to them would be either necessary or proper. It is said that the word "impertinent," by the ancient juriconsults or law counselors, who gave their opinions on cases, was used merely in opposition to "pertinent." "If a matter," says Walworth, Ch., "can have any influence whatever in the decision of the suit, either as to the subject-matter of the controversy, the relief to be sought, or as to the costs, it is not impertinent." *Wilmington & W. R. Co. v. Board of Railroad Com'rs* (U. S.) 90 Fed. 33, 34 (citing *Van Rensselaer v. Brice* [N. Y.] 4 Paige, 174).

"Impertinence" is the same description of fault in pleadings in equity which in those



at common law is denominated "surplusage." A matter claimed to be impertinent must be considered in relation to the cause of action or defense attempted to be set up. The question is, assuming the cause of action or defense good, is the matter claimed to be impertinent relevant to it? If it is, then the exception must be overruled. *Stokes v. Farnsworth* (U. S.) 99 Fed. 836, 838.

An impertinent fact is one which, whether proven or not, or whether admitted or denied, can have no influence in leading to a result. *Bromberg v. Bates*, 13 South. 557, 560, 98 Ala. 621.

Impertinence, in equity, consists in any allegation that is irrelevant to the material issues made or tendered. *Kelley v. Boettcher* (U. S.) 85 Fed. 55, 58, 29 C. C. A. 14.

## IMPLEAD.

The word "implead" is defined by Bouvier to mean "to sue or prosecute by due course of law." St. 1801 provides that "the people will not sue or implead any person for or in respect to any lands" by reason of any right acquired "40 years before any suit or such proceeding for the same be commenced." Held that, admitting that the term "implead" applies to a suit or proceeding at law more properly than to a proceeding in equity, yet that would not be a sufficient reason to defeat its operation against an equitable action brought to vacate letters patent, since the statute speaks also of "proceeding," which is a more general and comprehensive term than "suit" or "implead," and must include such an action. *People v. Clarke*, 9 N. Y. (5 Seld.) 349, 368.

## IMPLEMENT.

See "Gambling Implement"; "Mechanical Implements."

An exemption statute, providing that the "implements of the debtor's trade" shall be exempt from execution, means the tools of a mechanic carrying on his business. To come within this class the debtor must be a mechanic in contradistinction to a manufacturer, and the implements must be tools in contradistinction to machinery, and the trade must consist in the production of articles for the supply of the neighborhood or particular customers in contradistinction to such as are intended for sale in the market. *Atwood v. De Forest*, 19 Conn. 513, 517; *Seeley v. Gwillim*, 40 Conn. 106.

"Tools and implements," within the meaning of the statute exempting from execution the tools and implements of a debtor, include various machines for making boots, owned by the debtor and used in his shop,

although he employs four or five men to help him. *Daniels v. Hayward*, 87 Mass. (5 Allen) 43, 44, 81 Am. Dec. 731.

The words "goods, wares, chattels, implements, fixtures, tools, and other personal property," in a chattel mortgage so describing the mortgaged property, is insufficient in failing to identify any particular property so that it can be known as to what it is intended to apply. *Buskirk v. Cleveland* (N. Y.) 41 Barb. 610, 611.

### Binding twine.

In an insurance policy covering goods for sale at a general implement store, the word "implement" is sufficient to cover binding twine, since "implement" is defined to be that which fulfills or supplies a want or use, and has an especial application to an instrument, tool, or utensil, as supplying a requisite to an end. *Davis v. Anchor Mut. Fire Ins. Co.*, 64 N. W. 687, 688, 96 Iowa, 70.

### Boxes.

"Implements," are things necessary to any trade, without which the work cannot be performed; and hence the implements incident to the manufacture of gloves will not be held to include stationery and empty boxes, so that a submission to arbitrators of the loss under insurance policy to the implements of the manufacturer does not include a submission of loss to stationery and empty boxes. *Stemmer v. Scottish Union & National Ins. Co.*, 53 Pac. 498, 504, 33 Or. 65.

### Farm tools and machinery.

"Implements and tools," within the meaning of exemption statutes exempting such tools and implements when necessary to carry on the debtor's business, includes a logging capstan and cable and tools used in logging by one engaged as a farmer, if necessary to be used in clearing and improving his farm. *State v. Creech*, 51 Pac. 863, 18 Wash. 186.

### Horse and wagon.

"Implements of trade," as used in an exemption statute (Rev. St. c. 60, p. 377, § 20, subd. 6), declaring that the implements of trade of a mechanic shall be exempt, does not include a horse, since it cannot be said that a horse is an implement of trade of a mechanic. *Wallace v. Collins*, 5 Ark. 41, 46, 39 Am. Dec. 359.

A wagon is not included under Act 1842, exempting from execution the "tools and implements of any mechanic, necessary to the carrying on of his trade." *Morse v. Keyes* (N. Y.) 6 How. Prac. 18, 21.

The terms "tools, implements, materials, stock, or fixtures," necessary for carrying on a debtor's business, which are exempted from

execution in the statute, do not include a wagon, with patent couplings attached, used by the owner in carrying on his business of selling patent couplings. *Gibson v. Gibbs*, 75 Mass. (9 Gray) 62.

#### **Lamp, etc., of jeweler.**

The lamp and other articles kept by a watchmaker and jeweler, if necessary for his use in carrying on the business of making and repairing watches and jewelry, are exempt, under Gen. St. pp. 473, 474, § 3, providing that the necessary tools and implements of any person, kept and used for the purpose of carrying on his trade or business, shall be exempt from execution, etc. *Bequillard v. Bartlett*, 19 Kan. 382, 386, 27 Am. Rep. 120.

#### **Musical instruments.**

The term "implements," in Gen. St. c. 133, § 32, exempting from attachment the implements of a debtor necessary for carrying on his trade or business, and not exceeding \$100 in value, includes a violin and bow of a debtor, whose sole business is that of a musician, and who obtains most of his support by playing on the violin. *Goddard v. Chaffee*, 84 Mass. (2 Allen) 395, 79 Am. Dec. 796.

An implement of business is any implement necessary to the usual occupation of a person, and may include a piano owned and used by a person whose only means of support was the occupation of a music teacher. *Amend v. Murphy*, 69 Ill. 337, 339.

#### **Photographic lens.**

"Implements of trade," as used in Gen. St. § 1164, providing that the "implements of the debtor's trade" shall be exempt from execution, should be construed to include the photographic lens belonging to a photographer and used by him in his business. *Davidson v. Hannon*, 84 Atl. 1050, 67 Conn. 312, 84 L. R. A. 718, 52 Am. St. Rep. 282.

#### **Printing press and material.**

Exemption Act (Comp. Laws 1879, c. 38) § 3, subd. 8, provided that necessary tools and implements of any mechanic or other person, used and kept for the purpose of carrying on his trade or business, shall be exempt. It was held that, though the word "tools" alone, as held in *Buckingham v. Billings*, 13 Mass. 82, *Danforth v. Woodward*, 27 Mass. (10 Pick.) 423, 20 Am. Dec. 531, and *Spooner v. Fletcher*, 3 Vt. 133, 21 Am. Dec. 579, did not include a printing press and printing materials, such press and materials were clearly within the meaning of "implements," as the term was used to extend the term "tools" in the statute. *Bliss v. Vedder*, 7 Pac. 599, 601, 84 Kan. 57.

Comp. Laws 1879, p. 437, c. 38, § 3, providing that every person, residing in the state and being the head of a family, should have exempt from seizure and sale in attachment, execution, or other process, issued from any court in the state, inter alia, the necessary tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, should be construed to include a job printing press, used and kept by a person for the purpose of carrying on his trade or business as a job printer, for it might be as much a necessary tool or implement of such a person as an ax to a carpenter or an anvil to a blacksmith. The term "implements" is not to be confined to such implements only as are used by the hand of one man. *Jenkins v. McNall*, 27 Kan. 532, 533, 41 Am. Rep. 422.

"Implements or tools of trade," within the meaning of a statute exempting all implements or tools of trade from execution, includes the press and type of a practical printer, which are necessarily used by him and his journeymen in the publication of a weekly newspaper. *Sallee v. Waters*, 17 Ala. 482, 486.

#### **Safe.**

An iron safe of moderate value, kept in a silk mill and used for keeping the books and money of the establishment, is an "implement," within the meaning of Gen. St. § 3016, which secures the title of the mortgagee, notwithstanding the retention of possession by the mortgagor, under a recorded mortgage of any manufacturing establishment, together with the machinery, engines, or implements situated or used therein. In *Cowell's Interpreter*, the term "implements" is defined as signifying things tending to the necessary use of any trade, or furniture of household; and *Bouvier's Law Dictionary* gives it as meaning such things as are used or employed for a trade or furniture of a house. *Talcott v. Meigs*, 29 Atl. 131, 64 Conn. 55.

As used in Code Civ. Proc. § 690, subd. 4, exempting from execution tools or implements of a mechanic or artisan, necessary to carry on his trade, it includes a safe used by a jeweler and watch repairer. In *re McManus' Estate*, 25 Pac. 418, 87 Cal. 292, 10 L. R. A. 567, 22 Am. St. Rep. 250.

#### **Sewing machine.**

The terms, "tools, implements, and fixtures," in Gen. St. c. 133, § 32, exempting tools, implements, and fixtures from execution, includes a sewing machine. *Rayner v. Whicher*, 88 Mass. (6 Allen) 292, 294.

#### **Stock of goods, etc., of grocer.**

The tools or implements, materials, stock, and fixtures of a debtor necessary for carry-

ing on his trade or occupation, which are exempted from execution by St. 1855, c. 264, do not include the stock of goods, scales, and measures, horse, wagon, and harness of a shopkeeper in the country. The clause in this section which exempts from attachment the tools and implements of the debtor has never been so construed as to embrace that class of persons who are engaged merely in the business of buying and selling articles of merchandise. On the contrary, it has always been considered as having been intended specially for the benefit of those to whom, on account of their peculiar pursuits and avocations, tools and implements are essential to make their labor available and to enable them to complete the work which they undertake to perform. *Wilson v. Elliot*, 73 Mass. (7 Gray) 69, 70.

#### **Towline.**

"Implement of business," as used in a statute exempting from execution implements of business, includes a canal boatman's towline, though it is new and has never been used. *Fields v. Moul* (N. Y.) 15 Abb. Prac. 6.

#### **Trade fixtures and furniture.**

Articles necessary in carrying on a mercantile business are not "tools and implements," within Pub. St. c. 171, § 34, cl. 5, so as to be exempt from taxation under such statute. *Desmond v. Young*, 53 N. E. 151, 173 Mass. 90.

"Tools, implements, and fixtures," within the meaning of a statute exempting from execution tools, implements, and fixtures necessary for carrying on the trade or business of a debtor, includes a clock, stove, screen, pitcher, and table cover belonging to a milliner, if the jury find them necessary for carrying on the business. *Woods v. Keyes*, 96 Mass. (14 Allen) 236, 237, 92 Am. Dec. 766.

#### **Trained snakes.**

"Implements, instruments, and tools of trade, occupation, or employment," as used in Tariff Act Oct. 1, 1890, par. 686, includes trained snakes, imported by a professional snake charmer, to be used in exhibition of skill in that profession, and which were not for sale. *Magnon v. United States* (U. S.) 66 Fed. 151, 152.

#### **Turning lathe.**

"Tools or implements," within the meaning of Code Civ. Proc. § 690, subd. 4, exempting from execution the tools or implements of a mechanic necessary to carry on his trade, includes a turning lathe, which is easily turned by one man, and such as is ordinarily used by mechanics. In re *Robb*, 33 Pac. 890, 99 Cal. 202, 37 Am. St. Rep. 48.

### **IMPLEMENTS OF HUSBANDRY.**

All other implements of husbandry, see "All other."

"Implements and utensils of husbandry," exempt to a farmer by Code Civ. Proc. § 690, are not confined to the tools used by the debtor in any one branch of farming, but exempt all his necessary tools used in diversified farming. In re *Slade's Estate*, 55 Pac. 158, 159, 122 Cal. 434.

A threshing machine or a threshing outfit is an "implement of husbandry," as used in Code Civ. Proc. § 690, cl. 3, exempting farming utensils and husbandry from execution. *Spence v. Smith*, 121 Cal. 536, 53 Pac. 653, 66 Am. St. Rep. 62.

"Implements or utensils of husbandry," within the meaning of Code Civ. Proc. § 690, exempting utensils or implements of husbandry of farmers from execution, includes a combined harvester, regardless of its value. In re *Klemp's Estate*, 50 Pac. 1062, 119 Cal. 41, 39 L. R. A. 840, 63 Am. St. Rep. 69.

"Implements of husbandry," within the meaning of an exemption statute exempting all implements of husbandry used upon the homestead, does not include a well drill and a derrick, which is used for hire and only occasionally used on the farm. The term only includes such implements as are required or used by the farmer in conducting his own farming operations. *Nelson v. Fightmaster*, 44 Pac. 213, 214, 4 Okl. 88.

A steam engine, used exclusively for working a threshing machine, belonging to the same owner and passing a turnpike gate at the same time with the threshing machine, but in a separate cart, is an "implement of husbandry," within the meaning of St. 3 Geo. IV, c. 126, § 32, exempting implements of husbandry from toll, and St. 14 & 15 Vict. c. 38, § 14, declaring that such former statute shall be deemed to include threshing machines, although such steam engine is capable of being applied to other purposes. *Reg. v. Maltby*, 8 Ellis & B. 712, 715.

### **IMPLICATION.**

See "Necessary Implication"; "Repeal by Implication."

The implication or inference which may arise in the construction of statutes is of something not expressly declared, but arises out of that which is directly or expressly declared therein. *Conn v. Board of Com'rs of Cass County*, 51 N. E. 1062, 1064, 151 Ind. 517; In re *City of Buffalo*, 68 N. Y. 167, 173; *Sullivan v. Oregon Ry. & Nav. Co.*, 24 Pac. 408, 409, 19 Or. 319.

"Where a statute looking beyond the question of revenue inflicts a penalty for do-

ing an act, though that act be not in terms prohibited, yet it is unlawful, for the penalty implies a prohibition." In re City of Buffalo, 68 N. Y. 167, 173.

Where a statute prescribes as a precautionary measure what shall be deemed a sufficient fence to protect a railroad track from the entrance of live stock, and declares an absolute liability for the killing of stock for the failure to fence, or for killing stock on an unfenced track, except for contributory negligence or misconduct, imposes by implication the duty to fence as much as if such duty was expressly declared. Sullivan v. Oregon Ry. & Nav. Co., 24 Pac. 408, 409, 19 Or. 319.

It is a maxim which applies here, as well as in England, that an heir at law can only be disinherited by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed. Bender v. Dietrick (Pa.) 7 Watts & S. 284, 287; Rupp v. Eberly, 79 Pa. (29 P. F. Smith) 141, 144.

#### IMPLICATION OF LAW.

By "grants or reservations by implication of law" is meant such as the law implies from the circumstances, and which are not found by construction in a contract. The familiar instance of a reservation by implication of law is a way of necessity. Adams v. Marshall, 188 Mass. 228, 236, 52 Am. Rep. 271.

#### IMPLIED.

Express distinguished, see "Express."

#### IMPLIED ACCEPTANCE.

An "implied acceptance," as the term is used in speaking of the implied acceptance of a street or highway, arises in cases where the public authorities have done acts recognizing the existence of a public highway, and treated it as one of the public ways of a locality. When control of a way is assumed by the authorities representing a public corporation, the acceptance will be implied. Stewart v. Conley, 27 South. 803, 805, 122 Ala. 179.

#### IMPLIED AGREEMENT.

An implied agreement is one where the conduct of the parties with reference to the subject-matter is such as to induce the belief that they intended to do that which their acts indicate they have done. Cuneo v. De Cuneo, 59 S. W. 284, 285, 24 Tex. Civ. App. 436.

It is sometimes said that the law implies an agreement. Strictly speaking this

is inaccurate. The agreement, though not fully expressed in words, is nevertheless a genuine agreement of the parties. It is implied only in this: that it is to be inferred from the acts or conduct of the parties, instead of from their spoken words. The engagement is signified by conduct, instead of words; but acts intended to lead to a certain inference may express a promise as well as words would have done. Bixby v. Moor, 51 N. H. 402, 403; Rohr v. Baker, 10 Pac. 627, 13 Or. 350.

#### IMPLIED ASSUMPSIT.

"Implied assumpsit" is an undertaking presumed in law to have been made by a party by his conduct, though he has not made an express promise. The law implies a promise or contract to do that which a party is legally bound to perform, and where by law a duty is imposed a promise will be implied. Willenborg v. Illinois Cent. R. Co., 11 Ill. App. (11 Bradw.) 298, 302.

#### IMPLIED CONDITION.

An "implied condition," or a condition in law, is one which the law implies either from its being always understood to be annexed to certain estates or as annexed to estates held under certain circumstances. Raley v. County of Umatilla, 13 Pac. 890, 894, 15 Or. 172, 3 Am. St. Rep. 142.

#### IMPLIED CONFESSION.

In 2 Hawk. P. C. p. 469, it is said that an implied confession arises where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy and desiring to submit to a small fine, in which case, if the court think fit to accept of such submission, and make an entry that the defendant "posuit se in gratiam regis," without putting him to a direct confession or plea, the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall be where the entry is "quod cognovit indictamentum." Perhaps the only difference between this plea, where it is received, and the plea of guilty, is that while the latter is a solemn confession, which may bind the defendant in other proceedings, the former is held to be a confession only for the purpose of the particular case. State v. Conway, 38 Atl. 656, 657, 20 R. I. 270 (citing 1 Bish. Cr. Proc. § 469; Buck v. Commonwealth, 107 Pa. 489).

#### IMPLIED CONSENT.

"Implied consent" is defined to be that manifested by signs, actions, or facts, or by inaction or silence, which raises a presump-

tion that the consent has been given. *Cowen v. Paddock*, 17 N. Y. Supp. 387, 388.

### IMPLIED CONTRACT.

Implied contracts are such as reason and justice dictate, and which the law, therefore, presumes that every man undertakes to perform. *Wickham v. Well*, 17 N. Y. Supp. 518 (citing 2 Bl. Comm. 443); *McSorley v. Faulkner*, 18 N. Y. Supp. 460; *People v. Bennett* (N. Y.) 6 Abb. Prac. 843, 848; *Hawkes v. Taylor*, 51 N. E. 611, 613, 175 Ill. 344; *Thompson v. Woodruff*, 47 Tenn. (7 Cold.) 401, 410; *Deane v. Hodge*, 27 N. W. 917, 919, 35 Minn. 146, 59 Am. Rep. 321; *Wyoming Nat. Bank v. Brown*, 53 Pac. 291, 292, 7 Wyo. 494, 75 Am. St. Rep. 935; *Hamilton v. Winterrowd*, 43 Ind. 393, 396; *Day v. Connecticut Gen. Life Ins. Co.*, 45 Conn. 480, 490, 29 Am. Rep. 693; *Nolan v. Swift*, 111 Mich. 56, 60, 69 N. W. 96-98.

An implied contract is one the existence and terms of which are manifested by conduct. Rev. Codes N. D. 1899, § 3884; Civ. Code S. D. 1903, § 1235; Civ. Code Cal. 1903, § 1621; Rev. St. Okl. 1903, § 777.

"Implied contracts" are such as reason and justice dictate, and which the law presumes from the relations and circumstances of the parties. *Appeal of Miller*, 100 Pa. 568, 570, 45 Am. Rep. 394.

An implied contract is one which the law creates from the conduct and relations of the parties, in the absence of an agreement by them. *Armstrong v. Cleveland* (Tex.) 74 S. W. 789.

"Implied contracts" are those which the law raises or presumes by reason of some value or service rendered, and because common justice requires it. As a general principle it may be stated that one who knowingly takes the benefit of the service of another or the use of his property, not under an express contract or engagement, impliedly promises to make reasonable compensation. *Brush Electric Light & Power Co. v. City Council of Montgomery*, 114 Ala. 433, 446, 21 South. 960.

An implied contract is one which, though not expressly made by the parties, is made by the law, where it, enforcing a sound morality and a wise public policy, acting on principles of equity and justice, imposes on a party an obligation to pay or to discharge a duty. *Gutta Percha & Rubber Mfg. Co. v. City of Houston*, 15 N. E. 402, 403, 108 N. Y. 276, 2 Am. St. Rep. 412.

"Contracts which are proved by the declarations and conduct of the parties and other circumstances, all of which are explainable only on the theory of a mutual agreement, are often called, though not with entire accuracy, 'implied contracts,' and this

definition will explain the ambiguity of some authorities and the apparent contrariety of others. All of the authorities, however, seem to agree that in suits for compensation for services, where a family relation is conceded to exist, an actual contract must be clearly proven. Such a contract may be in writing, or it may rest entirely in parol; but it must nevertheless be a contract, and in our opinion it is a misnomer to denominate it an 'implied contract.' It does not arise from, nor is it aided by, implication, but must be strictly proved. *Hinkle v. Sage*, 65 N. E. 999, 1001, 67 Ohio St. 256.

In implied contracts the parties have capacity to contract, and facts and circumstances, few or many, clear or complicated, exist which lead the minds of the jurors to the conclusion that the minds of the parties met. Minds may meet by words, acts, or both. The words, even, may negative such meeting; but actions, which speak louder than words, may conclude him who denies a tacit contract. *Sceva v. True*, 53 N. H. 627, 628.

"An implied contract is one which the law infers from the facts and circumstances of a case, but it will not be inferred in any case where an express contract would for any reason be invalid." *Chase v. Second Ave. R. Co.*, 97 N. Y. 384, 388, 49 Am. Rep. 531.

### Consent required.

An "implied contract" is created by law to establish justice between parties. It does not require mutual assent, but may bind the party against his will. *Adams v. Hilliard*, 14 N. Y. Supp. 120, 122, 59 Hun. 626.

Neither an express contract nor one by implication can come into existence unless the parties sustain contract relations, and the difference between the two forms consists in the mode of substantiation and not in the nature of the thing itself. To constitute either one, the parties must occupy toward each other a contract status, and there must be that connection, mutuality of will, and interaction of parties generally expressed, though not very clearly, by the term "privity." Without this a contract by implication is quite impossible. *Woods v. Ayres*, 39 Mich. 345, 350, 33 Am. Rep. 396.

Bishop, in his work on Contracts, says: "The word 'contract,' which as a question of fact, not of law, is implied, does not differ from an express one, except in form of proof. All true contracts grow out of the mutual intention of the parties; and if in a particular instance there is evidence arising from the situation, conduct, or family relationship of the parties, tending to show that the service was rendered without expectation of any payment, or without other payment than such as was received as the service progressed, it cannot be said as a mat-

ter of law that a contract is implied on the part of the defendant to pay for such services." *Saunders v. Saunders*, 88 Atl. 172, 174, 90 Me. 284 (citing *Cole v. Clark*, 85 Me. 336, 27 Atl. 186, 21 L. R. A. 714).

#### Express contracts compared.

An implied contract is a matter of inference or deduction. It creates an obligation akin to duty, and differs from an express contract, which is one whose terms are stated in parol or in writing. *Pence v. Beckman*, 39 N. E. 169, 170, 11 Ind. App. 263, 54 Am. St. Rep. 505.

"An express contract is one to which the minds of the parties have assented, while implied contracts are those implied by law from the facts and circumstances of the transaction, although they are even against the consent of the party to be bound. The distinction between an express contract and an implied one is that in one the liability arises directly from the contract, while in the other the contract is implied, or arises from the liability." *Musgrove v. City of Jackson*, 59 Miss. 390, 392.

Contracts that are true contracts are frequently termed "implied contracts," as where from the facts and circumstances a court or jury may fairly infer as a matter of fact that a contract exists between the parties, explanatory of the relation existing between them. Such implied contracts are not generally different from express contracts. The difference exists simply in the mode of proof. Express contracts are proved by showing that the terms were expressly agreed upon between the parties, while in the other case the terms are inferred as a matter of fact from the evidence offered by circumstances surrounding the parties, making it reasonable that a contract existed between them by tacit understanding. In such cases no fictions are or can be indulged. *Columbus, H. V. & T. Ry. Co. v. Gaffney*, 61 N. E. 152, 153, 65 Ohio St. 104.

Distinguishing between express and implied contracts, it has been said: "In one case the language of the contract is in terms used, and because of the expressions used the contract is called an 'express contract'; whereas in the other case the contract is established by the conduct of the parties, viewed in the light of surrounding circumstances, and is called a 'contract implied in fact.'" A party performing services that should have been performed by another, and without any expectation of compensation, or without any intention of claiming any pay for his services, cannot show an implied contract. *Columbus, H. V. & T. Ry. Co. v. Gaffney*, 61 N. E. 152, 153, 65 Ohio St. 104 (quoting *Keener*, *Quasi Contracts*, c. 1).

An express contract is one where a bargain has been made by the two parties cover-

ing the subject in question, and an implied contract is one without such bargain, as, where a man obtains goods from another upon credit without fixing the price, then the law holds that the party who sold the goods shall be paid a fair, honest compensation for them. *Coffroth v. Somerset County*, 19 Pa. Co. Ct. R. 354, 358.

#### As implied in fact.

"The term 'implied contract' is generally used to denote a promise which the law, from the existence of certain facts, presumes that a party has made." *Davis v. Town of Seymour*, 21 Atl. 1004, 1005, 59 Conn. 531, 13 L. R. A. 210 (quoting 1 Swift, Dig. p. 182).

An implied contract is one the existence and terms of which are manifested by conduct, or, in the language of a learned writer, "is inferred from the context, situation, or mutual relation of the parties, and enforced by the law on the grounds of justice." *Jennings v. Bank of California*, 21 Pac. 352, 353, 79 Cal. 323, 5 L. R. A. 233, 12 Am. St. Rep. 145.

All true contracts grow out of the intention of the parties to transactions, and where this intention may be inferred, implied, or presumed from circumstances really existing, the contract thus ascertained is implied. They are sometimes called "quasi contracts" and "constructive contracts." *Columbus, H. V. & T. Ry. Co. v. Gaffney*, 61 N. E. 152, 153, 65 Ohio St. 104.

Where the evidence fails to disclose an express agreement or understanding, the law may imply a contract from the circumstances or the acts of the parties, and where there is nothing from which a contrary intention or understanding is to be inferred it is a just and reasonable presumption that he who has received the benefit of the services and property of another impliedly undertakes to make compensation therefor. *Deane v. Hodge*, 27 N. W. 917, 919, 59 Am. Rep. 321, 35 Minn. 146 (citing 3 Bl. Comm. 158; 2 Kent, Comm. 450; *Bouv. Law Dict.*; 2 *Greenl. Ev.* § 108).

"It is sometimes said that the law implies a contract. Strictly speaking this is inaccurate. The contract, though not fully expressed in words, is nevertheless a genuine agreement of the parties. It is implied only in that it is to be inferred from the acts or conduct of the parties, instead of from their spoken words. The engagement is signified by conduct instead of words; but acts tending to lead to a certain inference may express a promise as well as words." *Blxby v. Moor*, 51 N. H. 403 (cited in *Rohr v. Baker*, 10 Pac. 627, 13 Or. 350).

An implied contract respecting any matter can exist only where there is no express one. *King v. Kilbride*, 19 Atl. 519, 520, 58 Conn. 109 (citing 1 Chit. Cont. [11th Am.

Ed.] 89); *Weinhouse v. Cronin*, 36 Atl. 45, 68 Conn. 250; *Brown v. Fales*, 29 N. E. 211, 213, 139 Mass. 21; *Musgrove v. City of Jackson*, 59 Miss. 390, 392.

#### As implied in law.

An implied contract arises where the terms are not expressed between the contracting parties, but the obligations of natural justice, by reason of some legal liability, impose the payment of money, or the performance of some duty, and raise a promise to that effect. In such case, as the law creates the duty, it also provides the exception, or, if the party be disabled from performance without his own default, his obligation is discharged. *Linn v. Ross*, 10 Ohio, 412, 414, 36 Am. Dec. 95.

Implied contracts are based on a familiar principle that a contract is co-ordinate and commensurate with duty, which has a wide, though much more uniform, application, and means that whatsoever it is certain a man ought to do that the law supposes him to have promised to do. The absence of the essentials of the ordinary contract relation will not affect the liability. There is a class of cases where the law prescribes rights and liabilities of parties who have not in reality entered into any contract with one another, but between whom circumstances have arisen which make it just that one should have a right and the other should be subject to a liability, similar to the rights and liabilities in certain cases of express contracts. Implied or constructive contracts of this nature are similar to constructive trusts in courts of equity, and in fact are not contracts at all. A somewhat similar distinction is recognized in the civil law, where it is said: "In contracts, it is the consent of the contracting parties which produces the obligation; in quasi contracts there is not any consent. The law alone, or natural equity, produces the obligation by rendering obligatory the fact from which it results. Therefore these facts are called 'quasi contracts,' because, without being contracts, they produce obligations in the same manner as actual contracts." 1 Poth. Oblig. 113. So obligations are created in consequence of fraud or negligence, and in either case the law compels reparation, and permits the tort to be waived and the obligation enforced as of a contract. *People v. Speir*, 77 N. Y. 144, 150; *McSorley v. Faulkner*, 18 N. Y. Supp. 460, 462.

There has been some inaccuracy in the use of this phrase. If it is applied only to cases in which parties enter into a real contract, but without express words, then it is accurately used. Thus, if A. borrows money of B., he really agrees to repay it, though he does not expressly say so. But, in case of money lost on a wager, there is no contract to repay the money, either express or

implied, and to call the liability an "implied contract" gives an incorrect idea of the nature of the liability. Such use of the phrase probably arose under the old forms of pleading, when the action of assumpsit was found to be useful. It was necessary in that action to allege a promise, but the action often lay in cases where no promise in fact had been made. The civil law writers found difficulty in attempting to classify actions into those *ex contractu* and those *ex delicto*. Therefore they made two other classes, viz., quasi *ex contractu* and quasi *ex delicto*. Thus they said that an action to recover money paid by mistake was quasi *ex contractu*; for the party was so far from being bound by a contract that he was bound rather *ex distractu* than *ex contractu*, because the money paid was rather to dissolve than to form a contract. Just. Inst. bk. 3, tit. 27, § 6. Similarly, in the case of the wager, the defendant made no contract to pay the plaintiff the money demanded. The actual contract between the parties, even if valid, would not be that which the plaintiff seeks to enforce in an action to recover the money. He claims that the defendant has money of his, which in justice and good conscience the defendant should return. The right of action is not unlike the action to recover money paid by mistake. In each money is paid voluntarily, in each it is unjust for the defendant to retain that which he has received, and in neither has he agreed to return it. We might, then, class this as an action quasi *ex contractu*, for there is no agreement to return the money, which would give an action *ex contractu*, and, on the other hand, possession of the money was not obtained by force or fraud, and thus, the action is not strictly *ex delicto*. Implied contracts are therefore the better described as quasi contracts. *Willard v. Doran & Wright Co.*, 1 N. Y. Supp. 588, 48 Hun, 402.

Within the provisions of 24 Stat. 505, permitting a recovery against the United States for a claim founded upon any contract, expressed or implied, with the government of the United States, the term "implied contract" was not intended to include mere breaches of duty productive of injury to the licensee upon property of the government, such as an action for injury in an elevator used in a building of the government. *Bigby v. United States* (U. S.) 103 Fed. 597, 599.

Implied contracts are contracts created by the law to establish justice between the parties, which imposes upon a party against his will an obligation to pay a debt or discharge a duty. In *O'Brien v. Young*, 95 N. Y. 428, 432, 47 Am. Rep. 64, Judge Earl says: "A man ought to support his helpless children, and hence the law implies a promise that he will do so. So one ought to pay a

judgment rendered against him or a penalty which he has by his misconduct incurred, and hence the law implies a promise that he will pay." A judgment awarding alimony gives rise to an implied contract on the part of the husband to pay such alimony. *Grevell v. Whiteman*, 65 N. Y. Supp. 974, 975, 32 Misc. Rep. 279.

An implied contract to pay interest at the rate fixed by law at the time judgment is entered does not arise from every agreement as an implied condition of the breach of the contract, but such an agreement rather gives rise to an implied contract to pay interest on the judgment rendered for a breach thereof at all times at the rate provided by law at such various times. *Wyoming Nat. Bank v. Brown*, 53 Pac. 291, 292, 7 Wyo. 494, 75 Am. St. Rep. 935.

#### **As quasi contract.**

What is often termed an "implied contract," though it is more properly denominated a "quasi contract," is matter of law. 1 Swift, Dig. p. 175. Such a contract rests merely on construction of law. It is one which the law, from the existence of facts, presumes the party had made. *Brackett v. Norton*, 4 Conn. 517, 524, 10 Am. Dec. 179. A true implied contract, on the other hand, is one which may be inferred from the conduct of the parties, though not expressed in words. *Weinhouse v. Cronin*, 86 Atl. 45, 68 Conn. 250.

#### **Statutory liability.**

An implied contract is an express promise proved by circumstantial evidence. It is quite distinct from that fiction by which a statute liability has been deemed sufficient to sustain an action of assumpsit upon the ground that the party subjecting himself to the penalty or other liability imposed by the statute has promised to pay it. This feature does not suppose a contract, but simply a promise ex parte. In this view every man promises not to trespass on his neighbor's property or commit an assault upon his person. *McCoun v. New York Cent. & H. R. Co.*, 50 N. Y. 176, 180.

#### **IMPLIED CORPORATION.**

An implied corporation arises "where there is a grant of such corporate powers as necessarily imply either the existence of, or the intention to create, a corporation." *Warner v. Beers* (N. Y.) 23 Wend. 103, 176.

#### **IMPLIED COVENANT.**

Implied covenants are those inferred by legal construction from the use of certain words of conveyance. *McDonough v. Martin*, 16 S. E. 59, 88 Ga. 675, 18 L. R. A. 343.

Implied covenants are such as the law creates or implies in the absence of express stipulation. They not infrequently spring from the duties and liabilities arising out of express covenants. They depend for their existence on the intent or implication of the law, and are such as the law raises from the relations of the contracting parties to each other, in respect to the contract, in the absence of any express agreement on the subject. *Conrad v. Morehead*, 89 N. C. 31, 34.

Thus, when a grantor conveys land, bounding it on a way or street, it constitutes an implied covenant of the existence of the way, and he and his heirs are estopped to deny that there is such a street or way. *Garstang v. City of Davenport*, 57 N. W. 876, 878, 90 Iowa, 359; *Parker v. Smith*, 17 Mass. 413, 416, 9 Am. Dec. 157.

The general rule is that an implied covenant is much more restricted in its interpretation than one which is express, and an implied covenant cannot endure longer than the estate out of which it arises. *Mershon v. Williams*, 44 Atl. 211, 214, 63 N. J. Law, 398.

A covenant is not implied in a conveyance of real property, whether the conveyance contains any special covenant or not. *Thompson v. Schenectady Ry. Co.* (U. S.) 124 Fed. 274, 278.

#### **IMPLIED DEDICATION.**

An implied dedication, which arises from operation of law from the conduct of the owner of the property, rests upon the broad common-law doctrine of equitable estoppel. *Town of Kent v. Pratt*, 48 Atl. 418, 420, 73 Conn. 573 (citing *Guthrie v. Town of New Haven*, 31 Conn. 308, 321; *New York, N. H. & H. R. Co. v. City of New Haven*, 46 Conn. 257, 262); *City of Athens v. Burkett* (Tenn.) 59 S. W. 404, 408; *City of San Antonio v. Sullivan*, 23 S. W. 307, 308, 4 Tex. Civ. App. 451.

It does not assume a grant, but that the owner, by his conduct or his acquiescence in the use by the public of the land for the specified purpose, until it would be greatly injured or inconvenienced by a deprivation of the use, is estopped from interfering or preventing the public from continuing the use. *City of Athens v. Burkett* (Tenn.) 59 S. W. 404, 408. See, also, *Close v. Swanson*, 89 N. W. 1043, 1045, 64 Neb. 889.

To constitute an implied common-law dedication of land, it is necessary that there should be an appropriation of the land by the owner to public use by some act or course of conduct from which the law would imply an intent to devote the land to the pub-



lice use. *City of San Antonio v. Sullivan*, 57 S. W. 42, 44, 23 Tex. Civ. App. 619.

If a landowner by open and visible acts unequivocally indicates to the public and to citizens that he intended to and did open a street to the public, and the citizens and the public have acted upon the faith that there was a dedication, the law will treat the acts of the owner as constituting irrevocable dedication. In such case there need be no grant, if the acts indicate an intent to dedicate, are so treated by the public, and there is an acceptance. Then it is immaterial whether there was or was not any express dedication. The principle upon which implied dedication rests is that which underlies the principle of estoppel in pais. *Faust v. City of Huntington*, 91 Ind. 493, 494.

In order to render a dedication of a street complete, there must be an acceptance on the part of the public, and this carries with it the duty of repairing the street and becoming liable for any injuries arising from the unsafe or defective condition of the way, so that where it appears that the city had exercised no control over the land in controversy, never in any manner working it, and the only evidence of an acceptance was by the use of the public, there was not an implied dedication. *City of San Antonio v. Sullivan*, 23 S. W. 307, 308, 4 Tex. Civ. App. 451.

To constitute a dedication there must be an intent on the part of the owner to dedicate, which must clearly appear. Such intent may be inferred from circumstances. The assent of the owner to the use need not be expressly declared, nor manifested in any particular manner, but may be implied from the conduct of the owner of the land. Implied dedication arises by operation of law from the acts of the owner. *Williams v. Wiley*, 16 Ind. 362; *City of Evansville v. Evans*, 37 Ind. 229. It is considered in the nature of an estoppel in pais, and, once made, it is irrevocable. *Town of Marion v. Skillman*, 127 Ind. 130, 136, 26 N. E. 676, 11 L. R. A. 55.

#### IMPLIED DEVISE.

See "Devise by Implication."

#### IMPLIED EASEMENT.

An implied easement is an easement resting upon the principle that, where the owner of two or more adjacent lots sells a part thereof, he grants by implication to the grantee all those apparent and visible easements which are necessary for the reasonable use of the property granted, which at the time of the grant are used by the owner of the entirety for the benefit of the part

granted. *Farley v. Howard*, 68 N. Y. Supp. 159, 160, 33 Misc. Rep. 57.

#### IMPLIED INVITATION.

"Implied invitation," as used with reference to trespass on realty, imports knowledge by the owner of the probable use by the alleged trespasser of the owner's property, so situated and conditioned as to be open to and likely to be subjected to such use. *Lepnick v. Gaddis*, 16 South. 213, 215, 72 Miss. 200, 26 L. R. A. 686, 48 Am. St. Rep. 547.

"Implied invitation is part of the law of negligence, by which an obligation to use reasonable care arises from the conduct of the parties. Its essence is that the defendant knew or ought to have known that something that he was doing or permitting to be done might give rise in an ordinarily discerning mind to a natural belief that he intended that to be done which his conduct had led the plaintiff to believe that he intended. It is not enough that the user believed that the use was intended. He must bring his belief home to the owner by pointing to some act or conduct of his that afforded a reasonable basis for such a belief." The fact that a railroad company had uncoupled cars, and allowed an opening to remain between the cars, and that the opening had been used as a passageway by the employes without molestation, was held not an invitation which a servant could act on. Notable instances of the doctrine of invitation are found in the so-called "turntable cases." *Furey v. New York Cent. & H. R. Co.*, 51 Atl. 505, 506, 67 N. J. Law, 270.

In a legal sense, to come under an implied invitation, as distinguished from the mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must be some mutuality of interests in the subject to which the visitor's business relates, although the particular thing which is the subject of the visit may not be for the benefit of the occupant. 3 Elliott, R. R. § 1249; *Plummer v. Dill*, 31 N. E. 128, 156 Mass. 426, 32 Am. St. Rep. 463. An independent contractor, going upon premises to do work under contract with the owner, goes upon such premises by invitation in the legal sense. *Sesler v. Rolfe Coal & Coke Co.*, 41 S. E. 216, 217, 51 W. Va. 318.

#### IMPLIED LICENSE.

An implied license is one which is presumed to have been given from the words acts, or passive acquiescence of the party authorized to give it. Such a license must

be established by proof, and is not to be inferred from equivocal declarations or acts of the owner of the land. *Weldon v. Philadelphia, W. & B. R. Co. (Del.)* 43 Atl. 156, 159, 2 Pennewill, 1.

### IMPLIED MALICE.

Implied malice is malice not positively, but inferentially, appearing. Sometimes it is defined as malice which does not appear at all, but is imputed by law. *Hogan v. State*, 36 Wis. 226, 238.

Malice is properly called "implied malice" where it is inferred from the naked fact of the homicide, and "express malice" when established by other evidence. They are apt terms to express different modes of proof, but are not adapted to the description of different degrees of malicious intent. Where there is no other proof of malice than the act which caused the death, the law does not impute a malicious intent; but it presumes, in accordance with the settled rules of evidence, that such an intent did actually exist. The term has, however, been inappropriately used in cases of constructive murder, where, the want of actual intent to take the life being conceded, yet the law, in view of some other criminal intent, punishes the offense as murder. Its use in these cases doubtless arose from a misconception of the meaning of the term "malice aforethought," used in indictments for murder. Such term does not, as erroneously assumed, necessarily impute a charge of premeditated design to kill, and hence, in order to support it, the law does not need to imply by fiction such intent or malice. So far as any criminal intent exists, it may be expressly proved, and when so proved will meet the requirement of the term "malice aforethought" as completely as a proven premeditated design to kill. *Darry v. People*, 10 N. Y. (6 Seld.) 120, 137, 138.

"Malice implied," as applied to homicide, is the same thing as any other kind of malice. The word "implied" refers to the manner in which the malice is shown or proven, and in general the law implies or presumes malice from the intentional and voluntary doing of an act that is wrongful, where there is no justification or excuse for the act. So, where an act of that kind is done, where a person is killed and nothing appears but the fact of the killing, the law presumes that it is a killing with malice, and that is what is meant by implied malice. *State v. Mason*, 32 S. E. 357, 358, 54 S. C. 240.

Probably the phrase "express malice" is identical with "malice in fact," and "implied malice" identical with "malice in law." *Missouri Pac. Ry. Co. v. Behee*, 21 S. W. 384, 385, 2 Tex. Civ. App. 107.

### As arising from abandoned heart or lack of provocation.

Malice is implied when no considerable provocation appears, or where all the circumstances of the killing show an abandoned and malignant heart. *Kota v. People*, 27 N. E. 53, 136 Ill. 655; *Aguilar v. Territory*, 46 Pac. 342, 343, 8 N. M. 496; *Kent v. People*, 9 Pac. 852, 857, 8 Colo. 563 (citing Gen. Laws Cal. § 615); *Taylor v. People*, 42 Pac. 652, 655, 21 Colo. 426; *May v. People*, 6 Pac. 816, 821, 8 Colo. 210; *People v. Nichol*, 34 Cal. 211, 213; *People v. Dice*, 120 Cal. 189, 201, 52 Pac. 477; *People v. Evans*, 56 Pac. 1024, 1025, 124 Cal. 206; *Territory v. Catton*, 16 Pac. 902, 905, 5 Utah, 451; *People v. Halliday*, 17 Pac. 118, 119, 5 Utah, 467; *Comp. Laws N. M. § 1062*; *Pen. Code Ga. 1895, § 62*. Implied malice does not, therefore, arise merely from an intentional killing, but from a killing under such circumstances as that the jury can say that no considerable provocation appeared, or that all the circumstances show a wicked and malignant heart. *Territory v. Lucero*, 46 Pac. 18, 21, 8 N. M. 543.

When the killing of any person has taken place without any cause which will in law justify, excuse, or extenuate the homicide, and it was not done with a sedate and deliberate mind and formed design, the killing would be deemed to be with implied malice, for the law would imply the malice. *Plasters v. State*, 1 Tex. App. 678, 681.

"Implied malice," or malice by construction, exists where death ensues from some unusual act of aggression, or enormous act of cruelty, though there be no previous grudge or enmity, as the killing of an officer in the discharge of his duty, or the administration of poison, or killing without any, or considerable, provocation; because no person, unless possessed of an abandoned heart, would deprive a fellow being of life, upon slight, or without apparent cause. *State v. Town (Ohio) Wright*, 75, 76.

### As arising from deliberate cruel acts.

Implied malice is an inference of the law from any deliberate and cruel act by one person against another. *Sparf v. United States*, 15 Sup. Ct. 273, 277, 156 U. S. 51, 39 L. Ed. 343; *Kilpatrick v. Commonwealth*, 31 Pa. (7 Casey) 193, 201.

"Malice is implied by law from any deliberate cruel act committed by one person against another suddenly, without any, or without considerable, provocation." *State v. Neal*, 37 Me. 468, 469.

Implied malice is malice presumed by law from the commission of any deliberate and cruel act, however sudden, done or committed without just cause or excuse. *Whitaker v. State*, 12 Tex. App. 436, 441. As when the act has been committed under such

circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit, or of a heart regardless of social duty and fatally bent upon mischief. *Jordan v. State*, 10 Tex. 479, 493.

Where the act is committed deliberately with a deadly weapon, and is likely to be attended by dangerous consequences, the malice requisite to murder will be presumed. *Kilpatrick v. Commonwealth*, 31 Pa. (7 Casey) 198, 201; *Smith v. Commonwealth*, 100 Pa. 324, 326, 327; *Warren v. State*, 44 Tenn. (4 Coldw.) 180, 185.

#### **As arising from unlawful killing.**

Implied malice is that which the law infers from or imputes to certain acts. Thus the law implies malice from the killing of a human being, unless the circumstances make it evident that the killing was either justifiable or was so mitigated as to reduce the offense below murder in the first or second degree. *Sharp v. State*, 6 Tex. App. 650, 658; *Johnson v. State*, 5 Tex. App. 423, 439.

Implied malice is that which the law infers from or imputes to certain acts. Thus, when the fact of an unlawful killing is established, and there are no circumstances in evidence which tend to establish the existence of express malice, nor which tend to mitigate or excuse or justify the act, then the law implies malice. *Boyd v. State*, 12 S. W. 737, 739, 28 Tex. App. 137; *Martinez v. State*, 16 S. W. 767, 30 Tex. App. 129, 28 Am. St. Rep. 895.

By the term "implied malice" is meant that in the case charged the evidence shows that the party charged committed the act, and that it was intentional and unlawful—that is, without justifiable excuse—and the evidence fails to reveal the motive why the person committed the act. *Hotema v. United States*, 22 Sup. Ct. 895, 896, 186 U. S. 413, 46 L. Ed. 1225.

"Implied or constructive malice" is an inference or conclusion of law upon facts proved, as when a person unlawfully and suddenly kills another, without premeditation or design, and without any, or without a considerable, provocation, such as would reduce the crime to manslaughter. *State v. Harrigan* (Del.) 31 Atl. 1052, 9 Houst. 369.

#### **Intent.**

Implied or constructive malice, in the law of homicide, is an inference or conclusion of law from the facts found by the jury, and among these the actual intention of the prisoner becomes an important and material fact; for though he may not have intended to take away life or to do any personal harm, yet he may have been engaged in the perpetration of some other felonious or unlawful act, from which the law raises

the presumption of malice. *State v. Miller* (Del.) 32 Atl. 137, 139, 9 Houst. 564; *State v. Lodge* (Del.) 33 Atl. 312, 315, 9 Houst. 542; *State v. Jones* (Del.) 47 Atl. 1006, 1007, 2 Pennewill, 573.

Malice is a technical expression, and means the absence of any excuse for homicide. Malice is presumed till want of it is shown. It may be either express or implied. It is not necessary, in order to imply malice, that there should be an intention of killing. If the act of killing be unlawful, with intention of hurting the deceased or any other person, and if it have the tendency to bloodshed, or if killing be the probable or natural consequence, malice is implied. *Pennsylvania v. Lewis* (Pa.) Add. 279, 282.

Implied malice is not necessarily confined to an intention to take the life of the deceased, but includes an intention to do any unlawful act which may probably result in depriving the party of life. *Warren v. State*, 44 Tenn. (4 Coldw.) 180, 185.

#### **In libel and slander.**

Implied malice exists where a wrongful act is intentionally done without just cause or excuse. *Parke v. Blackiston* (Del.) 3 Har. 373, 378.

Implied malice is that which is inferred from the act, or, in case of slander, from the publication of the false language. It is synonymous with "malice in law." *Smith v. Rodecap*, 31 N. E. 479, 5 Ind. App. 78.

"Implied malice," with reference to libel and slander, is that which is raised as a matter of law by the use of the words, libelous per se, when the occasion is not privileged. *Ramsey v. Cheek*, 13 S. E. 775, 109 N. C. 270.

In the law of libel implied malice is such as may be inferred from the article which is alleged to be malicious. *Grace v. McArthur*, 45 N. W. 518, 521, 76 Wis. 641; *Parke v. Blackiston* (Del.) 3 Har. 373, 378.

Implied malice, in an action of libel, consists in publishing without justifiable cause that which is injurious to the character of another. It is a presumption drawn by the law from the simple fact of publication. *Brandt v. Morning Journal Ass'n*, 80 N. Y. Supp. 1002, 1007, 81 App. Div. 183 (citing *Krug v. Pitass*, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317).

#### **IMPLIED NOTICE.**

Implied notice may be knowledge imputed impliedly by collateral facts of such a nature as to cast on the party the legal duty of not being willfully or negligently ignorant of all proper inferences to be drawn from such facts. *Wells v. Sheerer*, 78 Ala. 142, 147.

Notice is of two kinds, actual and constructive. Actual notice may be either express or implied. If the one, it is established by direct evidence; if the other, by proof of circumstances from which it is inferable as a fact. Express notice embraces not only knowledge, but also that which is communicative by direct information, either written or oral, from those who are cognizant of the fact communicated. Implied notice, which is equally actual notice, arises where the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him by the exercise of due diligence to a knowledge of the particular facts, or, as defined by the Supreme Court of Missouri in *Rhodes v. Outcalt*, 48 Mo. 367, 370, a notice is to be regarded in law as actual when the party sought to be affected by it knows of the particular fact, or is conscious of having the means of knowing it, although he may not employ the means in his possession for the purpose of gaining further information. *City of Baltimore v. Whittington*, 27 Atl. 984, 985, 78 Md. 231.

Implied notice on the part of a city of an obstruction in the public highway means that notice the city is presumed to have of the obstruction when it has existed so long that the city should reasonably take notice of and repair it. *City of Philadelphia v. Smith (Pa.)* 16 Atl. 493, 494.

#### IMPLIED POWERS.

Implied powers are such as are necessary to carry into effect those which are expressly granted, and which must therefore be presumed to have been within the intention of the legislative grant. *City of Madison v. Daley (U. S.)* 58 Fed. 751, 755.

Implied powers of a corporation exist only to enable a corporation to carry out the express powers granted—that is, to accomplish the purpose of its existence—and can in no case avail to enlarge the express powers, and thereby warrant it to devote its efforts and capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises not directly, but only remotely, connected with its specific corporate purposes. A power which the law will regard as existing by implication must be one in a sense necessary—that is, needful, suitable, and proper to accomplish the object of the grant—and one that is directly and immediately appropriate to the execution of the specific powers, and not one that has but a slight, indirect, or remote relation to the specific purposes of the corporation. *People v. Pullman's Palace Car Co.*, 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366, and cases and authorities there cited. The enumeration of powers in the charter of an incorporation, or in the act under which it is

incorporated, implies the exclusion of all powers not enumerated. *First M. E. Church v. Dixon*, 52 N. E. 887, 890, 178 Ill. 260 (citing *Thomas v. West Jersey R. Co.*, 101 U. S. 82, 25 L. Ed. 950).

#### IMPLIED PROMISE.

The law recognizes two kinds of promises: express and implied promises. The first is the express stipulation of the party making it to do or not to do a particular thing. The second the law presumes from some benefit received by the party against whom it is raised, as illustrated by the rule that to take a case out of the statute of limitations payment or acknowledgment of a debt implied a promise to pay it. *Foute v. Bacon*, 24 Miss. (2 Cushman) 156, 164.

In holding that an agreement to take a certain number of shares of railroad stock created an implied, and not an express, promise to pay for the shares, the court said: "Obligations of this character are created rather by the dictate of the law than the assent or agreement of the party, and the person upon whom they are imposed is obliged to perform them or render an equivalent in damages, whether he assents or dissents." As was said by Lord Holt (*Starke v. Cheeseman*, 1 Ld. Raym. 538): "The notion of promises in law is a metaphysical notion." It is the facts from which a promise springs that are issuable, and not the promise itself. *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 836, 342.

#### IMPLIED RATIFICATION.

Implied ratification must frequently arise from the acceptance of benefits which are the result of the unauthorized acts; for, when one with full knowledge receives the profits or benefits, he may be presumed to have ratified and accepted the conditions by which they are effected. *Fant v. Campbell*, 58 Pac. 741, 742, 8 Okl. 586.

The authorities all agree that, although ratification by a principal of an agent's unauthorized acts may be implied, as well as expressed, nevertheless there can be no ratification binding on the principal which was not made with the full knowledge of all the material circumstances of the case; hence the rule that implied ratification extends only to such acts of the agent as were known at the time. It is held that if one purchased goods for another without authority, and the person for whom they were purchased received them and used or sold them on his own account after being informed that they were purchased for him, this is an implied ratification of the act of the person making the purchase in his name. *Pike v. Douglass*, 28 Ark. 59, 65.

**IMPLIED REVOCATION.**

The revocation of a will is implied when the existence of the intention of the testator to revoke is presumed and inferred from some subsequent act or event. *Langdon v. Astor's Ex'rs*, 10 N. Y. Super. Ct. (3 Duer) 477, 561.

**IMPLIED TRUST.**

Implied trusts are such as arise by implication or operation of law. *Tenney v. Simpson*, 15 Pac. 187, 196, 87 Kan. 353; *Learned v. Tritch*, 6 Colo. 432, 439.

Implied trusts are those which are deducible from the transactions of the parties, where there is no express purpose to claim a trust. *Caldwell v. Matthewson*, 45 Pac. 614, 615, 57 Kan. 258.

Implied trusts are such as are inferred by law from the nature of the transaction or the conduct of the parties. *Civ. Code Ga.* 1895, § 3152.

Implied trusts are those which the law implies from the language of the contract and the evident intent and purpose of the parties. *Wilson v. Welles*, 81 N. W. 549, 550, 79 Minn. 53.

Implied trusts are those that arise when trusts are not directly or expressly declared in terms, but courts, from the whole transaction and the words used, imply or infer that it was the intention of the parties to create a trust. *Bohon v. Barrett's Ex'r*, 2 Ky. Law Rep. 371, 374, 79 Ky. 378, 382; *Gabert v. Olcott* (Tex.) 23 S. W. 985, 987. As where in a will there is an absolute gift, with words expressing "a desire, request," etc., that the legatee will dispose of the property in a certain designated way, such words are held to raise an implied trust in favor of the designated party. *Burks v. Burks*, 66 Tenn. (7 Baxt.) 353, 356.

An implied trust exists when there is a claim which may be directly enforced at law against one party and to the due discharge of which another party is ultimately liable, and in such a case a court of equity treats it as a trust by the party ultimately liable, which may be directly enforced in favor of the party ultimately entitled to the benefit of it. *In re Morgan* (N. Y.) 34 Hun, 217, 220 (citing Story).

"Implied trusts" are defined by Judge Story as those which are deducible from the nature of the transaction as a matter of clear intention, though not found in the words of the parties, or which are superinduced upon the transaction by operation of law as matter of equity, independent of the particular intention of the parties. Implied trusts are other trusts than express trusts, and are created by implication or presump-

tion of law. *Kaphan v. Toney* (Tenn.) 58 S. W. 909, 913.

Implied trusts are such as arise by operation of law, for the purpose of carrying out the presumed intention of the parties, or, without regard to the intention of the parties, for the purpose of asserting rights of the parties, or of frustrating fraud. *Cone v. Dunham*, 20 Atl. 311, 313, 59 Conn. 145, 8 L. R. A. 647; *Gorrell v. Alspaugh*, 27 S. E. 85, 87, 120 N. C. 362.

Implied trusts include both resulting and constructive trusts. *Mallagh v. Mallagh* (Cal.) 16 Pac. 535, 537; *Tenney v. Simpson*, 15 Pac. 187, 196, 87 Kan. 353; *Springer v. Young*, 12 Pac. 400, 402, 14 Or. 280; *Cone v. Dunham*, 20 Atl. 311, 313, 59 Conn. 145, 8 L. R. A. 647; *Gorrell v. Alspaugh*, 27 S. E. 85, 87, 120 N. C. 362.

Implied trusts embrace what are known as resulting and presumptive trusts. *Kaphan v. Toney* (Tenn.) 58 S. W. 909, 913.

In North Carolina all implied trusts are generally denominated "parol trusts," referring to their origin and nature of proof, rather than their incidents and results. *Gorrell v. Alspaugh*, 27 S. E. 85, 87, 120 N. C. 362.

**Express trusts distinguished.**

"Express trusts" are those which are created in express terms in the deed or will, and as such are to be distinguished from "implied trusts," which, without being expressed, are deducible from the nature of the transaction as matters of interest, or superinduced upon the transaction by operation of law as matters of equity, independently of the particular intention of the parties. *Russell v. Peyton*, 4 Ill. App. (4 Bradw.) 473, 478; *Brown v. Cherry* (N. Y.) 38 How. Prac. 352, 357.

A direct or express trust is one springing from the agreement of the parties, created by words either expressly or impliedly evincing the intention to create a trust. It is distinguished from a constructive or implied trust, which is a trust created by equity law; a trust not created by any words, either expressly or impliedly evincing a direct intention to create a trust, but by the construction of equity in order to satisfy the demands of justice. *Currence v. Ward*, 27 S. E. 329, 330, 43 W. Va. 367.

**As express trust by statute.**

An implied trust, under Code N. Y. § 113, as amended in 1851, which provides that a person with whom or in whose name a contract is made for the benefit of another shall be the trustee of an express trust, was converted into an express trust. *Brown v. Cherry* (N. Y.) 56 Barb. 635, 640.

**As arising between legal and equitable title.**

Implied or resulting trusts are such as result from the transfer of property by indentment or application of law. *Wilcox v. Jackson*, 4 Pac. 986-978, 7 Colo. 521.

When one person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another, a trust arises in favor of the latter person, commensurate with his interest in the subject-matter, which is known as an "implied or resulting trust." *Western Union Tel. Co. v. Shepard*, 62 N. E. 154, 157, 169 N. Y. 170; *Brown v. Cherry* (N. Y.) 56 Barb. 635, 640.

All trusts by operation of law consist in the situation of the legal and equitable estate; one person holding the legal title for the benefit of the equitable owner, who is regarded in equity as the real owner, and who is entitled to be clothed with the legal title by a conveyance. *Cone v. Dunham*, 20 Atl. 311, 313, 59 Conn. 145, 8 L. R. A. 647.

An implied trust exists where land is purchased in the name of one person and the money paid by another, or where a conveyance has been obtained by fraud. *Watson v. Watson*, 47 Atl. 1096, 1100, 198 Pa. 234.

Whenever the purchase money for land is paid by one person and the conveyance is to another, or whenever the consideration for the conveyance, if other than money, moves from a person who is not the grantee, the law, unless the person stands in the relation of husband or parent to the grantee, so that the conveyance may be presumed to be an advancement, raises an implied trust, ordinarily termed a "resulting trust," in favor of him who pays the purchase money or from whom the consideration proceeds. The principle on which the rule is based is that the beneficial estate follows the consideration and attaches to the person from whom it comes. The principle itself is founded in the natural presumption that he who supplies the purchase money or other consideration intends the purchase for his own benefit, and not for the benefit of a stranger, and that the conveyance is taken to the grantee as a matter of convenience to the purchaser. *Aborn v. Searles*, 27 Atl. 796, 18 R. I. 357.

**IMPLIED WAIVER.**

A waiver is implied whenever it may be reasonably and fairly inferred from the act or omission or silence of the party who has the power of waiving. *Roumage v. Mechanics' Fire Ins. Co.*, 13 N. J. Law (1 J. S. Green) 110, 124.

**IMPLIED WARRANTY.**

According to the modern cases warranties are divided into two kinds: Express war-

ranties, where there is a direct stipulation, or something equivalent to it; or implied warranties, which are conclusive, and in reference to law they are facts which are admitted or proved before the jury. *Borrekens v. Beaven*, 8 Rawle, 23, 36, 23 Am. Dec. 85.

**In lease.**

"A warranty is implied in a lease in a different sense from the implied warranty of a freehold. The latter depends on tenure; the former, on contract. The remedies, too, were originally different. In the latter the dispossessed recovered the value in land; in the former, damages only for the breach of the contract. Hence a warranty is implied from any contract for the possession of land amounting to a lease for years, no matter in what words it is framed; but the warranty of a freehold is not implied, except from the feudal term of donation, 'give.' No other words will answer. The words 'grant, bargain, and sell' raise no warranty." *Young v. Hargrave's Adm'r*, 7 Ohio (7 Ham. pt. 2) 63, 69.

**In sales.**

Every warranty is a promise that the article is so and so, and when this promise may be implied by the contract of the vendor, or may result from the nature and circumstances of the sale, it is then called an "implied warranty." An implied warranty is an exception to the rule of caveat emptor. *Wood v. Ross* (Tex.) 26 S. W. 148, 149.

An implied warranty is simply a warranty that the article sold, when there is no express warranty, is merchantable and fit for the purpose for which it is intended. *Buffalo Barb Wire Co. v. Phillips*, 80 N. W. 295, 296, 67 Wis. 129.

If a man buy an article for a particular purpose, made known to the seller at the time of the contract, and rely upon the skill or judgment of the seller to supply what is wanted, there is an "implied contract" that the thing sold will be fit for the desired purpose. *Morris v. Bradley Fertilizer Co.* (U. S.) 64 Fed. 55, 56, 12 O. C. A. 34.

Words used in an executory contract of sale to describe specific quality of goods to be delivered are words of description merely, and do not constitute a collateral or implied warranty of the quality of the goods. *Waebler v. Talbot*, 59 N. Y. Supp. 396, 398, 43 App. Div. 180.

An implied warranty arises, first, when an examination of the goods is impracticable, and a warranty will be implied that they are merchantable; second, in an executory contract for the sale of goods to be manufactured for a particular purpose a warranty will be implied that they are fitted for such purpose; third, a warranty is implied, in the case of the seller being the manufac-

turer, that there are no latent defects against which the seller might have provided. *Carleton v. Lombard, Ayres & Co.*, 25 N. Y. Supp. 570, 573, 72 Hun, 254.

A sale of personal chattels implies an affirmation by the vendor that the chattels are his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattels sold. *Wood v. Sheldon*, 42 N. J. Law (13 Vroom) 421, 424, 36 Am. Rep. 528.

## IMPORT—IMPORTATION.

See "Duties on Imports"; "Natural Import."

In an action brought in a state court to enjoin the threatened importation of armed men into a county where a strike existed, it was contended that the word "import," as used in the bill, meant to bring into from another state or foreign country, so as to give a federal court jurisdiction; but it was held that the word "import" necessarily meant bringing into the county or town from outside their boundaries, but that, as used in the bill, it did not necessarily signify the bringing in from outside the state. *State of Arkansas v. Kansas & T. Coal Co.*, 22 Sup. Ct. 47, 49, 183 U. S. 185, 46 L. Ed. 144 (reversing [U. S.] 96 Fed. 353, 358).

The term "imported," as used in the tariff laws, has in general the same meaning that its etymology shows. To import is to bear or carry into. An imported article is an article brought or carried into this country from abroad. A vessel, purchased abroad by an American citizen and navigated to an American port, is not borne into or carried into this country, and hence not imported, within the meaning of the tariff laws, so as to be subject to tariff duty. *Vanderbilt v. The Conqueror* (U. S.) 49 Fed. 99, 102.

In Act March 3, 1875, § 3, forbidding the knowing and willful importing of women into the United States for purposes of prostitution, "importing" is synonymous with the words "bringing in," and, when the subject is persons, "importing" and "bringing in" are synonymous terms. *United States v. Pagliano* (U. S.) 53 Fed. 1001, 1003.

An attachment affidavit, alleging that the defendant had "imported and brought into the United States at the port of New York" certain goods, will be construed to show a completed importation. *United States v. Graff* (N. Y.) 67 Barb. 304, 307.

Const. U. S. art. 1, § 9, providing that the migration and "importation" of such persons as any of the states now existing shall

think proper to permit shall not be prohibited, etc., means the importation of African slaves. *People of State of New York v. Compagnie Generale Transatlantique*, 2 Sup. Ct. 87, 89, 107 U. S. 59, 27 L. Ed. 383.

### As arrival at port of entry or in harbor.

Goods are not imported, within the meaning of statutes fixing an import duty, until their arrival at the port of entry. *United States v. Vowell*, 9 U. S. (5 Cranch) 368, 369, 3 L. Ed. 128.

"The literal meaning of 'importation' is to bring in with intent to land. It means a bringing into some port, harbor, or haven, with an intent to land the goods there. It takes place when the vessel arrives at a port of entry, intending there to discharge her cargo." *Kidd v. Flagler* (U. S.) 54 Fed. 367, 369; *The Mary* (U. S.) 16 Fed. Cas. 932, 933. The mere act of going into a port, without breaking bulk, is prima facie evidence of importation. *The Mary* (U. S.) 16 Fed. Cas. 932, 933.

Importation is not the making entry of goods at the custom house, but merely the bringing them into port; and the importation is complete before entry at the custom house. *United States v. Lyman* (U. S.) 26 Fed. Cas. 1024, 1028; *Perots v. United States*, 19 Fed. Cas. 258.

Act Cong. July 1, 1812, c. 112, providing a double duty on all goods, wares, and merchandise imported into the United States from and after the passage of the act, means not only that there shall be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry. *Arnold v. United States*, 13 U. S. (9 Cranch) 104, 120, 3 L. Ed. 671.

Goods brought up a river in a sea-going vessel, which, having first used the rings and posts erected by harbor commissioners in order to moor the vessel while lowering the masts, passed up the river and unloaded the cargo beyond the limits of the harbor, are not goods imported into such harbor, within the meaning of St. 48 Geo. III, c. 104, § 33, imposing a duty on all goods imported into such harbor. *Wilson v. Robertson*, 30 Eng. Law & Eq. R. 242, 245.

An article is not imported from a foreign country, within the meaning of the tariff laws, until it actually arrives at a port of entry of the United States, and the importation is governed by the law in force at the time of such arrival; and hence under the treaty of Paris, by which Spain ceded the Philippine Islands to the United States, and which took effect by the exchange of ratifications and the president's proclamation on April 1, 1899, which repealed the existing tariff duties on goods brought from those is-

lands, the goods, arriving at a port of entry of the United States from Philippine ports after its taking effect, were not subject to duty, although they were shipped before April 11th. *American Sugar Refining Co. v. Bidwell* (U. S.) 124 Fed. 677, 681.

#### Export distinguished.

The term "import" means to bring into a country merchandise from abroad, and is the direct converse of the term "export," which means to carry from a state or country, as wares in commerce. The term "export" signifies etymologically "to carry out," and "import" means "to bring in." Its commercial meaning is directly contrary to the term "export." *Kidd v. Flagler* (U. S.) 54 Fed. 367, 369.

#### IMPORTER.

The exemption of importers from the mercantile license tax in Act May 4, 1841 (P. L. 307), means those who import merchandise from foreign countries, and not those who buy from sister states. *Commonwealth v. H. C. Tomblor Grocery Co.*, 6 Pa. Dist. R. 8, 9.

The term "importer" does not include a person who purchases goods from an importer after they have been brought within the boundaries and jurisdiction of the United States, but before he pays duty on them or they are delivered at the port of entry, and who then transports them at his own expense from the place where they were when brought to the port to which they were consigned. *City of Mobile v. Waring*, 41 Ala. 139, 151.

Within the meaning of St. 1855, c. 215, concerning the manufacture and sale of spirituous liquors, the term "importer" does not include one who receives from an importer, and duly forecloses a mortgage on a cask of spirituous liquors, which is in the United States warehouse in bond, and pays the duties and receives the cask of liquors. *King v. McEvoy*, 86 Mass. (4 Allen) 110, 112.

The term "importer" shall include such persons as shall bring into or offer for sale within the state concentrated commercial feeding stuffs manufactured without the state. *Gen. St. Conn. 1902*, § 4597.

The term "importer," as used in the chapter relating to commercial fertilizers, shall mean a person who procures or sells fertilizers made in other states. *V. S. 1894*, 4347.

#### IMPORTS.

Imports "are things imported. If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country." *Per Marshall, C. J.*, in

*Brown v. Maryland*, 25 U. S. (12 Wheat.) 419, 437, 6 L. Ed. 678.

As the term "imports" was used in a statute fixing an ad valorem duty on imports, it meant the goods "arriving or coming within the limits of a port. It includes nothing which are not actually brought within our limits." *Marriott v. Brune*, 50 U. S. (9 How.) 619, 632, 13 L. Ed. 282.

#### Bill of exchange.

Const. U. S. art. 1, § 10, providing that no state shall, without the consent of Congress, lay any imposts or duties on imports, except what may be absolutely necessary for executing its inspection laws, cannot be construed to include a bill of exchange. *Ex parte Martin*, 7 Nev. 140, 142, 8 Am. Rep. 707.

#### As while in importer's hands.

As used in the United States Constitution, providing that no state shall lay any impost or duties on imports and exports, excepting what shall be absolutely necessary for executing its inspection laws, the term "imports" means not only the act of importation, but the articles imported; but in the latter sense the exemption from taxation continues only until the first wholesale disposition of the articles. After such disposition, or after the packages are broken up and the goods appropriated to private use or offered for sale at retail or in any peculiar manner, they cease to be imports within the meaning of the Constitution. They then become the subject of state taxation in all its modifications, either on the value or on the sale, as other property may be taxed. *Wynne v. Wright*, 18 N. C. 19, 23.

"Imports," as used in Const. art. 1, § 10, which declares that no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, includes goods which are brought into the country, but remain in the hands of the importer in the form and shape in which they are imported. *Low v. Austin*, 80 U. S. (13 Wall.) 29, 34, 20 L. Ed. 517.

#### As relating to interstate commerce.

The term "imports," as used in that clause of the Constitution which declares that no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, does not refer to articles carried from one state to another, but only to articles imported from foreign countries into the United States. *Woodruff v. Parham*, 75 U. S. (8 Wall.) 123, 131, 19 L. Ed. 382; *Brown v. Houston*, 5 Sup. Ct. 1091, 1094, 114 U. S. 622, 29 L. Ed. 257; *Pittsburg & S. Coal Co. v. Bates*, 15 Sup. Ct. 415, 419, 156 U. S. 577, 39 L. Ed. 538; *State v. Pittsburg & S. Coal Co. (La.)* 6 South. 220, 222; *Pittsburg & S. Coal Co. v. Louisiana*, 156 U. S. 590, 600, 15 Sup.



Oct. 459, 463, 39 L. Ed. 544; Patapsco Guano Co. v. Board of Agriculture, 18 Sup. Ct. 862, 864, 171 U. S. 345, 43 L. Ed. 191; Dooley v. United States, 22 Sup. Ct. 62, 63; 183 U. S. 151, 46 L. Ed. 128; In re Rudolph (U. S.) 2 Fed. 65, 66; United States v. Forrester (U. S.) 25 Fed. Cas. 1147, 1152; People v. Walling, 18 N. W. 807, 810, 53 Mich. 264; Territory v. Farnsworth, 5 Pac. 869, 874, 5 Mont. 303; Rothermel v. Meyerle (Pa.) 20 Atl. 583, 586, 9 L. R. A. 366; Racine Iron Co. v. McCommons (Ga.) 36 S. E. 866, 867, 51 L. R. A. 134.

The shipment of goods from New York to Puerto Rico does not come within such provision of the Constitution as being imports. Dooley v. United States, 22 Sup. Ct. 62, 63, 183 U. S. 151, 46 L. Ed. 128.

#### As relating to persons.

As the term is used in the Constitution, prohibiting the states from laying any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, it "refers only to articles of merchandise. Persons are not imports or exports or articles to be inspected under the exception." People of State of New York v. Compagnie Generale Transatlantique (U. S.) 10 Fed. 357, 361.

### IMPORTANT CASE.

The term "important case," within the meaning of Code, § 1063, providing that, where it appears to the court that a fair and impartial trial of an issue of fact triable by a jury cannot be had without a struck jury, or that the importance or intricacy of the case requires such a jury, the court must make an order, upon notice, directing a special jury to be struck for the trial of the issue, was held not to characterize an action which was of importance only to the immediate parties. Adams v. Morgen, 21 N. Y. Supp. 1057, 1058; Poucher v. Livingston (N. Y.) 2 Wend. 296.

#### Libel of public officers.

Where public officers have been libeled for acts done in their official capacity, suits brought by them in vindication of their characters have been deemed important. Poucher v. Livingston (N. Y.) 2 Wend. 296.

A libel against a person who is a public officer is not of such importance as to require a struck jury, where the libel does not relate to his official conduct. Thomas v. Croswell (N. Y.) 4 Johns. 491; Van Vechten v. Hopkins (N. Y.) 2 Johns. 373.

Where a libel has been published concerning the official conduct of a Representative in Congress, the case is of such importance as to authorize a struck jury. Thomas v. Rumsey (N. Y.) 4 Johns. 482, 483.

The term "important case," within the rule that, to entitle a party to the struck jury, the case must be intricate or important, characterizes a libel case against the Attorney General in which it is claimed that the words spoken were against him in his official character, as it is of great importance to the court to protect its officers and those of the public in the discharge of their duties. Spencer v. Sampson (N. Y.) Coleman & C. Cas. 311.

Where the subject-matter of a libel related to a remote transaction, and concerning the conduct of a foreign minister resident here who had been long superseded, it was not of such importance as to authorize a struck jury. Genet v. Mitchell (N. Y.) 4 Johns. 186.

### IMPOSE.

"Impose" is derived from the Latin word "imponere," which means literally "to lay upon"; and hence, where it is used in Const. art. 12, § 1, imposing licenses on persons and corporations, while the terms "levy and assess" and "rate" are used in the same article in regard to taxation, its absence in section 4 will indicate that said section relates to taxation, and not to license. State v. Camp Sing, 44 Pac. 516, 520, 18 Mont. 123, 32 L. R. A. 635, 56 Am. Rep. 551.

#### IMPOSED BY LAW.

"Imposed by a law" is equivalent to the expression "imposed under a law." United States v. Wigglesworth (U. S.) 28 Fed. Cas. 595, 596.

Any tax authorized by the Legislature of the state, for whatever purpose and however ascertained, which is fixed in its amount or is assessed and collected by the instrumentality provided for it in an act, is in effect imposed by law on the person who is bound to pay it, whether it be laid directly or indirectly upon him. Consequently the provision in a statute in regard to the taxation of railroads, which provided that nothing therein should affect "any existing law imposing taxes upon said company, otherwise than to suspend," etc., and that it should not exempt the company from the payment of such taxes as the Legislature may "hereafter impose upon said company," referred to "county taxes" assessed under the general law of the state, as well as taxes directly imposed by the Legislature. Neary v. Philadelphia, W. & B. R. Co. (Del.) 9 Atl. 405, 411, 7 Houst. 419.

### IMPOSITION.

See "Civil Imposition."

"Taxes, charges, and impositions," as used in a charter exempting the property of a

corporation, are the taxes, charges, and impositions imposed for public use, and do not include assessments for benefits. *City of Paterson v. Society for Establishment of Useful Manufactures*, 24 N. J. Law (4 Zab.) 385, 400.

The charter of a railroad company, authorizing the taxation of its capital stock and providing that "no other or further tax or imposition" shall be levied upon the company, will be construed to include an assessment for a portion of the damages and expenses of altering and widening a street used by the tracks of such railroad company. *New Jersey R. & Transp. Co. v. City of Newark*, 27 N. J. Law (3 Dutch.) 185, 193.

The term "imposition," in a corporation charter, in which the corporation is exempt from any imposition whatever, includes every kind of enforced contribution to the public treasury. *Singer Mfg. Co. v. Heppenheimer*, 34 Atl. 1061, 1063, 58 N. J. Law, 633, 32 L. R. A. 643.

## IMPOSSIBILITY OF PERFORMANCE.

Impossibility of performance, sufficient to excuse the nonperformance of an executory contract, means "an impossibility consisting in the nature of the thing to be done, and not in the inability of the party to do it. If what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse nonperformance." *Klauber v. San Diego Street Car Co.*, 30 Pac. 555, 556, 95 Cal. 853.

There is a marked distinction between a disability or inability of a party to perform a contract, and the absolute and inherent impossibility of performance, in the true sense. To excuse performance of a contract on the ground of impossibility of performance, the impossibility must be more than merely a great inconvenience or hardship, or mere impracticability. *Reid v. Alaska Packing Co.*, 73 Pac. 337, 339, 43 Or. 429.

## IMPOSTS

An impost is a custom or tax levied on articles brought into a country, or things imported. *Norris v. City of Boston*, 45 Mass. (4 Metc.) 282, 296.

The word "imposts," in its more restricted sense, as used in the federal Constitution, signifies a duty on imported goods and merchandise. *Union Bank v. Hill*, 43 Tenn. (3 Cold.) 325, 328.

"An impost or duty on imports is a custom or a tax levied on articles brought

into a country, and is most usually secured before the importer is allowed to exercise his right of ownership over them, because evasions of law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles if it were levied on them after they were landed." *Brown v. Maryland*, 25 U. S. (12 Wheat.) 419, 437, 6 L. Ed. 678.

"Impost" is a duty on imported goods and merchandise. In a larger sense, it is any tax or imposition. Duties and imposts were properly intended to comprehend every species of tax or contribution not included under the ordinary term "taxes and excises." *Pacific Ins. Co. v. Soule*, 74 U. S. (7 Wall.) 483, 445, 19 L. Ed. 95; *Hancock v. Singer Mfg. Co.*, 41 Atl. 846, 849, 62 N. J. Law, 289, 42 L. R. A. 852.

The words "imposts," "taxes," and "duties," as used in the federal Constitution, must be confined to the idea which they commonly and ordinarily present to the mind—as exactions to fill the public coffers for the payment of the debts and promotion of the general welfare of a country. *Worsley v. Second Municipality of New Orleans (La.)* 9 Rob. 324, 333, 41 Am. Dec. 333.

A duty on imposts is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. *People v. Huntington*, 4 N. Y. Leg. Obs. 187, 194.

### Compensation for improvement of navigation.

The word "impost," as used in a clause of the Ordinance of 1787 providing that navigable streams shall be highways, without tax, impost, or duty, means a "charge for the use of the government, not compensation for improvements." The clause does not prevent the artificial improvement of such streams, and the exaction of reasonable tolls by the state to pay therefor. *Sands v. Manistee River Imp. Co.*, 8 Sup. Ct. 113, 117, 123 U. S. 288, 31 L. Ed. 149; *Huse v. Glover*, 7 Sup. Ct. 313, 316, 119 U. S. 543, 30 L. Ed. 487.

The fact that if any surplus remained from the tolls, over what is used to keep locks in the river in repair and for their collection, it is to be paid into the state treasury, as a part of the revenue of the state, does not change the character of the charge or impost. *Huse v. Glover*, 7 Sup. Ct. 313, 316, 119 U. S. 543, 30 L. Ed. 487.

### Custom distinguished.

Cowell says that impost is distinguished from custom, because custom is, rather, prof-

it which the prince makes on goods shipped out; but Madison considered the terms "duties" and "imposts," as used in the federal Constitution, as synonymous. *Pacific Ins. Co. v. Soule*, 74 U. S. (7 Wall.) 433, 435, 19 L. Ed. 95.

#### Franchise tax.

Where the shares of stock of a corporation in the hands of the stockholders were exempted from any tax or impost whatsoever, the word "impost" included every contribution from the company to the public treasury, and rendered invalid a franchise tax on the corporation. *Hancock v. Singer Mfg. Co.*, 41 Atl. 846, 849, 62 N. J. Law, 289, 42 L. R. A. 852.

#### Income tax.

"Cooley, Tax'n, p. 3, says that the term 'impost' signifies any tax, tribute, or duty, but it is seldom applied to any but indirect taxes. In the second case involving the construction of the United States income tax of 1894, in which a tax on incomes derived from real and personal property is held to be a direct tax, and not a duty, within the meaning of the federal Constitution, article 1, § 2, requiring direct taxes to be apportioned among the several states, and article 1, § 1, requiring all duties, imposts, and excises to be uniform throughout the United States, the court, after quoting Cooley, say: 'We know of no reason for holding otherwise than that the words 'direct taxes,' on the one hand, and 'duties, imposts, and excises,' on the other, were used in the Constitution in their natural and obvious sense.' *Pollock v. Farmers' Loan & Trust Co.*, 15 Sup. Ct. 912, 915, 158 U. S. 601, 39 L. Ed. 1108.

#### Interstate commerce.

The word "imposts," as used in the Constitution, providing that no state shall, without the consent of Congress, levy any imposts or duties on imports or exports, does not relate to the shipment of goods between states, but to those brought in from foreign countries. *Woodruff v. Parham*, 75 U. S. (8 Wall.) 123, 131, 19 L. Ed. 382; *Dooley v. United States*, 22 Sup. Ct. 62, 63, 183 U. S. 151, 46 L. Ed. 128.

It does not include a tax imposed by a municipality on the sales of produce imported by the citizens of other states, and sold within the limits of the city. The prohibition of the federal Constitution has reference only to imports from a foreign country into the ports of the United States. *Harrison v. City of Vicksburg*, 11 Miss. (3 Smedes & M.) 581, 586, 41 Am. Dec. 633.

The United States Constitution, in prohibiting any state from levying a duty or impost on imports or exports without the

consent of Congress, except where absolutely necessary to execute its inspection laws, cannot be construed to include a license tax for selling goods by sample in a state, though the person so engaged represents and is selling the goods of a resident of another state, for every tax is not a duty or impost within the meaning of that term as used in the Constitution, though every duty or impost is a tax. *Territory v. Farnsworth*, 5 Pac. 869, 874, 5 Mont. 303.

#### Pilotage.

"Imposts or duties on imports, exports, or tonnage," as used in Const. U. S. art. 1, § 10, cl. 3, which prohibits a state, without the consent of Congress, from laying any "imposts or duties on imports, exports, or tonnage," were at the time of the adoption of the Constitution known to the commerce of the civilized world to be distinct from fees and charges for pilotage, and from the penalties by which commercial states enforced their pilot laws, as they were from charges for wharfage or towage, or any other local port charges for services rendered to vessels or cargoes; and to declare that such pilot fees or penalties are embraced within the words "imposts or duties on imports, exports, or tonnage" would be to confound things essentially different, and which must have been known to be actually different by those who used this language. Hence the clause above referred to would not include pilot dues or penalties. *Cooley v. Board of Wardens of Philadelphia*, 53 U. S. (12 How.) 299, 314, 13 L. Ed. 996.

#### Tax on persons.

"Impost," as used in Act Cong. Feb. 25, 1799, § 1, which provides that nothing therein contained shall enable any state to collect a duty of tonnage or impost without the consent of Congress, is used in its enlarged sense, and means any tax or tribute imposed by authority, and applies as well to a tax on persons as to a tax on merchandise. *Passenger Cases*, 48 U. S. (7 How.) 283, 407, 12 L. Ed. 702.

#### Wharfage fees.

In the case of *Huse v. Glover*, 119 U. S. 543, 549, 7 Sup. Ct. 313, 30 L. Ed. 487, it was said that by the terms "tax" "impost," "duty," mentioned in the Ordinance of 1787, is meant a charge for the use of the government, not compensation for improvement. The fact that if any surplus remains from the tolls, over what is used to keep the locks in repair and for their collection, it is to be paid into the state treasury, as a part of the revenue of a state, does not change the character of the toll or impost, and hence wharfage fees are not included. *Onachita & M. R. Packet Co. v. Aiken*, 7 Sup. Ct. 907, 909, 121 U. S. 444, 30 L. Ed. 976.

## IMPOTENCY.

See "Naturally Impotent."

"Impotency," in the law of divorce, means want of potentia copulandi, and not merely incapacity for procreation. It is an incapacity that admits neither copulation nor procreation. *Payne v. Payne*, 49 N. W. 230, 46 Minn. 467, 24 Am. St. Rep. 240; *Griffeth v. Griffeth*, 44 N. E. 820, 821, 162 Ill. 368.

"Impotency," as a cause for divorce, means an incurable defect, and not every temporary or occasional incapacity, but permanent and lasting inability for copulation and procreation. *Kempf v. Kempf*, 34 Mo. 211, 213.

The word "barrenness" is in no sense the synonym of "impotency." Anonymous, 7 South. 100, 89 Ala. 291, 7 L. R. A. 425, 18 Am. St. Rep. 116.

## IMPOUND.

Impound as relating to the "impounding" of cattle implies an inclosed space. *Thomas v. Harries*, 1 Man. & G. 703.

The word "impounded," as used in a notice that the giver had taken up and impounded in his yard the horse of another according to the laws of the state, being used in connection with the words "in my yard," does not have a technical meaning which excludes the idea that the horse was taken under a certain act, and does not imply that it was taken under the old statute in relation to pounds. *Goodsell v. Dunning*, 34 Conn. 251, 257.

The restraining of cattle taken damage feasant, without placing them in a pound, and without an intent to impound them, does not constitute an impounding, though there was no usable public pound in the town where the cattle were taken. *Howard v. Bartlett*, 40 Atl. 825, 70 Vt. 314.

## IMPRACTICABLE.

"Impracticable" is defined as incapable of being effected from lack of adequate means; impossible of performance; not feasible. Thus an order committing a child to one asylum, and stating that it is impracticable to send her to another, is not sufficient where it appears that such other asylum existed, and was authorized by law to receive children committed by such magistrates. *People v. Poly*, 40 N. Y. Supp. 990, 992, 17 Misc. Rep. 162.

Where the members of an unincorporated joint-stock company are numerous (in this case being about 1,000), so that frequent changes are liable to occur in the ownership of the shares by sale, or death of members,

or otherwise, it is impracticable to bring them all before the court, within the meaning of Rev. St. § 5008, permitting one or more stockholders to sue or defend in behalf of all when it is impracticable to bring them all before the court, and hence one stockholder may sue in behalf of himself and all others for the recovery of money stolen from the company. *Platt v. Colvin*, 36 N. E. 735, 739, 50 Ohio St. 703.

A machine cannot be pronounced useless or impracticable, so as to render it insusceptible to a patent, because improvements may be made which will obviate or prevent embarrassment to its most perfect operation. For example, where a mowing machine would mow, as patented, upon level prairies or other smooth ground, and upon ground containing only slight elevations and depressions, without the addition of a curved toe, which was subsequently added, it could not be called a useless or impracticable machine. *Wheeler v. Clipper Mower Co.* (U. S.) 29 Fed. Cas. 881, 890.

Under an insurance policy providing that in no case shall assured have the right to abandon until it shall be ascertained that the recovery and repair of the vessel are impracticable, the term "impracticable" does not relate to the mechanical possibility nor to the ability to raise and repair the vessel at any cost, but it is legally impracticable to recover and repair the vessel if the expense of so doing will exceed 50 per cent. of her actual value. *Peabody Ins. Co. v. Memphis & A. R. Packet Co.*, 5 Ohio Dec. 417.

## IMPRESSARIO.

As the term "impressario" is used in public land laws, it means one who contracted directly with the government. *Rose v. Governor*, 24 Tex. 496, 503.

## IMPRESSION.

The phrase "impression, device, color, or thing," within the meaning of Pol. Code, §§ 1206, 1207, providing that when any ballot bears upon it any impression, device, color, or thing designed to distinguish such ballot from other ballots, it shall be rejected, when construed with the phrase "designed to distinguish such ballots," is to be taken to mean an impression, device, color, or thing expressly designed as a means of designating the ballot, and does not include a mere discoloration appearing on ballots which is not designed, but results from the use of ink by the elector in scratching his ballot. *Wyman v. Lemon*, 51 Cal. 273, 274.

### As belief.

An impression of a defendant in a prosecution for larceny that he had a claim to the property taken is not equivalent to an honest

belief, so as to be a defense, *Currier v. State*, 60 N. H. 1023, 1024, 157 Ind. 114; *Morrisette v. State*, 77 Ala. 71, 74; since this might amount to a vague notion, unaccompanied with the honesty of conviction. *Morrisette v. State*, 77 Ala. 71, 74.

"An impression is an image fixed in the mind; it is belief; and believing the paper in question was destroyed has been deemed sufficient to let in secondary evidence. Thus an affidavit in which the witness only states his impression that he tore up a paper was held sufficient to authorize admission of secondary evidence." *Riggs v. Tayloe*, 22 U. S. (9 Wheat.) 483, 485, 6 L. Ed. 140.

An impression formed by one called as a juror, so as to disqualify him to be sworn as a juror, means an impression or opinion regarding the case which is strong enough to prevent a candid judgment on his part upon a full hearing of the evidence. A mere opinion or belief as to the facts, unconfirmed, or not strong enough to prevent the juror from rendering an unbiased verdict in consideration of all the evidence, is not such an impression as will prevent him from being sworn. *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533.

#### **Delusion distinguished.**

See "Delusion."

#### **As inference or recollection.**

The word "impression," when a witness states certain things as his impression, may mean that it is derived from recollection, or may mean that it is mere inference. If it is used in the former sense, his testimony is admissible, but not if it is used in the latter. *Kingsbury v. Moses*, 45 N. H. 222, 225.

"An impression of a past fact" may mean personal knowledge of the fact as it rests in the memory, though the remembrance is so faint that it cannot be characterized as an undoubting recollection, and is therefore spoken of as an impression. This, perhaps, is the sense in which the word is most commonly used by witnesses in giving their testimony. In this sense the impression of a witness is evidence, however indistinct and unreliable the recollection may be. No line can be drawn for the exclusion of any record left upon the memory, as the impress of personal knowledge because of the dimness of the inscription. An impression, however, may mean an understanding or belief of the fact derived from some other source than personal observation, as the information of others, or it may mean an inference or conclusion of the mind as to the existence of the fact, drawn from a knowledge of other facts. When used in these senses, it is not evidence. *Whitman v. Morey*, 2 Atl. 899, 905, 63 N. H. 448.

"Impression," as used in the testimony of a witness testifying from recollection that it was his impression that certain things were true, means, according to Webster, "slight, indistinct remembrance. I have an impression that the fact was stated to me. but I cannot clearly recollect it"—and does not make the testimony of such witness illegal. *Humphries v. Parker*, 52 Me. 502, 504.

The use of the word "impression" by a witness, in testifying that he has an impression as to certain facts, does not show that the witness is not testifying from recollection. "We understand this expression to be used familiarly and colloquially as equivalent to this: 'I have an indistinct recollection.' We think it is ordinarily used in this sense by persons not well educated or attentive to their modes of speech, and is ordinarily so understood by everybody." *Lisbon v. Bath*, 23 N. H. (3 Fost.) 1, 9.

Where a witness testified that he read a bond hastily when he signed it, and could not say whether it had been altered or not, but that he had an impression in regard to it, such testimony may be understood to mean that although, from the slight attention which he gave to the bond in his hasty reading, he cannot say positively whether it had been altered or not, he nevertheless had the impression upon his memory, derived from reading it, that it had not. *State v. Flanders*, 38 N. H. 324, 333.

#### **Opinion distinguished.**

On the examination of a juror in answer to the question, "Now, on the assumption that the facts were true, as you read them in the paper, you formed an opinion, did you not?" he answered: "Well, I think not. I formed an impression." Commenting on this, the court said: "The word 'impression,' if it can properly be applied to a mental operation, does not reach the strength of an opinion. An opinion is a conviction which is based, and must be based, upon testimony. An impression is a mere fancy or lodgment in the mind, which is not based upon testimony, and the existence of which cannot be traced to proof; and in this case the juror himself distinguished between an opinion and an impression by insisting that he had not formed an opinion, and did not entertain any at the time, but that it was a mere impression." *State v. Krug*, 41 Pac. 126, 130, 131, 12 Wash. 288; *State v. Royse*, 64 Pac. 742, 744, 24 Wash. 440.

The use of the word "impression" by a juror in stating that he had such impression as would lead him to a belief of the guilt of the person will be deemed of the force of an opinion, where it would require evidence to remove such impression, though the juror stated that he made a slight distinction between an impression and an opinion. *Green*

*Seld v. People* (N. Y.) 6 Abb. N. O. 1, 7, 74 N. Y. 277, 288, 287.

An impression is not an opinion, and therefore a mere impression as to the guilt of defendant is not a ground of challenge under a statute making a formed opinion a ground of challenge. *State v. Medlicott*, 9 Kan. 257, 259; *Traviss v. Commonwealth*, 106 Pa. 597, 605; *State v. Allen*, 46 Conn. 531, 547.

## IMPRIMIS.

In a will which states that "imprimis I bequeath certain property," and which is then followed by other bequests, the word "imprimis" does not give preference to the bequest introduced by such word. *Perrine v. Perrine*, 6 N. J. Law (1 Halst.) 133, 136, 10 Am. Dec. 392; *Everett v. Carr*, 59 Me. 325, 330.

Lord Hardwicke, in *Lewin v. Lewin*, 2 Ves. 415, said "that 'imprimis,' or 'in the first place,' 'I give a legacy,' amounts only to the order in which testator expressed his gifts in the will, but if he had said, 'to be paid in the first place,' and it had been in that case a provision for the wife, I should have been inclined to think it was a declaration of his intent that the provision for his wife should come out of the personal estate, and be paid in the first place, because there is ground for that from a preference to the wife and children unprovided for. If they all stood in equal degree, it was sufficient ground for the court not to presume a preference, but it was a provision for the wife or children unprovided for. That is different." *Duncan v. Alt* (Pa.) 8 Pen. & W. 382, 386.

## IMPRISON—IMPRISONMENT.

See "Lawfully Imprisoned."

See "False Imprisonment"; "Indefinite Imprisonment"; "Unlawful Imprisonment."

"Imprison" means "to confine; to incarcerate; to shut up or restrain one of his liberty." *State v. Woodward*, 23 N. E. 968, 969, 123 Ind. 80.

"Imprisonment" is defined as the deprivation of the liberty of another without his consent. *Efroymsen v. Smith*, 63 N. E. 328, 329, 29 Ind. App. 451.

"Imprisonment" is the detention of another against his will, and depriving him of the power of locomotion. *United States v. Benner* (U. S.) 24 Fed. Cas. 1084, 1087.

An imprisonment is a forcible detention of a man's person or control over his movements, so that, where a party accompanies an officer without any constraint, it will not amount to an imprisonment. *Lawson v. Buzines* (Del.) 3 Har. 416, 418.

Imprisonment is something more than mere loss of freedom. It includes the notion of restraint within limits defined by wall or any exterior barrier. *Bird v. Jones*, 4 N. Y. Leg. Obs. 158, 159.

In ordinary practice, words are sufficient to constitute an imprisonment if they impose a restraint upon the person, and the plaintiff is accordingly restrained, for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence be used. *Cahill v. Terrio*, 55 N. H. 571, 572.

The words "confined," "imprisoned," "in custody," "confinement," and "imprisonment" refer not only to the actual, corporeal and forcible detention of a person, but likewise to any and all coercive measures, by threats, menaces, or the fear of injury, whereby one person exercises a control over the person of another, and detains him within certain limits. *Code Cr. Proc. Tex.* 1895, art. 171.

It is the fact of compulsory submission which brings a person into imprisonment, and impending and threatened physical violence, which, to all appearances, can only be avoided by submission, operates as effectually, if submitted to, as if the arrest had been forcibly accomplished without such submission. *Brushaber v. Stegemann*, 22 Mich. 266, 268.

Lord Coke, in discussing the crime of breaking prison, said: "Imprisonment is a restraint of a man's liberty under the custody of another by lawful warrant, in deed or in law. Lawful warrant is when the offense appeareth by matter of record, or when it doth not appear by matter of record. By matter of record, as when the party is taken upon an indictment at the suit of the King, or upon an appeal at the suit of the party. When it doth not appear by matter of record, as when a felony is done, and the offender, by a lawful mittimus, is committed to the jail for the same. But between these two there is great diversity. For, in the first case, whether any felony were committed or no, if the offender be taken by force of a capias, the warrant is lawful; and, if he break prison, it is felony, albeit no felony were committed. But in the other case, if no felony be done at all, and yet he is committed to prison for a supposed felony, but break prison, this is no felony, for there is no cause." *State v. Shaw*, 50 Atl. 863, 867, 73 Vt. 149 (citing 2 Co. Inst. 590).

Imprisonment is a form of slavery, and the law will not permit a man to enslave himself even by the most solemn engagement. The right to personal liberty is so sacred that he cannot part with it by consent, although he may forfeit it by crime. He cannot barter away his liberty, nor be deprived of it without due process of law. He cannot

give his own body in pledge, nor consent that a court may imprison him unless he pays a certain debt. He cannot put himself in contempt by promising that a failure to do a certain thing may be punishable as for contempt, when it would not otherwise be thus punishable. He cannot consent to be thus imprisoned, any more than he can consent to be assaulted, or to forfeit one of his members, or a "pound of flesh." Such engagements cannot be enforced by any court, because security of the person is protected by the Bill of Rights against any violence, unless inflicted by command of the law itself. *In re Langslow*, 60 N. E. 590, 593, 167 N. Y. 314.

The words "recommit" and "imprison," as used in Rev. St. c. 158, § 32, providing that any person recommitting or imprisoning any person who shall have been discharged on habeas corpus shall be guilty of a misdemeanor, refer to courts and magistrates, and imply some judicial or ministerial act on their part, and do not extend to proceedings between parents for the custody of an infant child. *Beyer v. Vanderkühlen*, 4 N. W. 354, 355, 48 Wis. 320.

The word "imprisonment," as used in the sixtieth article of war (U. S. Comp. St. 1901, p. 956), was not employed in a technical sense, to signify imprisonment at a military post without hard labor, but has a broader signification, and empowers a court-martial to sentence a person in the military service to imprisonment at hard labor, or to a penitentiary where hard labor is a part of the discipline, where the offense of which he is convicted is one for which the civil tribunals could impose a like sentence. *In re Langan* (U. S.) 123 Fed. 132, 134.

How. Ann. St. c. 809, providing that every person who shall be imprisoned under an execution in a civil cause may apply for his discharge from imprisonment after a certain length of time, does not apply to a person who is released from custody on a bond for the jail limits, and is in a position to apply directly for a discharge. *Griffin v. Helme*, 94 Mich. 494, 495, 54 N. W. 173; *Miller v. Strabbing*, 92 Mich. 300, 303, 52 N. W. 453, 454.

#### Arrest.

An arrest is an imprisonment. *Blight v. Meeker*, 7 N. J. Law (2 Halst.) 97, 98.

"There is certainly no great misapplication of legal thought or legal phraseology in considering or speaking of a person under arrest on a warrant as 'imprisoned,' since arrest involves imprisonment." *People v. Bancker*, 5 N. Y. (1 Seld.) 106, 123.

"Imprisoned," as used in Civ. Code, § 511, allowing any person imprisoned for debt to have the liberties of the jail on giving

bond not to go beyond it, includes any actual arrest and detention by the sheriff, whether in or out of jail. The word "imprisoned," as here used, does not require that the debtor should have been corporally confined in jail before a valid undertaking can be given. *Doyle v. Boyle*, 19 Kan. 168, 171.

#### As close custody.

To suffer a prisoner to have greater liberty than the law allows is an escape, and prisoners are to be kept in *salva et arcta custodia*; but the question remains, what is a safe and close custody? Lord Coke says that, in contemplation of law, it is imprisonment where a party is restrained by force or against his will. Therefore he that is in the stocks or under lawful arrest is said to be in prison, though he be not *infra parietes carceris*, for there may be a prison in law as well as in deed. 2 Inst. 589. There may be an imprisonment either by physical restraint, or by superior force acting as a moral restraint upon the party. Thus a party is not less imprisoned by being in the presence of an officer who has arrested him and restrains the liberty of his action than he would be by a personal detention by imposition of hands or by the application of fetters. Nevertheless there must be an actual or constructive custody or restraint. For example, if a woman is warden of the prison, and marries a person there imprisoned, it is an escape, for the prisoner cannot be imprisoned without a keeper, and he cannot be in the custody of his wife. Or, if a sheriff be arrested and committed to the county jail, it is an escape, for he cannot be imprisoned in a jail of which he is the custodian. This restraint may be exercised by another who is a prisoner, provided that he has the proper authority. It is sufficient if there be a virtual custody by some person having authority from the sheriff, and that this person is himself a prisoner does not affect the case. Under these principles, the safe and close custody required from the jailer does not prohibit the jailer from allowing prisoners in execution for debt the liberty of all or of any of the rooms within the walls of the prison. It also follows that where a prisoner is permitted to act not merely as a turnkey, but to have possession and custody and perform all the duties of the deputy or an assistant, without any restraint whatever, he cannot be justly deemed in custody, and such proceeding constitutes an escape, as to him. *Steere v. Field* (U. S.) 22 Fed. Cas. 1210, 1221.

#### Detain distinguished.

See "Detain."

#### Detention in reform school.

It is not an imprisonment of a vagrant or pauper child for the state to detain such

child at one of the state industrial schools, any more than its detention in the poor-house, nor the detention of any child at any boarding school by one standing for the time in loco parentis to the child. Parental authority implies restraint, not imprisonment, and every school must necessarily exercise some measure of the parental power of restraint over children committed to it; and when the state, as *parens patriæ*, is compelled by the misfortune of a child to assume for it parental duty, and to charge itself with its nurture, it is compelled also to assume parental authority over it. This authority must necessarily be delegated to those to whom the state delegates the nurture and education of the child. And in exercising a wholesome parental restraint over the child, it can be properly said to imprison the child no more than the tenderest parent exercising like power of restraint over children. *Milwaukee Industrial School v. Milwaukee County Sup'rs*, 40 Wis. 328, 337, 22 Am. Rep. 702; *State v. Brown*, 52 N. W. 935, 936, 50 Minn. 353, 16 L. R. A. 691, 36 Am. St. Rep. 651.

#### **As duress.**

See "Duress."

#### **As imprisonment in county jail.**

When the word is used in the penal legislation of the state of Arkansas, it is understood to mean imprisonment in a county jail or local prison. When imprisonment in the penitentiary is intended it is so expressed. *Cheaney v. State*, 36 Ark. 74, 80.

As used in the Penal Code, the word "imprisoned," when the context does not otherwise require, shall be construed to mean imprisoned in the county jail. *Bates' Ann. St. Ohio* 1904, § 6794.

#### **As imprisonment in house of correction.**

Where an offense is declared by law to be punishable by imprisonment, and it is not specified that such imprisonment shall be in the State Prison, it shall be construed to mean imprisonment in the house of correction, if the offender is over 16 years of age, if a man, or fifteen if a woman, at the time of conviction. *V. S.* 1894, 5170.

#### **As imprisonment at hard labor.**

"Imprisonment," as used in criminal statutes, alone and unqualified, does not mean imprisonment at hard labor, but means any other confinement than the latter. *State v. Hyland*, 36 La. Ann. 709, 710.

#### **Slavery.**

"Imprison," as used in the statute of limitations, containing a saving clause in favor of persons not of the age of 25 years, unsound mind, imprisoned, etc., includes the

act of wrongfully holding in slavery a negro entitled to his freedom. *Downs v. Allen*, 78 Tenn. (10 Lea) 652, 662.

#### **As within jail limits.**

The word "imprisoned," as used in 2 Rev. St. p. 31, art. 6, relating to voluntary assignments by a debtor imprisoned in execution in civil cases, means one charged in execution, whether in close custody or on the jail limits. So long as a person is within those limits, so long he is to be considered as imprisoned; and, being placed and kept there by virtue of an execution, he is imprisoned by virtue of such execution. *Coman v. Storm* (N. Y.) 26 How. Prac. 84, 85.

#### **IMPRISONMENT FOR DEBT.**

The words "imprisonment for debt" have a well-defined and well-known meaning, and have never been understood or held to apply to criminal proceedings. The provision of the Constitution prohibiting imprisonment for debt has therefore no application to the administration of the criminal laws. Acts 1836, § 47, which provides that, for all fines assessed and costs of prosecution in criminal cases not capital, the person convicted may stand committed to prison by the order of the court until such fines and costs be paid, is therefore not in violation of this Constitutional provision. *Dixon v. State*, 2 Tex. 481, 482.

The imprisonment for debt which the framers of constitutions had in mind was imprisonment upon process in civil actions, the object and sole purpose of which was the collection of debts. It was to remove evils incident to this system that the constitutional prohibition came to be ordained, but its effect has been to establish a policy much broader than would have sufficed for the eradication of the ills which depend upon the recovery or attempted recovery of debts by restraint of the debtor's person. This policy is inimical alike to the incarceration of a debtor as a means of coercing payment, and to his punishment by imprisonment for a failure to pay, at least when such failure results from inability; and hence it is that, while neither the letter of the inhibition, nor the broader policy which is engendered by it and has come to be a part of it, has any application to criminal judgments for fines and costs, yet it is not within legislative competency to declare the mere non-performance of a contract of indebtedness a misdemeanor, and punish the commission thereof by imprisonment, directly or indirectly. Consequently it is held that Act December 12, 1892, declaring a banker who receives a deposit, knowing his insolvency, to be guilty of a misdemeanor punishable by fine of double the deposit, half to go to the depositor, with imprisonment in case of non-



payment, but payment back to depositor of the amount of the deposit before conviction to be a defense, violates the constitutional prohibition against imprisonment for debt. *Carr v. State*, 17 South. 350, 351, 106 Ala. 35, 34 L. R. A. 634, 54 Am. St. Rep. 17.

The word "debt," as used in the Bill of Rights, providing that no person shall be imprisoned for debt, means only a liability arising on contract. In *re Wheeler*, 8 Pac. 276, 277, 34 Kan. 96; *Perry v. Orr*, 35 N. J. Law (6 Vroom) 295, 298. See, also, *United States v. Walsh* (U. S.) 28 Fed. Cas. 391, 393.

Rent due a receiver and unpaid constitutes a debt, within the constitutional provision against imprisonment for debt. *Knutte v. Superior Court of City and County of San Francisco*, 66 Pac. 875, 134 Cal. 660.

The term "debt," as used in the constitutional provision forbidding imprisonment for debt, is used in a broad sense, and will embrace such obligations to pay money as arise upon the law, as well as those which arise upon contract. *Granholm v. Sweigle*, 57 N. W. 509, 510, 3 N. D. 476.

#### **Failure to pay over money.**

An order of a court of bankruptcy for the payment of money or delivery of property to a trustee in bankruptcy, which constitutes a part of the estate in bankruptcy, and which is under the control and possession of the party directed to pay or deliver it at the time the order is made, is not an order for the payment of a debt, and a commitment of a party to jail until such order is complied with is not imprisonment for debt. In *re Rosser*, 101 Fed. 562, 566, 41 C. C. A. 497. See, also, *Ex parte Smith*, 53 Cal. 204, 207.

The word "debt" is a technical term, and, when construed according to its strict and literal meaning, there is a very close question whether imprisonment, as a means of compelling the party over whom the court has jurisdiction to surrender the possession of money which he has no legal right to keep, is imprisonment for debt, within the Constitution. *Ripon Knitting Works v. Schreiber* (U. S.) 101 Fed. 810, 816.

"Imprisonment for debt," as used in Const. Mo. art. 2, § 16, prohibiting imprisonment for debt, should not be construed to include imprisonment of an attorney for contempt in failing to obey an order to pay over money collected for a client, since the punishment is not inflicted for a disobedience of an order standing by itself for the payment of money, but because of professional misconduct of the attorney. *Jeffries v. Laurie* (U. S.) 27 Fed. 198.

#### **Nonpayment of fine or penalty.**

It is not imprisonment for debt, within Const. art. 1, § 14, providing that there shall

be no imprisonment for debt, except in cases of fraud where the imprisonment is for the nonpayment of a fine, which is generally construed as a means of enforcing compliance with orders of the courts; imprisonment being but an incident to the fine. The imprisonment for the violation of a town ordinance is only a consequence of the power to fine. In *re McDonald*, 33 Pac. 18, 20, 4 Wyo. 150; *McCool v. State*, 23 Ind. 127, 132; *State v. Mace*, 5 Md. 337, 351.

A fine assessed by a justice against a constable under Rev. St. art. 4539, providing that any constable failing or refusing to execute any process may be fined for contempt on motion of the party injured, which fine shall be for the benefit of the party injured, does not constitute a debt within the meaning of the constitutional prohibition against imprisonment for debt. The imprisonment of the constable until such fine was paid constituted rather a punishment for contempt than imprisonment for debt. *Ex parte Robertson*, 11 S. W. 689, 670, 27 Tex. App. 628, 11 Am. St. Rep. 207.

A penalty in a bastardy proceeding is not a debt, within the constitutional provision against imprisonment for debt. *State v. Brewer*, 16 S. E. 1001, 1003, 38 S. C. 263, 19 L. R. A. 362, 37 Am. St. Rep. 752.

#### **Satisfaction of costs.**

Imprisonment of one convicted of crime for the satisfaction of costs incurred by the state in his prosecution, or to which the state, if it were liable for costs, should be subjected, is not imprisonment for debt, within the provision of the Constitution that no person shall be imprisoned for debt. *Bailey v. State*, 6 South. 398, 399, 87 Ala. 44; *Morgan v. State*, 47 Ala. 34, 36; In *re Boyd*, 9 Pac. 240, 243, 34 Kan. 570. Contra, see *Thompson v. State*, 16 Ind. 516, 517.

#### **Actions for tort.**

Const. art. 1, § 16, prohibiting imprisonment for debt except in cases of fraud, has no application to actions for tort. *Long v. McLean*, 88 N. C. 3, 4; *Moore v. Green*, 73 N. C. 394, 396, 21 Am. Rep. 470; *Stroheim v. Deimel* (U. S.) 77 Fed. 802, 806, 23 C. C. A. 467. It does not include imprisonment for seduction under promise of marriage, and holding to bail in a subsequent action for the injury so done. *Perry v. Orr*, 35 N. J. Law (6 Vroom) 295, 296.

Const. 1868, declaring that there shall be no imprisonment for debt, cannot be construed to include imprisonment under bail process issued in an action of trover for personality. *Harris v. Bridges*, 57 Ga. 407, 408, 24 Am. Rep. 495.

#### **Writ of ne exeat.**

"Imprisonment for debt," as used in Const. art. 1, § 16, declaring that no person

shall be imprisoned for debt arising out of or founded on a contract, express or implied, does not include a detention in the state by virtue of a writ of ne exeat. *Dean v. Smith*, 23 Wis. 483, 486, 99 Am. Dec. 193.

## IMPROPER—IMPROPERLY.

Illegal distinguished, see "Illegal—Illegally."

When applied to human conduct "improper" is defined to be such conduct as a man of ordinary and reasonable care and prudence would not, under the circumstances, have been guilty of; and where an instruction in a personal injury suit against a railroad stated that if the company ran upon a certain switch at an excessive or improper rate of speed, and thereby contributed to and caused the accident, the company would be liable, the words "excessive or improper" were equivalent to the word "negligent," and the instruction was not erroneous. *Central of Georgia R. Co. v. Johnston*, 82 S. E. 78, 79, 106 Ga. 130.

"Improperly," as used in a charge, in an action against a town for injuries by reason of a defect in a bridge, that if the plaintiff, in repairing such bridge, wrongfully or improperly put defective planks or other defective materials into such bridge, by reason of which in any essential degree the injury complained of was occasioned, he was the author of his own misfortune, and he could not recover, does not imply that the existence or breach of the contract were questions that were to be decided by the jury. The words "wrongfully or improperly" would not be understood to be used in reference to the existence or fulfillment of any contract between the parties, and such is not the fair import of that phrase; there being no evidence of any contract before the jury. *Seger v. Town of Barkhamsted*, 22 Conn. 290, 297.

"Improperly," as used in Laws 1892, c. 686, § 16, providing that county supervisors may refund any taxes illegally or improperly assessed or levied, is governed by the word "illegally," and does not authorize the refunding of any taxes, except such as are illegally assessed. *In re Baumgarten*, 57 N. Y. Supp. 284, 287, 39 App. Div. 174 (citing *In re Hermance v. Ulster County Sup'rs*, 71 N. Y. 481).

## IMPROPER CONDUCT.

The term "improper conduct," as used in the statute providing that no person shall recover damages of a town for the destruction of his property by a mob if it shall appear that the destruction was caused by his illegal or improper conduct, means such as a man of ordinary and reasonable care and prudence, under the circumstances, in the owner's situation, would not have been

guilty of. *Palmer v. City of Concord*, 48 N. H. 211, 97 Am. Dec. 605.

Under an act making towns liable for property destroyed by rioters, but providing that no person shall be entitled to the benefits of the act if the destruction of his property was caused by his illegal or improper conduct, the keeper of a drinking and gambling house is not entitled to recover for property destroyed in such house in a riot growing directly out of a dispute therein concerning a gambling transaction, although such keeper was not engaged in the dispute. His conduct in openly keeping a saloon for gambling was illegal and improper. *Underhill v. City of Manchester*, 45 N. H. 214, 216.

The term "irregular or improper conduct," in a statute authorizing all persons affected by the laying out or altering of a highway to appear before the court and remonstrate against the acceptance of the report of the committee for any irregular or improper conduct, includes the action of the committee appointed by the superior court to consider the matter of laying out a highway in failing to give notice of the proceedings to the persons whose lands are to be taken in the construction of the highway. *Shelton v. Town of Derby*, 27 Conn. 414, 422.

Act 1841, declaring that, where any building is destroyed in the county of Philadelphia in consequence of any mob or riot, the county shall be liable for the damages, but that no person shall be entitled to the benefit of the act if it shall appear that the disturbance was caused by his improper conduct, means conduct which was the proximate cause of the destruction. *County of Allegheny v. Gibson*, 90 Pa. 397, 416, 35 Am. Rep. 670.

## IMPROPER INFLUENCE.

"Improper influence is that dominion acquired by any person over a mind of sanity for general purposes, and of sufficient soundness and discretion to regulate his affairs in general, which prevents the exercise of his discretion and destroys his free will." *Millican v. Millican*, 24 Tex. 423, 446.

By the words "improper influence" as used in the statement that a "voluntary confession" must not be extorted by any sort of threats or violence, nor obtained by any direct or implied promises, or the exercise of any "improper influence," is meant influence exercised by threats or promises. *Roesel v. State*, 41 Atl. 408, 412, 62 N. J. Law, 216 (citing 3 Russ. Crimes, 367).

## IMPROPER LIBERTIES.

To take "improper liberties" may mean no more than the undue familiarities in some

states of society considered altogether compatible with the strictest virtue. *State v. Carr*, 15 N. W. 271, 272, 60 Iowa, 453.

#### IMPROPER NAVIGATION.

Any navigation of a vessel when she is not in a fit condition to be navigated with safety to herself or her cargo is improper navigation. *The Manitoba* (U. S.) 104 Fed. 145, 155 (citing *Good v. Association*, L. R. 6 C. P. 563; *Carmichael v. Association*, 19 Q. B. Div. 242; *Canada Shipping Co. v. British Shipowners' Mut. Protection Ass'n*, 23 Q. B. Div. 342).

#### IMPROPER REMOVAL.

"Improper removal," as used in Rev. St. § 81, requiring, as a preliminary step to fix the liability for removing a pauper from one jurisdiction to another, that the officers of the county claiming to fix it upon another county shall give notice to the appropriate authorities of the latter county, informing them of such improper removal, means a removal without legal authority, and with the intent to make the county where the pauper is left chargeable with his support. *Foster v. Cronkhite*, 35 N. Y. 139, 145.

#### IMPROPER TREATMENT.

See "Manifestly Improper Treatment."

#### IMPROPERLY ISSUED.

The failure of a tax collector to return to the auditor a license properly issued under the revenue act does not render such license one irregularly issued or improperly issued. *People v. Logan*, 1 Nev. 110, 115.

#### IMPROPERLY REMOVED.

In relation to removal of actions to federal courts, the term "improperly removed" is sometimes used merely for convenience, as indicating those cases where the petition to remove is improperly allowed. *Springs v. Southern Ry. Co.*, 41 S. E. 100, 102, 130 N. C. 186.

#### IMPROPERLY SUED OUT.

The term "improperly sued out," in a statute requiring an attachment bond to be conditioned to pay all costs and damages the defendant may sustain in consequence of improperly suing out the attachment, has a broader signification than a mere irregularity. It is only improperly issued when the plaintiff has no meritorious cause of action of that class of actions in which the law authorizes a resort to the remedy against the defendant, or, having such a cause of action, the ground alleged in the affidavit for its issue is untrue, or not one of the

grounds enumerated which must exist before it can be obtained. We do not think it is intended to cover a case where the plaintiff had a meritorious cause of action of the class for which an attachment may legally issue, and when the cause for its issuance is one of those specified in the statute, and such cause is true, but the attachment is dissolved for some irregularity or for some technical reason. *Steen v. Ross*, 22 Fla. 480, 486.

#### IMPROPERLY UNITED.

"Improperly united," as used in Practice Act, art. 6, § 6, authorizing a demurrer where several causes of action have been improperly united, construed to mean the uniting "of incongruous causes of action, and not to the intermingling of causes of the same class in the same count." *Otis v. Mechanics' Bank*, 35 Mo. 128, 132.

### IMPROVE

Otherwise improve, see "Otherwise."

The charter of a corporation, declaring that its object is to improve, sell, lease, or otherwise dispose of real estate, means "the performance of any act, whether on or off the land, the direct and proximate tendency of which is to benefit the property or enhance its value." *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83, 85.

Where a lease provided that the lessee should have the right to alter, repair, and improve the premises as might be to his interest, the word "improve" meant to make better, so that the tenants might alter and make the premises better at their own will. *Hasty v. Wheeler*, 12 Me. (3 Fairf.) 434, 437.

"Amongst other definitions, Worcester defines the word 'improve' to mean 'to make good use of; to employ advantageously; to increase, augment, or enhance, as to that which is evil'; while Webster defines it 'to make better; to advance in value; to use or employ to a good purpose; to make productive or to turn to profitable account; to use to advantage.' The term, in articles of incorporation declaring the purpose of the incorporation to buy, improve, lease, sell, or otherwise dispose of real estate, includes the performance of any act, whether on or off the land the direct and proximate tendency of which is to benefit the property or enhance its value, and therefore the corporation is entitled to contract for additional railroad facilities which tend to facilitate the value of the property." *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83, 85.

"Improving such estate," as used in Laws 1886, c. 257, authorizing the sale or

mortgage of land held in trust whenever it shall appear to the satisfaction of the court that it is for the best interest of such estate so to do, and that it is necessary for the benefit of the estate to raise, by a mortgage thereon or by a sale thereof, funds for the purpose of improving such estate, means the improvement of the real estate, and hence does not authorize a sale of real estate for the reason that by investing the proceeds the income of the life tenant would be increased. *In re Roe*, 23 N. E. 1063, 119 N. Y. 509.

#### **As use, occupy, and appropriate.**

In an instrument of donation of property to a church for the purpose of supporting a clergyman, one of the recitals of which was, "As to the particular mode of improving the aforesaid donation in the best manner for answering the design of it, we submit it to the present executory wardens and officers to form such rules," etc., "for managing the same," "improving" is used in its enlarged sense, and means to use, occupy, and appropriate. It may be sometimes used in a restrictive sense, and confined to investing, increasing, or bettering the fund to which the terms apply. *Trustees of Greene Foundation v. City of Boston*, 66 Mass. (12 Cush.) 54, 57.

#### **IMPROVED DESIGN.**

Rev. St. N. Y. § 4929, provides that a patent may be granted for a new and original design. Held that, where a patent was granted for a new and improved design, the term "improved," as so used, should be construed to mean a new and distinctive design. It was an improvement as compared with others used, and, in connection with the term "new," it meant that the design was original with the patentee. *Wood v. Dolby* (U. S.) 7 Fed. 475, 476.

#### **IMPROVED LAND.**

The term "improved land," as used in How. Ann. St. § 9174, which provides for the punishment of every person who shall willfully commit any trespass by entering on the garden, orchard, or other improved land of another, without the permission of the owner thereof, and with intent, etc., does not include that portion of a farm lying within the limits of a highway. *People v. O'Brien*, 26 N. W. 795, 796, 60 Mich. 8.

"Improved," as used in Rev. St. c. 136, § 9, authorizing the owner of land, who shall have improved the same and erected a division fence, to recover of the adjoining owner the value of such part of the fence as it was his duty to build, means land which is used in any way or for any purpose, or occupied by buildings. *Wiggin v. Baptist Soc.*, 43 N. H. 260, 261.

Using premises as part of a wood lot, taking therefrom wood for fuel, and using it

as a sugar bush, does not make it cultivated or improved land, within Code Civ. Proc. §§ 371, 372, so as to sustain a claim of adverse possession. Thus, in *Clark v. Phelps* (N. Y.) 4 Cow. 203, the court, in speaking of the terms "improved or cultivated land," as used in the law as to laying out of highways, says: "These terms are to be taken in the popular sense, according to the general understanding of the community, when distinguishing what is called wild lands, or land in a state of nature, from that which has been cultivated and improved. To improve, and cultivate may be considered synonymous. To cultivate is defined as to improve the product of the earth by manual industry. When speaking of improved land, it is generally understood to be such as has been reclaimed, is used for the purpose of husbandry, and is cultivated as such, whether the appropriation is for tillage, meadow, or pasture." So, in *Doolittle v. Tice* (N. Y.) 41 Barb. 181, 185, the court says: "Reaping, alone, can scarcely be considered as cultivating. Nor can the keeping up a fence already made, mowing the grass, and cutting brush, be considered an improvement." *Voight v. Meyer*, 59 N. Y. Supp. 70, 72, 42 App. Div. 350.

#### **Inclosed fields.**

In sustaining a declaration in an action against a railroad company for killing stock, which contained an allegation that the place where the stock was killed was not where the road passed through unimproved lands at a greater distance than five miles from any settlement, the court, in answer to the contention that the pleader should have used the words "uninclosed lands" instead of "unimproved lands," stated that "the inclosure of land is an improvement of it, as would also be the erection of a house upon it. It is something done towards its enjoyment. But land may also be improved without being inclosed, as by plowing. To aver, therefore, that land is unimproved, is to aver that it is uninclosed, and something more. It is to aver that it is neither inclosed nor cultivated. When, then, this declaration avers that it was the duty of the company to fence its road, except where it ran through unimproved land, it states the exception as larger than it really is, and the obligation of the company as less than it is." *Illinois Central R. Co. v. Wade*, 46 Ill. 115, 116.

#### **As land occupied and held.**

"Improved," as used in a deed describing the boundary of the granted premises as "then running northerly by land improved by A. to the road," means occupied or held. The word "improved" is not a technical word, having a precise legal meaning. Indeed, there is no very good authority for its use in the sense in which it is not infrequently employed in familiar speech, viz., occupied or held. *Bond v. Fay*, 90 Mass. (8 Allen) 212, 215.

"Improved land," as used in Rev. St. c. 51, § 36, requiring railroads to make legal, sufficient fences along the line of their location, where the road passes through inclosed or improved land, should be construed to include the land appurtenant to a dwelling house and barn. "Improved" is not a technical word, having a precise legal meaning, when applied to real estate, but may mean land that is occupied. *Bouv. Law Dict.* As generally understood, improved land is that which is occupied or made better by care or cultivation, or which is employed for advantage. *Osborne v. Canadian Pac. Ry. Co.*, 32 Atl. 902, 903, 87 Me. 303 (citing *Webst. Dict.*; *Wilder v. Maine Cent. R. Co.*, 65 Me. 332, 339, 20 Am. Rep. 698).

"Improved," as used in Rev. St. 1898, § 4214, providing that, for the purpose of constituting adverse possession, land shall be deemed to have been possessed and occupied when it has been usually cultivated and improved, means put to the exclusive use of the occupant, as the true owner might in the usual course of events. That use may be, as it often is, one that adds nothing to the value of the premises. It may even destroy the natural and actual value—as, for instance, a highway may be acquired by 20 years' uninterrupted adverse use. *Batz v. Woerpel*, 89 N. W. 516, 519, 113 Wis. 442.

"Improved land," as used in a rule of court (section 1) providing that, when a road is laid out over improved land of a person, the person occupying such land shall receive five days' notice of the time and place of meeting of the viewers, should be construed to include the ground appropriated for a railroad, for it is improved in the only mode in which it is capable of improvement; that is, by laying its tracks upon it. *In re Road in Lancaster City*, 68 Pa. (18 P. F. Smith) 396, 399.

#### IMPROVED METHOD.

If part of a method be new so as to produce a result that, as a whole, is new, surely it may be called a new or improved method, within the meaning of the patent laws. *Beard v. Egerton*, 3 C. B. 97, 127.

#### IMPROVEMENT.

See "County Improvements"; "Internal Improvement"; "Local Improvement"; "Moral and Mental Improvement"; "Necessary Improvements"; "Permanent Improvement"; "Public Improvements"; "Reasonable Improvements"; "Special Improvements"; "Street Improvement"; "Under Improvement"; "Valuable Improvements."

Other improvements, see "Other."

In Act June 3, 1887, providing that marriage shall not impose any disability on or

incapacity in a married woman as to the acquisition of property for the use, enjoyment, and improvement of her separate estate, the term "improvement" implies an existing subject, but does not control or even color the meaning of the words "use" and "enjoyment," with which it is coupled. They were coupled for the sake of convenience, but were employed to express distinct and independent purposes in reference to the separate estate. The acquisition of lands would often be advantageous to the use and enjoyment of her separate estate when not required for its improvement. *Steffen v. Smith*, 28 Atl. 295, 296, 159 Pa. 207.

Const. art. 1, § 18, declares that private property shall not be taken for public use without just compensation first being made, etc., as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantage that may result to said owner on account of the improvement for which it is taken. Held, that the word "improvement," in this connection, relates to the work done—the road itself when constructed, as well as to its uses and purposes. *Frederick v. Shane*, 32 Iowa, 254, 256.

#### IMPROVEMENT (In Mill).

In a covenant in a lease of a mill to leave at the end of the term, and to yield the premises, together with all locks, bolts, bars, and other fixtures, fastenings, and improvements which then were or which might be placed on the premises, "improvements" was a word large enough to cover alterations in the working part of the mill, and would include a pair of new millstones set up by the lessee during his term, though the custom of the country authorized the lessee to remove them. *Martyr v. Bradley*, 9 Bing. 24.

#### IMPROVEMENT (In Patent Law).

See "New and Useful Improvement."

As applied to machinery an improvement is where a specified machine already exists, and an addition or alteration is made to produce the same effect in a better manner, or some new combination is added to produce some better results. In such cases the patent can only be for the improvement or new combination. *Curtiss on Patents*, §§ 8, 22. According to the *Century Dictionary*, "In patent law, an improvement is an addition to or change in some specific machine or contrivance by which the same effects are produced in a better manner than before, or new effects are produced." *Bouvier's Law Dictionary* defines "improvement" as an addition of some useful thing to a machine, manufacture, or composition of matter. *Allison Bros. Co. v. Allison*, 23 N. Y. Supp. 1065, 1069, 70 Hun, 27.

In a contract by an inventor, giving a manufacturer the right to use certain inventions and all improvements thereon thereafter made, the word "improvements" is not to be technically construed, but to be understood in its ordinary sense. Being so understood, it is broadly inclusive. It comprises anything and everything by which the subject to which it relates may be improved, and embraces improvements to main features as well as any minor details. It necessarily imports modification, and the alterations may consist either in omission of parts, or their readjustment, or in the substitution of new parts for old ones, or in all of these, yet the thing altered, though it may be greatly changed, is not, in common apprehension, regarded as a different thing, and does not, in common speech, acquire a different name. *Geisler Mfg. Co. v. Frick Co.* (U. S.) 92 Fed. 189, 191.

"Improvements," as used in a contract for services pertaining to the manufacture of shellers and powers, providing that improvements that the person may make or cause to be made should belong to his employer, cannot be construed to include the invention of improved check rowers—an attachment to a machine for planting corn, the manufacture of which had been taken up by the employer subsequent to the contract—but only includes improvements to be made in shellers and powers without reference to check rowers. *Joliet Mfg. Co. v. Dice*, 105 Ill. 649, 650.

#### Extension of patent.

The word "improvement," when used in an assignment of an improvement pending an application for a patent, naturally refers to the subject-matter of the expected grant, and does not refer to any extension of the patent which may be obtained later by the assignor. *Johnson v. Wilcox & Gibbs Sewing Machine Co.* (U. S.) 27 Fed. 689, 691.

#### Invention.

"Improvement" and "invention" are not convertible terms. An improvement is not necessarily an invention, while an invention is *prima facie* an improvement. And where the most favorable construction that can be given to a patent is that the article constitutes an improvement over prior inventions, but it embodies no new principle or mode of operation not utilized before by other inventors, there is no invention. *William Schwarzwaelder & Co. v. City of Detroit* (U. S.) 77 Fed. 886, 891.

"All improvement is not invention, and entitled to protection as such. Thus to entitle it, it must be the product of some exercise of the inventive faculties, and it must involve something more than what is obvious to persons skilled in the art to which

it relates." *William Schwarzwaelder & Co. v. City of Detroit* (U. S.) 77 Fed. 886, 891 (quoted in *Pearce v. Mulford*, 102 U. S. 112, 118, 28 L. Ed. 98).

The term "improvement" is a technical one in patent practice, and is almost always used, in making out applications, to designate the invention itself. Thus, in a contract for the sale of patents and improvements of the same, the term "improvements" was construed to mean "inventions." *Appeal of Reese*, 15 Atl. 807, 811, 122 Pa. 392, 22 Wkly. Notes Cas. 501, 509.

#### New element or process.

An improvement, within the meaning of the patent law, often consists in the introduction of a new element into an old machine. *Rheem v. Holliday*, 16 Pa. (4 Harris) 347, 352.

"Improvement," as used in an assignment of a patent and improvements on the same which may hereafter be made, cannot be deemed to be equivalent to some entirely new process which is independent of the former invention, and hence does not include a patent subsequently granted the assignor for a machine to manufacture by a different process the same goods as were produced by the machine covered by the patent assigned, but which can be used without any of the machinery included in the earlier patent, and without infringing thereon. *Allison Bros. Co. v. Allison*, 38 N. E. 956, 958, 144 N. Y. 21.

An assignment of all rights and formulas pertaining to or about the combination or article known as "Stanton's Naphtha Soap," and the mixture and combination thereof, and any and all parts thereof, including letters patent, including any and all improvements for or about the same, or pertaining to the art of naphtha soap making, cannot comprehend every future invention of every possible process for making naphtha soap, though different from and independent of the first formula. *McFarland v. Stanton Mfg. Co.*, 33 Atl. 962, 963, 53 N. J. Eq. (8 Dick.) 649.

#### New use.

Where the claim for a patent rests merely upon the application of an old machine to a new use or to a new purpose, or upon the application of an old process to a new result, the patent cannot be sustained, because the patentee, under these circumstances, has not invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter not known or used by others, for which alone a patent can be legally granted. *Bray v. Hartshorn* (U. S.) 4 Fed. Cas. 38, 40.

**IMPROVEMENT (Of Building).**

As building, see "Building (In Lien Laws)."

Under a statute providing that any one furnishing material or labor for the improvement of any building shall be entitled to a lien, it is held that the term "improvement" includes the entire building. *Equitable Life Ins. Co. v. Slye*, 45 Iowa, 615.

**Store fixtures.**

As used in a lease providing that all the improvements, alterations, repairs, and additions put upon the premises by the tenant shall be left for the benefit of the landlord at the expiration of the term, "improvements" ordinarily refers to changes and additions made to the freehold, and not to the mere introduction of movable chattels brought in by the tenant for his personal use and the convenience of his trade, and will not include movable store fixtures. *Smusch v. Kohn*, 49 N. Y. Supp. 176, 178, 22 Misc. Rep. 344.

Within a lease in which the lessee agreed to leave the building, with all the improvements that should be erected, in good repair and condition, a plate-glass shop front, which had been erected by the lessee in order to make the shop more convenient for his trade, was an improvement, within the true meaning of the covenant. *Haslett v. Burt*, 18 C. B. 893, 902.

"Improvements," as used in a lease which provides that all improvements of the building shall belong to the landlord at the expiration of the term, may be said to "comprehend everything that tends to add to the value or convenience of a building or a place of business, whether it be a store, manufacturing establishment, warehouse, or farming premises. It certainly includes repairs of every description. It necessarily includes more than the term 'fixtures.'" *Parker v. Wulstein*, 21 Atl. 623, 48 N. J. Eq. (3 Dick.) 94.

**IMPROVEMENT (Of Land).**

"Improvements," as used in a contract whereby a party went into possession of premises under a contract to purchase the improvements of the owner, and his title to the premises, as soon as it should be settled, means work and labor of the owner which enhanced the value of the premises. *Spencer v. Tobey* (N. Y.) 22 Barb. 260, 269.

In construing Code Civ. Proc. § 325, providing that land claimed by adverse possession may be occupied and possessed by the usual cultivation and improvement, it was held not error to refuse an instruction that "improvement" meant advantageous improvement, or to enhance in value, or to occupy for a beneficial purpose. The court

said that a portion of the instruction that "improvement" did not necessarily mean buildings or structures thereon might properly have been given, but that the mere beneficial user of the land for hunting, fishing, or bathing would probably have come within the signification of the language used in the requested instruction, yet certainly those things are not meant by the words "usually improved." *Allen v. McKay*, 52 Pac. 828, 830, 120 Cal. 332.

*Gantt's Dig.* § 3905, provides that it shall be the duty of every person who has obtained a donation of a tract of improved land to pay the owner of such improvements double the value thereof within a certain time, and, should any such improvement not be paid for, the donee shall forfeit all rights to land, etc. Held, that the word "improvement," as used in the statute, as well as in all the laws pertaining to the Arkansas land system, does not mean a general enhancement of the value of the tract from the occupant's operations. It has a more limited meaning, which has in view the population of our forests and the increase of agricultural products. All works which are directed to the creation of homes for families, or which are substantial steps towards bringing lands into cultivation, have, in their results, the special character of improvements. The test is, are they real, and made bona fide, in accordance with the policy of the law, or are they only colorable, and made for the purpose of fraud or speculation? The amount of their value, if any at all, is immaterial. *Simpson v. Robinson*, 37 Ark. 132, 137.

"Escriche, in his Dictionary, divides improvements into three classes—necessary, beneficial, and voluntary. Necessary are those made to prevent the loss or deterioration of the property, as repairs on an edifice threatened with ruin, or an embankment to secure lands from overflow. Beneficial are such as, though they are not devised to preserve the property, yet enhance its value or rent, as the planting of trees, vineyards; the construction of wine presses, granaries, stables, etc. The voluntary are those which serve merely for ornament, as paintings, flower beds, etc." *Saunders v. Wilson*, 19 Tex. 194, 197.

The term "improvement" as used in the title relating to revenue, includes all buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land, whether title has been acquired to such land or not. *Pol. Code Mont.* 1895, § 3680, subd. 3; *Comp. Laws N. M.* 1897, § 4019; *Mills' Ann. St. Colo.* 1891, § 3782, cl. 2; *Rev. St. Utah* 1898, § 2505.

For the purpose of assessment, everything attached to the soil shall be known as "improvements." *Ky. St.* 1903, § 2984.

The term "improvements," as used in the title relating to revenue, includes (1) all buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land; (2) all fruit, nut-bearing, or ornamental trees or vines, not of natural growth. Pol. Code Idaho 1901, § 1813, subd. 3.

The term "improvements," as used in the revenue act, includes (1) all buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land, except telephone and telegraph lines; (2) all fruit, nut-bearing, or ornamental trees and vines, not of natural growth, excepting fruit and nut-bearing trees under four years of age, and grapevines under three years of age. Pol. Code Cal. 1903, § 8617, subd. 3.

#### **Alfalfa.**

Alfalfa is not an improvement, within Pol. Code, § 8617, providing that the term "improvements" includes fruit and nut-bearing or ornamental trees and vines, not of natural growth, except fruit and nut-bearing trees under four years of age, and grapevines under three years. *Miller v. Kern County*, 70 Pac. 549, 553, 137 Cal. 516.

#### **Building.**

The term "improvements," within a statute giving a lien for lumber furnished for improvements on land, includes building an office, and putting in floors and ceilings therefor, in a building constructed, and putting in stairs and elevators, and erecting a shed behind the building. *National Life Ins. Co. v. Ayres*, 82 N. W. 607, 608, 111 Iowa, 200.

A greenhouse is an erection and improvement, within a lease requiring the lessee to yield up "all erections and improvements" made or set up during the term. *West v. Blakeway*, 2 Man. & G. 729, \*757.

"Improvement," as used in Code, § 3019, giving a lien for labor or materials furnished on any building or improvement on land, is not necessarily synonymous with "building." An improvement may be an independent structure or addition, and it may be an addition to, or mere betterment of, a building or improvement already made. *Wimberley v. Mayberry*, 10 South. 157, 158, 94 Ala. 240, 14 L. R. A. 305.

In Code, § 2723, giving any person doing work or furnishing materials for any building or improvement upon land a lien, etc., "improvement" is not restricted in its meaning to buildings only, but the scope of the term is in a great measure left for determination in particular cases as they may arise; and, since a well may greatly enhance the permanent value of the land, it is held to be an improvement, within the meaning of the statute. *Bates v. Harte*, 26 South.

898, 899, 124 Ala. 427, 82 Am. St. Rep. 186 (citing *Hoppes v. Baile*, 105 Iowa, 648, 75 N. W. 495).

The term "improvements," in statutes giving a mechanic's lien on all improvements, engines, pumps, etc., about, in, or in any way connected with or appurtenant to, oil or other refineries, and to all tanks for the storage of petroleum, coal, or carbon oil, or the products thereof, whether said tanks be connected with the refinery or otherwise, does not include an ordinary dwelling house, though it is large enough, under ordinary circumstances, to include such a house, as it is manifest from the connection of the word with the words, "engines, pumps," etc., that the word was not intended to authorize the creation of liens upon ordinary houses or dwellings of tenants, independently of the works indicated by the other expressions used in connection with the word "improvements." These words have clear reference to the works "erected on colliery leases." *Appeal of Schenley*, 70 Pa. (20 P. F. Smith) 98, 102; *Schmidt & Co. v. Armstrong*, 72 Pa. (22 P. F. Smith) 355, 358.

A building for business purposes erected by a tenant of a leased estate upon the leased land is an improvement, within the meaning of Act Pa. Feb. 17, 1858, which extends the mechanic's lien law to the interest of tenants of leased estates for all improvements erected on leased lands. *George Carroll & Bro. Co. v. Young* (U. S.) 119 Fed. 576, 577, 56 C. C. A. 380 (citing *Thomas v. Smith*, 42 Pa. [6 Wright] 68, 73; *Mountain City Ass'n v. Kearns*, 103 Pa. 403).

#### **Clearing, fences, etc.**

"Improvements," as used in a viewer's report stating that a draft was attached, showing the course and distance of the road, and noticing briefly the improvements over which it passes, cannot be construed to include the boundary lines between landowners. Mere boundary lines are not improvements, but fences erected upon them, and buildings, clearings, etc., upon the lands inclosed by them, are. In re *Leet Tp. Road*, 23 Atl. 238, 239, 159 Pa. 72.

"The term 'improvement' is a comprehensive term and means any melioration whereby land is converted from its natural estate to a state and condition for the use and enjoyment of man. It may consist in clearing, fencing, and building, or other ways of converting soil to the use of man by enriching its condition." The improvements, as so defined, are understood by the statute of November 21, 1831, providing that it shall be unlawful for any person, within 12 months after the passage of the act, to enter any quarter section, etc., in a certain district, which has been made by any actual settler in the land district, etc. *Johnson v. Gresham*, 35 Ky. (5 Dana) 542, 547.



"Improvements," as used in Act Cong. Feb. 19, 1875, giving the holder of certain Indian leases the right of renewal thereof in case he is the owner of improvements erected on the land leased, as it falls to designate the nature of the improvement, means improvements of any description; and hence the act is satisfied by the construction of a log and brush or stump fence partly around the premises, though the materials therefor are taken from the land itself. *Walt v. Jame-son* (N. Y.) 15 Abb. N. C. 382, 385.

"Improve," as used in Gen. St. 1878, c. 18, § 3, providing that occupants of lands shall maintain partition fences in equal shares so long as they continue to improve the land, is not used in the sense of "cultivate." It would include the fencing of the land. The word, as defined by Webster, means "to use or employ to good purpose; to make productive; to turn to profitable account; to use for advantage; to use; to occupy; to cultivate." *Boenig v. Hornberg*, 24 Minn. 307, 310.

Code 1873, § 2130, secures a lien to persons who labor upon any building, erection, or other improvement upon land. It was held that breaking prairie sod, while it was an improvement of the land, could not in any just sense be denominated an improvement upon the land. *Brown v. Wyman*, 9 N. W. 344, 345, 56 Iowa, 452, 41 Am. Rep. 117.

"Improvements," as used in Elmer's Dig. p. 472, § 5, relating to roads, and providing that the surveyors shall cause the road to be marked at proper distances, and make return thereof, with a map or draft of the same, with the courses and distances, and references to the most remarkable places, and the improvements through which it may pass, means inclosures or inclosed fields—lands fenced in, as distinguished from waste or common lands—and does not mean dwelling houses or barns. *State v. Hopping*, 18 N. J. Law (3 Har.) 423, 424.

#### Coal mine.

"Improvement," as used in Code Ala. 1886, § 3018, giving a lien to every mechanic or other person doing work or furnishing material, fixtures, or machinery for any building or improvement on land, includes a coal mine. *Central Trust Co. v. Sheffield & B. Coal, Iron & Ry. Co.* (U. S.) 42 Fed. 103, 9 L. R. A. 67.

#### Embankments along canal.

Embankments constructed along the margin of a canal to confine the water in the channel are not improvements, within the definition of Pol. Code, § 3617, subd. 4, defining "improvements" as a building, structure, fence or fixture, and improvements erected and affixed to the land, except telephones and telegraphs. *Kern Valley Water*

*Co. v. Kern County*, 70 Pac. 476, 477, 137 Cal. 511.

#### As entire erection.

In the lien law, authorizing a lien for work done and material furnished for a building, erection, or other improvement, which lien shall attach to the improvement in preference to any prior lien or incumbrance, "improvement" is limited to those cases where it is descriptive of an entire building or independent erection, and not to those cases where additions may be made to a structure already on the ground, which it would be inequitable to permit the lienor to remove. *Getchell v. Allen*, 34 Iowa, 559, 561; *Church v. Smithea*, 35 Pac. 267, 268. 4 Colo. App. 175.

"Improvements," as used in Revision 1860, providing that a mechanic's lien is made to attach from the commencement of a building, erection, or other improvement, comprehends the entire erection, and is not limited to the constituent parts thereof. *Neilson v. Iowa Eastern Ry. Co.*, 44 Iowa, 71, 75.

#### Engine and machinery.

Within the meaning of Rev. Code, c. 872, which requires that a tax on land be made according to its value, including the improvements thereon, the term "improvements on land" includes machinery in a mill used for the spinning of cotton, where the same is connected with the water wheel which provides the power for running said machinery. The phrase as used in the act above quoted and like acts would include all buildings and erections which add to the value of the estate, and which would pass as a part of it under a sale and conveyance. *Ex parte Makepeace*, 31 N. C. 91, 93.

The word "improvement," in Rev. St. 1879, §§ 3172, 3175, giving a mechanic's lien on a building or improvement, is synonymous with the term "building," and does not extend to engines, boilers, and machinery erected by a tenant upon leased premises, with power of removal, unless the same are used in the construction of the building or improvement, or are afterwards connected therewith, and become a part of the building itself, for some permanent object. *Richardson v. Koch*, 31 Mo. 264, 270.

Gen. St. 1865, c. 195, gives a mechanic's lien for materials, etc., for any building or other improvement erected or materials furnished on the building, improvement, and the land, if the work is done for the proprietor. Held, that the term "improvement" should be construed as synonymous with "building," and does not include an engine and boilers erected by a tenant on leased premises, with power of removal. *Collins v. Mott*, 45 Mo. 100, 102.

"Improvements," within the meaning of the constitutional provision excepting debts for the erection of improvements on homesteads from the operation of the provision that homesteads shall be exempt from the owner's debts, does not include a portable engine placed on the land for purposes connected with the planting business of the owner. *Greenwood & Son v. Maddox & Toms*, 27 Ark. 648, 661.

Gen. St. 1883, § 2001, which provides that the homestead exemption shall not extend to an obligation for the erection of improvements on the homestead, would include a waterwheel and other mill fixtures attached to the homestead. *All v. Goodson*, 11 S. E. 703, 704, 33 S. C. 229.

#### As carrying estate in fee.

In a will giving testator's wife the use and improvement of one-third of all his real estate, "improvement" should be construed in its more general and popular acceptance, and refers to a temporary occupancy of the land, rather than to an estate in it coupled with the power of alienation. This word is not ordinarily selected to convey a permanent interest in land, nor is such its natural import or meaning. *Fay v. Fay*, 55 Mass. (1 Cush.) 93, 104.

Under a will by which testator devised "to my wife one-third part of all my effects, the improvements excepted. Also I give to my son James the improvement whereon I now live"—the son took an estate in fee. *Anonymous* (Pa.) 3 Dall. 477, 1 L. Ed. 687.

The use of the word "improvement" in a will devising the improvement of testator's farm to a certain beneficiary has a considerable tendency to show that a fee simple was not intended to be given; and, when such devise is followed by a clause directing the said premises to be equally divided between all the legal heirs of the beneficiary at her decease, the will can only be construed to pass a life estate to the first beneficiary. *Bowers v. Porter*, 21 Mass. (4 Pick.) 198, 202.

The words "improvements and income" when used in a devise conveying the improvements and the income of a testator's dwelling house generally operate to convey the land, but their meaning may be modified by the context, and, a devise of the improvements and income of testator's dwelling house to his wife "so long as she keeps my name," could not be construed to carry more than a life estate. *Long v. Paul*, 17 Atl. 968, 991, 127 Pa. 456, 14 Am. St. Rep. 862.

A devise of "the improvement, use, and benefits" of all testator's real estate passes the estate itself, and would carry a fee if it were not succeeded by the words "during his natural life." *Gleason v. Fayerweather*, 70 Mass. (4 Gray) 348, 351.

#### As fixtures.

The phrase "all the improvements thereon," when used in conveyances of land, is in common use in our western country to denote whatever has the character of a physical fixture at the time, and is generally comprehended in the words "appurtenances, hereditaments," etc. *Bemis v. First Nat. Bank*, 40 S. W. 127, 128, 63 Ark. 625.

"Improvements," as used in a lease providing that on the last day of the term the lessee will surrender the demised premises, and all the improvements that may have been placed thereon by the lessee, embraces every addition, alteration, erection, or annexation made by the lessee during the demised term to render the premises more valuable and profitable or useful and convenient to them. It is a more comprehensive word than "fixtures," but necessarily includes it and such additions as the law may not regard as fixtures. *French v. Mayor of New York* (N. Y.) 16 How. Prac. 220, 222.

A lease containing a covenant that improvements made upon the premises the lessee should leave undisturbed, for the benefit of the premises, without charge, means improvements on the realty itself. The word itself conveys this meaning. In order that there might be an improvement, there must previously have been something to be improved. The improvement consists in the amelioration or bettering of the premises. The improvements, to be within the provision of the lease, must, when made, savor of the realty. To become such an improvement, the personalty used must be converted into realty; and, to be so converted, it must have been actually annexed to the realty, with an intention to make it a part of the demised premises. *Ames v. Trenton Brewing Co.*, 38 Atl. 858, 861, 56 N. J. Eq. 309.

The term "improvements," within the meaning of special act St. Louis county, 1857 A., p. 668, giving a lien to mechanics on improvements, does not include such improvements as a lessee will be permitted to remove at the end of his term. *Koenig v. Mueller*, 39 Mo. 165, 168.

#### Grading city lot.

"Improvements," as used in Code 1873, § 469, providing that a city changing the established grade of a street shall be liable for injuries done to any person who shall have built or made any improvements on such street, will be construed to include a grading and filling in of a city lot preparatory to building thereon. *French v. City of New York* (N. Y.) 16 How. Prac. 220; *Chase v. City of Sioux City*, 53 N. W. 333, 334, 86 Iowa, 603.

#### Icehouse.

"Improvements," as used in Act Feb. 17, 1858, authorizing a mechanic's lien on cer-

tain buildings and improvements, does not include a temporary and insignificant addition, but only such permanent and substantial erections as essentially augment the interest which the tenant has in the land; and hence an icehouse, which constituted an independent and separate structure for purposes of commerce, must be considered an improvement, within the meaning of the statute. *Thomas v. Smith*, 42 Pa. (6 Wright) 68, 73.

#### **As labor performed.**

"Improvement," as used in Code Civ. Proc. § 1187, requiring every person, save the original contractor, to file his claim for a lien within 30 days after the completion of any building, improvement, or structure, is used as equivalent to the object on which the labor has been performed, and will not be held to be equivalent to the labor itself, or to that particular class of labor for which the claimant was employed, so that where a lien was filed before the completion of the building or improvement, and within 30 days after the completion of the particular labor, it was prematurely filed. *Davis v. MacDonough*, 42 Pac. 450, 451, 109 Cal. 547.

#### **Ornamental vase and stepping stone.**

Improvements covered by a mortgage on land, with all the buildings and improvements thereon, did not include heavy ornamental vases standing in the garden of the house on the premises, but not in any way fastened to the soil, or a stepping stone on the sidewalk in front of said premises. *Pflugger v. Carmichael*, 66 N. Y. Supp. 417, 418, 54 App. Div. 153.

#### **As permanent structures.**

The term "improvement" in the phrase "house or improvement" in the lien law, implies any permanent structure not under the designation of the word "house." *Fagan & Osgood v. Boyle Ice Mach. Co.*, 65 Tex. 324, 332.

"Improvement," as used in a covenant in a deed as to building restrictions, does not refer to the erection of mere temporary structures, intending only to answer the purpose of present use, however long that use may continue, but evidently contemplates the improvement of the ground by the erection of permanent buildings. That is the popular and ordinary sense of the word "improvement." *Appeal of St. Andrews Church*, 67 Pa. (17 P. F. Smith) 512, 519.

Act Feb. 17, 1857, giving liens on improvements put up by a lessee on land of another, cannot be applied to temporary and insignificant additions, but only to such permanent and substantial erections as do essentially augment the interest which the tenant has in the lands. *Orth v. West View Oil Co.*, 28 Atl. 180, 181, 159 Pa. 388.

#### **Railroad.**

By Laws 1897, p. 231, c. 89, § 5, the word "improvement," when referring to tide or shore lands and harbor areas, is declared to mean all fills or made ground of a permanent character, and all structures erected or commenced on said lands, or actually in use for purposes of trade, business, or commerce, prior to a certain date; and under this statute it is held that a railroad built on public tide lands of the state is not an improvement for which the owner has the right to demand an appraisalment on the sale of the land by the state to another. "It is evident," says the court, "that the statute contemplates by the word 'improvement' a structure which will add value to the land, and which will be of use and benefit to the purchaser, as owner of the land. The things enumerated as constituting improvements are all of this character, but a line of railroad track extending across the land cannot be of use as an improvement, or tend in any way to enhance its value." *Lake Whatcom Logging Co. v. Callvert*, 73 Pac. 1128, 1130, 33 Wash. 126.

The term "improvement," in a mechanic's lien law, giving a mechanic's lien on improvements or fixtures erected by tenants, etc., does not include a railroad constructed by a lessee for mining coal in the slope of a mine, as such railroad is necessarily temporary, and the act only applies to such permanent and substantial erections as do essentially augment the interest which the tenant has in the land. *Appeal of Esterley*, 54 Pa. (4 P. F. Smith) 192, 195.

#### **Rebuilding.**

Gen. St. c. 38, art. 13, § 16, providing that the exemption of a homestead in favor of housekeepers shall not apply to sales under execution, attachment, or judgment at the suit of creditors, if the debt or liability existed prior to the purchase of the lands or of the erection of improvements thereon, and that the policy of the statute was not to allow the debtor to withdraw his money or means from the creditor by erecting improvements thereon, should be construed to include a building built on the homestead in part out of material from an old residence which the owner had torn down. "The fact that the old building was torn down, and some of the material worked into the new building, is in no sense an ordinary repair of the residence, but is the erection of an improvement." *Butler v. Davis* (Ky.) 23 S. W. 220.

#### **Repairs.**

A mechanic's claim for work and materials furnished in the erection, construction, "improvement," and fitting up of certain buildings is not a sufficient statement of the making of repairs thereon. The word "improvement" cannot properly be used to signify any particular thing for which a lien

may be filed. It points to no specific thing, except with the context; and where other words show that the claim is for erection or for repairs that will relate to them. Not only such of those things for which a lien has been given may properly be called an improvement, but so may everything else which adds to the beauty and usefulness of the premises. Appeal of Wetmore, 91 Pa. 276, 279.

Repairs by the tenant of premises in which dower is claimed for the purpose of keeping the house in a tenable condition are not improvements, properly so called, upon the premises, to the expenses of which the demandant, before the assignment of her dower, is under no obligation to contribute. Walsh v. Wilson, 131 Mass. 535, 536.

#### Settlement distinguished.

"In our acts of Assembly and in common parlance there is a difference between an improvement and a settlement. An improvement may be made by clearing land and cultivating it, without residing on it. A settlement requires an actual residence." Bixler v. Baker (Pa.) 4 Bin. 213, 217.

#### Sidewalk.

"Improvements," as used in a statute giving a lien for material used in making improvements on land, should be construed to include stone purchased and placed partly on the lot, and partly on the street adjoining it, in the construction of a sidewalk. Dugan Cut Stone Co. v. Gray, 21 S. W. 854, 855, 114 Mo. 497, 35 Am. St. Rep. 767.

#### Well.

The term "improvement," within the meaning of a statute giving a mechanic's lien for labor or material for any building, erection, or other improvement upon land, includes a well. It is true that the well drilled into land is not an improvement on land in precisely the same sense as a building is, but that might be said of excavations for foundation walls and cellars. Hoppes v. Baile, 75 N. W. 495, 496, 105 Iowa, 648.

"Improvement," as used in Mansf. Dig. § 4402, providing for a lien for labor or materials furnished for any building, erection, or other improvement, cannot be construed to include a well. Guise v. Oliver, 11 S. W. 515, 51 Ark. 356.

"Improvements," as used in Act Feb. 17, 1858, giving mechanics and materialmen a lien on all improvements put up by a lessee on land of another, cannot be applied to temporary and insignificant additions, but only to such permanent and substantial erections as do essentially augment the interest which the tenant has in the lands. Casing and tubing and sand lines used in drilling oil wells are not improvements, within the

meaning of the statute, for no character of permanency can be attributed to them. Orth v. West View Oil Co., 28 Atl. 180, 181, 159 Pa. 388.

#### Windmill.

A windmill erected upon land is within the meaning of Comp. Laws, par. 4447 (Code, § 630), giving a mechanic's lien for the erection of improvements, etc. Phelps & Bigelow Windmill Co. v. Baker, 30 Pac. 472, 473, 49 Kan. 434.

#### IMPROVEMENT (Of Municipality).

"Improvement," as used in a city charter declaring that all the contracts for doing work or furnishing material for any improvement shall be given to the lowest bidder, means work done under contracts relating to the city streets, etc., and has no application to contracts for the purchase of supplies for city departments. City of Trenton v. Shaw, 10 Atl. 273, 274, 49 N. J. Law (20 Vroom) 638.

Under a city charter authorizing the city to purchase property required for the "use, convenience, and improvement" of the city, collateral advantages incidentally resulting in the promotion of the city's commercial or business prosperity will not be sufficient. It is not contemplated or permitted that such property shall be acquired in aid of any public enterprise not of a public character, however laudable may be its purpose, or however useful may be its encouragement. A city cannot purchase land as a place for holding an annual fair. City of Eufaula v. McNab, 67 Ala. 588, 591, 42 Am. Rep. 118.

"Improvements," as used in Act Feb. 17, 1858, relating to mechanics' liens in certain counties for improvements, should be construed to include a building erected for a market house on the first floor, and a hall or audience room on the second. Mountain City Ass'n v. Kearns, 103 Pa. 408, 407.

#### IMPROVEMENT (Of Navigable Water).

"Improvements," as used in Acts 1862, § 38, providing that "the proprietor of land bounding on any of the navigable waters of this state is hereafter declared to be entitled to the exclusive right of making improvements into the waters in front of his land," means such structures as are subservient to the land, and which are used in connection with the land, and hence enlarge its commercial or agricultural facilities or its utility to an extent the land alone would be incapable of, and in this way improves it—as, for example, wharfs, piers, and landings. It would not include an oyster bed. Hess v. Muir, 5 Atl. 540, 542, 65 Md. 586.

**IMPROVEMENT (Of Public Ways).**

"Improvement," as applied to public ways, shall mean all work and material used upon them in the construction and reconstruction thereof. Ky. St. 1908, § 2832.

**IMPROVEMENT (Of Stock).**

The phrase "premiums for the improvement of stock," in Code 1873, § 1114, providing that all county agricultural societies shall annually offer and award premiums for the improvement of stock, includes premiums for horse racing. *Delier v. Plymouth Agricultural Soc.*, 10 N. W. 872, 873, 57 Iowa, 481.

**IMPROVEMENT (On Mining Claim).**

"Improvements," as used in Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], requiring on each mining claim not less than \$100 worth of work or improvements during each year, is not synonymous with "work and labor," and hence an allegation and proof that \$100 worth of work and labor had not been performed on the claim was not sufficient to effect a forfeiture. *Power v. Sla*, 61 Pac. 468, 471, 24 Mont. 248.

"Labor and improvements," within the meaning of the statute requiring \$100 to be expended annually on each mine in labor and improvements, are deemed to have been had on a mining claim when the labor is performed or the improvements are made for its development—that is to facilitate the extraction of the metals it may contain—though in fact such labor and improvements may be at a distance from the claim itself. *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *De Noon v. Morrison*, 23 Pac. 374, 83 Cal. 163; *Doherty v. Morse*, 28 Pac. 85, 86, 17 Colo. 105. Labor performed by the owner of the mine in constructing a wagon road thereto for the purpose of developing and operating the same may be treated as a compliance with the statute. *Doherty v. Morse*, 28 Pac. 85, 86, 17 Colo. 105.

The term "improvements," within the meaning of a federal statute requiring a certain amount of work or labor to be performed or improvements made each year on a mining claim, does not include a house erected outside the claim, to be used in connection therewith, as building a house or cabin is not one of the necessary means or instruments for extracting ore from a mine. In so holding, it is said that undoubtedly work done outside of the claim, if done for the purpose and as a means of taking out the ore, or prospecting or developing the claim, such as running tunnels and drifts, or building flues or works necessary and proper for mining, would be as available as if done within the boundaries. *Remington v. Baudit*, 9 Pac. 819, 820, 6 Mont. 138.

"Improvement," within the meaning of the federal statute requiring the making of improvements, etc., of a certain value, on a mining claim, does not include a house erected on a claim, if not placed thereon for the purpose of benefiting the claim itself, but for the purpose of benefiting an adjoining claim. *Bryan v. McCaig*, 15 Pac. 413, 416, 10 Colo. 309.

**IMPROVEMENT (On Public Land).**

Settlement distinguished, see "Settlement (Public Lands)."

Improvements on public lands are not an interest in or concerning lands, within the meaning of the statute of frauds, requiring a sale of an interest in or concerning lands to be in writing. *Zickafosse v. Hulick* (Iowa) *Morris*, 175, 178, 39 Am. Dec. 458.

The term "improvements," as used in articles 12 and 15 of the United States Cherokee treaty of 1835, declaring that all the Cherokees shall receive their due proportion of all the personal benefits accruing under the treaty for their claims, improvements, and per capita, meant those improvements which were made on the property ceded to the United States at the time of the cession. *Eastern Band of Cherokee Indians v. United States*, 6 Sup. Ct. 718, 728, 117 U. S. 288, 29 L. Ed. 880.

**IMPROVEMENT BOND.**

An "improvement bond" is practically but another form of a special assessment certificate, which gives the property owner an opportunity to pay his assessment in installments running through a period of years, instead of paying the whole amount of the assessment at once. It is collected like other taxes. Rev. St. 1898, §§ 925-190 to 925-197a. *Schintgen v. City of La Crosse*, 94 N. W. 84, 87, 117 Wis. 158.

**IMPROVEMENT DISTRICT.**

As municipality, see "Municipality."

**IMPROVIDENCE.**

Within the meaning of a statute which declares that no person shall be deemed competent to serve as an executor who shall be adjudged incompetent by the surrogate to execute the duties of such trust by reason of drunkenness, improvidence, or want of understanding, the improvidence which renders a man incompetent signifies want of care and foresight in the management of whatever may be put under his control. Without prudence, care, and foresight, property, whatever may be its kind or quality, is sure to go to decay and diminish in value.

The improvidence which the framers of Revised Statutes had in contemplation as a ground of exclusion is that want of care and foresight in the management of property which would be likely to render the estate and the effects of the intestate unsafe and liable to loss or to be diminished in value by improvidence in case administration should be committed to such improvident person. *Emerson v. Bowers* (N. Y.) 14 Barb. 658, 660; *Coope v. Lowerre* (N. Y.) 1 Barb. Ch. 45, 47; *In re Ferguson's Will*, 84 N. Y. Supp. 1102, 1104, 41 Misc. Rep. 465. It means habits of mind and conduct, rendering him generally and under all ordinary circumstances unfit for the trust or employment in question. *Emerson v. Bowers*, 14 N. Y. (4 Kern.) 449, 454.

Code Civ. Proc. § 2661, as amended by the Laws of 1893, providing that letters of administration shall not be granted to one who is judged incompetent by the surrogate to execute the duties of such trust by reason of drunkenness, improvidence, or want of understanding, does not include every species of drunkenness, improvidence, or want of understanding, but only applies when such defects or faults are of such a character as to amount to a lack of intelligence or habitual drunkenness. *In re Manley's Estate*, 34 N. Y. Supp. 258, 259, 12 Misc. Rep. 472. It would include a professional gambler, as the pursuit of gambling naturally engenders habits of recklessness. *McMahon v. Harrison*, 6 N. Y. (2 Seld.) 443, 447.

The construction of the word "improvidence" given by the New York cases was held to be its meaning as used in Code Civ. Proc. § 1369, providing that the father was entitled to be administrator of the deceased son's estate, unless he was adjudged incompetent to execute the duties of the trust by reason of improvidence, etc. *In re Connors' Estate*, 42 Pac. 908, 907, 110 Cal. 408.

"'Improvidence' is defined to be a want of care and foresight in the management of property. The symptoms of an improvident temperament would evidently be carelessness, indifference, prodigality, or wastefulness and negligence, in reference to the care, management, and preservation of the property in charge." *In re Davis' Estate*, 25 Pac. 105, 107, 10 Mont. 228.

An administrator will not be removed, as improvident, within the meaning of Code Civ. Proc. § 2685, subd. 2, relating to acts disqualifying an administrator, because a trust in real estate has, while in his hands, greatly diminished in value and income. *In re Treadwell's Estate*, 75 N. Y. Supp. 1058, 37 Misc. Rep. 584.

## IMPRUDENT.

The word "imprudent" in an instruction, in an action for an injury caused by the pre-

mature starting of the street car, that, in all ordinary cases, to get aboard or attempt to get aboard of a moving public vehicle is imprudent, was held to have been used as a synonym or substituted and equivalent word for "neglect." "This seems to be apparent from the fact that the court refused to charge that it is not always a matter of negligence, as a matter of law, for a person to get upon a car while in motion, so that, even if the plaintiff boarded or attempted to board a car while in motion, the jury might find in his favor. *Lobsenz v. Metropolitan St. Ry. Co.*, 76 N. Y. Supp. 411, 412, 72 App. Div. 181.

## IMPULSE.

See "Irresistible Impulse"; "Uncontrollable Impulse."

## IMPUNITIVE.

We have no such word in our language as "impunitive," and therefore a finding by a jury for "impunitive damages" was not a proper finding. The English word "impunity," which applies to something which may be done without penalty or punishment, comes from the Latin word "impunis," which is a derivative from the word "poena," with the prefix "in," and means without punishment or penalty. *Dillon v. Rogers*, 36 Tex. 152, 158

## IMPURE MILK.

The words "impure milk," as used in the act relating to the sale thereof, mean any milk obtained from animals fed on distillery waste or any substance in a state of putrefaction. P. & L. Dig. Laws Pa. 1894, vol. 1, col. 1271, § 449. All milk obtained from animals in a diseased or unhealthy condition, or who are fed of distillery waste, usually called "swill," or on any substance in a state of putrefaction or fermentation. Pen. Code N. Y. 1903, § 669. See, also, *Commonwealth v. Hough*, 1 Pa. Dist. R. 51, 53.

## IMPUTABLE CONTRIBUTORY NEGLIGENCE.

"Imputable contributory negligence," which will bar the plaintiff from recovery, exists when the plaintiff, although not chargeable with personal negligence, has been, by the negligence of a person in privity with him, and with whose fault he is chargeable, exposed to the injury which he received through the negligence of the defendant. *Smith v. New York Cent. & H. R. R. Co.*, 38 N. Y. Supp. 666, 670, 4 App. Div. 493.

## IN.

The word "in," when used in a grant of a right of way in, upon, and through lands

of U., speaks an intent to concede mere passage, and not to convey title to the land. *Uhl v. Ohio River R. Co.*, 41 S. E. 340, 341, 51 W. Va. 108.

The words "in or upon any mine, lode, or deposit," within the meaning of a statute providing a lien for work and labor in and upon any mine, lode, or deposit, operate to limit the work for which the lien is given to work strictly confined to the mine, and thus the statute does not include the hauling of ore from a mine to a quartzmill. *Barnard v. McKenzie*, 4 Colo. 251, 253.

In a devise of all the furniture, household effects, etc., in, upon, or about the premises, the term "in, upon, or about" included articles which had been upon the property, and had been temporarily sent away for repairs, but did not include articles which had been intended for, but which were never in, the house. *Brooke v. Warwick*, 12 Jur. 912, 913, 12 Law T. 41.

"In or about," as used in a will devising to testator's sons all the corn and other articles which should be in or about his mill, or in or about his dwelling house, did not include a cargo of wheat consigned to testator, which was in transitu at the time of his death, since such cargo could not be considered in or about or in the vicinity of the mill. *Lane v. Sewell*, 43 Law J. Ch. 378.

To constitute goods "property in a particular county," so as to make them legally assessable therein, within the meaning of the revenue laws, the goods must be in such situation as to make them a part of the wealth of the county. They must belong in it, and be incorporated with the other property of the county, and property simply passing through a county for the purpose of finding a market elsewhere is not taxable. *Conley v. Chedic*, 7 Nev. 336, 341.

The expression "in the buildings," in a sale by a lessee owning buildings in the leased premises of the buildings, and all the fixtures of every description attached to said buildings, in said buildings, and belonging to said buildings, simply points out the locality of the attached fixtures. *Stettauer v. Hamline*, 97 Ill. 312, 319.

A fire policy on goods "in a brick building" includes goods in a building erected as a wing against the real wall of the factory, with an opening through the wall of less than three feet square, usually closed by an iron door; both the wing and the main building being used for the same manufacturing purpose. *Blake v. Exchange Mut. Ins. Co. of Philadelphia*, 78 Mass. (12 Gray) 265, 270.

"In," as used in a will by which testator devised his dwelling house, with appurtenances, in High street, and all and every of his buildings and hereditaments in the same street, to his mother, included two cot-

tages behind the house, specifically mentioned, and fronting a lane through which there was no thoroughfare, the only entrance to which was from High street. *Doe v. Roberts*, 5 Barn. & Ald. 407.

A legacy of \$20,000 in "Confederate state bonds" designates the article in which payment is to be made, not the source or fund from which the means of payment are to be derived, and creates, therefore, a general, rather than a demonstrative, legacy. Had it been a legacy of \$20,000 "out of my Confederate state bonds," it would probably have been a demonstrative legacy, for it is a general rule that, nothing appearing to the contrary, a bequest of a certain sum of money out of a designated fund will create such a legacy. *Gilmer's Legatees v. Gilmer's Ex'rs*, 42 Ala. 9, 16.

The words "to," "by," "along," "with," "in," "up," or "down" a creek, river, slough, strait, or bay, mean the middle of the main channel thereof, unless otherwise expressed. *Pol. Code Cal. 1903, § 3906; Pol. Code Mont. 1895, § 4106.*

The words "in," "to," or "from" the ocean shore mean a point three miles from shore. *Pol. Code Cal. 1903, § 3907.*

#### As across.

In the case of *People's Rapid Transit Co. v. Dash*, 125 N. Y. 93, 26 N. E. 25, 10 L. R. A. 728, the Court of Appeals was called upon to construe an act which prohibited the building of a railroad "in, upon, or along any or either of the streets or avenues of the city of New York," except under the authority and subject to such regulations as the Legislature might thereafter provide. It was urged that this act only prohibited the building of a railroad through a portion of the length of the street, and did not apply to the crossing of the street. The court refused to consent to such a construction of the statute, and Judge Peckham says: "If the road were built through the length of the street, its location might be easily described by the use of any one of the three words contained in the statute, 'in,' 'upon,' or 'along' such street. But to describe a road which simply crossed a street as being built along such street would be using language neither appropriate nor exact. To say of such a road that it would be in or upon that street at the point where the road crossed it would be both appropriate and exact. There is a difference in the meaning of these three words as used in the statute, and some effect should be given to such difference. If their meaning be construed to simply prohibit a railroad along the length of the street, no effect whatever is given to this difference. The words used are certainly apt to describe a railroad which crosses the street. Such railroad is plainly for that distance both in and upon the street which it crosses. If not in or upon it at

that point, where is it? No description of its whereabouts at that particular point is better than to say that it is in or upon the street where it crosses. It is sufficient, and it is true. It is not necessary that the railroad should pass along the surface of the street, in order to be in or upon it." *New York, L. & W. Ry. Co. v. Roll*, 68 N. Y. Supp. 748, 751, 32 Misc. Rep. 321.

The charter of a street railroad company, authorizing it to construct and maintain its tracks "upon and over such streets, except in" certain of the streets therein mentioned, cannot be construed to mean that the company could not lay its tracks across one of the excepted streets. *State v. Newport St. Ry. Co.*, 18 Atl. 161, 16 R. L. 533.

#### As at or near.

"In," when used with reference to geographical locations, is usually employed to designate inclusive space, and not mere nearness of location. *Rogers v. Galloway Female College*, 44 S. W. 454, 455, 64 Ark. 627, 39 L. R. A. 636.

A will by which testatrix directed that the proceeds of her property should, at the expiration of five years after her death, be given to an orphan asylum "in" a certain city, or, if no such orphan asylum be then in existence in such city, to a home for old ladies in such city, should not be construed with a strictness limiting the meaning of "in" to within the corporate limits, but it should be regarded as equivalent to "at," so that an orphan asylum outside the corporate limits, but within a mile thereof, should take under the will. It is true that the word "in," literally construed, often fixes the place with more definiteness and certainty than does the word "at." If we speak of being "in" a house or "in" a building, we are understood to mean that we are actually within its walls. But this is not always true when applied to a geographical situation. It is a matter of common observation that the words "in" and "at" are used synonymously in speaking of cities and towns or other geographical locations; for, if one were to say either that he was "in" or "at" a certain town, the meaning would be the same, and he would not necessarily mean or be understood as meaning that his statement had reference to the geographical lines of the city. *Old Ladies' Home of Muscatine v. Hoffman*, 89 N. W. 1066, 1067, 117 Iowa, 716.

Under a statute requiring the posting of notices "in" certain public places, an affidavit stating that they were posted "at" such places is insufficient. The Legislature had seen fit to use the word "in" for good reasons, and certain it is that the words "in" and "at" are not synonymous, and may have a very different meaning, depending on their connection; and to give them the same meaning by construction might, by forcing them

out of their natural meaning, lead at best to uncertainty. *Hilgers v. Quinney*, 51 Wis. 62, 63, 8 N. W. 17.

#### As at expiration of.

The term "in twelve months," in a declaration on a note alleged to be payable in twelve months after date, is satisfied by a note twelve months after date. The legal effect of the terms is the same, as neither becomes due until after the expiration of twelve months from the date of the note. It may be that a note made payable in twelve months after date could be legally discharged by the payor before the expiration of the time the note has to run, but that fact would not make the note become due at any earlier date than if the note had been made payable twelve months after date. *Tipton v. Utley*, 59 Ill. 25, 27.

A bond payable "in twenty-five years after date" is payable at the expiration of twenty-five years, and not "within the twenty-five years," the word "in" not being used in the sense of "within" or "at any time during." *Allentown School Dist. v. Derr*, 9 Atl. 55, 57, 115 Pa. 489.

A contract for the sale of goods, with customary allowance for tare and draft, and to be paid for "by cash in one month," imported a month's credit, and the vendee was entitled to an immediate delivery, but was not bound to pay until the expiration of the month. *Spartali v. Benecke*, 10 C. B. 212, 221.

"It has always been the opinion of the profession that while a mortgage payable 'within a certain time' may, at the option of the mortgagor, be paid off at any time beyond that, a debt payable 'in' a certain time cannot be extinguished, without the consent of the creditor, before the expiration of the time specified." *In re Hofmann*, 14 Wkly. Notes Cas. 563, 565.

"In construing a bond requiring the reconveyance of land on the payment of a certain sum of money within a year, which was held to authorize a payment and require a reconveyance at any time within a year, it was doubted whether a note payable within a certain time could be paid before the expiration of the time; and it is said that there is but a slight difference in phraseology between such a note and one payable in a certain time, and perhaps commercial usage may have construed the latter as an engagement to pay at the expiration of the period, so that the party is not at liberty to tender payment before that time." *Buffum v. Buffum*, 11 N. H. 451, 456.

#### As beyond.

An indenture granting a right of drainage "in and through" three private ways or avenues named does not entitle the grantee, either expressly or impliedly, to extend the



drain to the sea beyond, across lands belonging to a third party which belonged to the grantor at the date of the indenture. *Fiske v. Wetmore*, 10 Atl. 627, 628, 15 R. I. 354.

**As during pendency of.**

The words "in an action," in Code, § 91, providing that the plaintiff, at the time of issuing the summons in an action on contract, express or implied, may have the property of the defendant attached, are not used to denote an action pending, but rather as introductory, describing the kind of action, to wit, an action on contract, express or implied, in which the plaintiff may have the property of the defendant attached. *Schuster v. Rader*, 22 Pac. 505, 506, 13 Colo. 329.

Comp. St. c. 57, § 21, providing that injunctions may be granted on complaint, "in all civil actions," did not intend to prescribe that the writ could only be issued after the commencement of an action by the service of a summons or the delivery of a summons for service, but intended to designate the nature or character of the class of remedies in the course of which a party might avail himself of the benefit of this writ. "It was not the intention of the Legislature to limit the jurisdiction so as to prevent the allowance of the injunction previous to the service of the summons, or of the delivery of the summons to the sheriff for service, in the action." *Lash v. McCormick*, 14 Minn. 482, 484 (Gil. 359, 361).

**As for.**

Under Const. art. 11, §§ 4, 5, 7, providing that there shall not be levied "in any one year a greater rate of taxation than" certain rates therein specified for state, county, and municipal purposes respectively, a tax exceeding such rate in the aggregate cannot be levied upon property for several preceding years during which the property has escaped taxation. The word "in," as used in the Constitution, cannot be read "for." The constitutional inhibition is against levying. The purpose was that property should not be excessively burdened, lest perchance it might be driven from the state or the taxpayer ruined. Levying a tax per cent. in one year, and declaring that the same rate is applicable to several preceding years during which no tax had been levied, would be equally burdensome to a taxpayer as if the aggregate had been levied in gross. It would be levying in one year, providing for assessment in one year, and collecting and turning into the treasury in one and the same year, a sum greatly in excess of the constitutional limit. *Maguire v. Board of Revenue & Road Com'rs*, 71 Ala. 401, 421.

**As on or upon.**

While the word "in" is ordinarily accepted as an equivalent of the word "on," yet, as

used in an insurance policy providing that persons shall receive double the amount of the policy if injured while riding as a passenger "in" a passenger conveyance, "in" will not be held to mean "on," so as to render the company liable for the double liability where the passenger was riding outside the passenger coach on the platform. *Van Bokkelen v. Travelers' Ins. Co.*, 54 N. Y. Supp. 307, 311, 34 App. Div. 399.

"In," as used in Mississippi statutes which prohibit shooting "in" the highways, is equivalent to and interchangeable with "on." Hence an indictment charging the defendant with shooting "on" the highways is sufficient. *Woods v. State*, 7 South. 495, 496, 67 Miss. 575.

In Act 1872, relating to cities and villages, and providing that the city council shall have no power to grant the use of or the right to lay down any railroad tracks in any street of the city except upon petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes, the phrase "in any street" means the same as "upon any street," in Railroad Act 1872, providing that no railroad shall be constructed upon or across any street without, etc., and applies only to cases where the city may propose to grant the privilege to a railroad company to run along a street for a given distance, and has no application where it is merely sought to construct a railroad across a street. *Chicago & W. I. R. Co. v. Dunbar*, 100 Ill. 110, 136.

"In ten days after giving notice," as used in Act Feb. 15, 1816, supplementary to an act incorporating a turnpike company, providing that, upon complaint made to a justice of the peace that the road is out of repair, he shall at the expense of the company, "in ten days after giving notice" to the keeper of the nearest gate, appoint three of the township committee, who, on notice given to the keeper of the nearest gate, should meet, etc., is clearly equivalent to saying upon ten days' notice given, or ten days after notice given. *New Jersey Turnpike Co. v. Hall*, 17 N. J. Law (2 Har.) 337, 339.

The defendant was the lessee for a term of years of premises occupied by him as a grocery store on the corner of Sixth avenue and Forty-Eighth street, New York, the lease containing a covenant by the defendant that "he will not make any alterations therein without the written consent of the party of the first part, under the penalty of forfeiture and damages;" and the plaintiff (lessor) alleged that the defendant was about constructing a wooden shed, or what he called an "awning," entirely around the two sides of said building, which, if erected, would greatly injure the value of the rest of the

building for the purposes for which it was used (for flats and tenement apartments for families), praying for an injunction restraining the defendant from further proceeding with such erection, etc. Held that, although the covenant in the lease alleged to have been broken is that the defendant will not make any alterations in the demised premises, the word "in" is to be taken as including "upon" as well, so that the covenant may read "alterations in or upon," and cover the erection which the defendant has annexed to the building. *Trenor v. Jackson* (N. Y.) 46 How. Prac. 389, 393.

#### As throughout.

In the act of 1861 providing that justices of the peace shall have jurisdiction "in" their respective counties to hear and determine all complaints, etc., the word "in" should be construed to mean "throughout" such counties. *Reynolds v. Larkin*, 14 Pac. 114, 117, 10 Colo. 128.

#### To distinguished.

Strictly speaking, confinement "in a house" differs from confinement "to a house." "To" signifies direction, connection with, appurtenant, while "in" signifies the quality of being interior. *Scales v. Masonic Protective Ass'n*, 48 Atl. 1084, 1085, 70 N. H. 490.

#### As within.

The Century Dictionary, vol. 3, p. 2084, has the following meanings of "in" as a preposition of time: "(a) Of a point of time, or a period taken as a point: at. (b) Of a course or period of time; within the limits or duration of: during. (c) Of a limited time: at the expiration of." As used in an advertising contract providing that the advertising may be discontinued "in" three months, the word operates to make the phrase capable of being interpreted to mean either that the contract may terminate at any time within three months or at the expiration of three months, but not to authorize its termination after such time. *Ferree v. Moquin-Offerman-Hessenbittel Coal Co.*, 61 N. Y. Supp. 120, 121, 29 Misc. Rep. 624.

The word "in" is defined by Webster as within, inside of, "and with such meaning the preposition is commonly and generally used." It is used in such meaning in a bond providing that it may be paid "in" five years, and hence the bond may be paid within such time. *Verdine v. Olney*, 43 N. W. 975, 978, 77 Mich. 310.

A bond, one of the conditions of which was that A. should deliver to B., or his agent or assigns, at a certain place, a certain quantity of good merchantable proof whisky in good and tight barrels "in all the month of May," 1809, should be so construed as to authorize the seller to deliver the whisky up

till the last hour of May 31st. *Savary v. Goe* (U. S.) 21 Fed. Cas. 549, 550.

In Const. Cal. art. 4, § 25, subd. 28, forbidding the Legislature to pass special laws creating offices or prescribing the powers and duties of officers "in" counties, cities, and townships, election or school districts, "in" qualifies the entire clause, and is used as denoting officers who exercise their office and perform their duties within the limits of either political division mentioned in the clause. *Farrell v. Board of Trustees*, 24 Pac. 868, 869, 85 Cal. 408.

As used in Act March 11, 1897, entitled "An act to provide a more uniform assessment and taxation of street railroads in cities in this state," and in section 3 stating it to be the purpose of the act to make the property of street railroads in cities assessable, etc., the words "in cities" should not be construed as limiting the effect of the act to street railroads within the corporate limits of cities and not elsewhere, but rather mere words of description, not preventing taxation under the act of street railroads, a portion of whose lines are located outside the corporate limits of any city. *State ex rel. Gottlieb v. Metropolitan St. Ry. Co.*, 61 S. W. 603, 604, 161 Mo. 188.

Webster defines "in" to mean within, inside of. It is held that where, by the terms of a mortgage, it is payable "in" one year from date, it can be paid at any time during the year. *Patterson v. Judge* (Pa.) 17 Wkly. Notes Cas. 127, 128.

#### IN ACCORDANCE WITH.

In a clause of a charter conferring general power of taxation on a city, and providing that it shall be exercised "in accordance with" the Constitution and laws of the state, the language "in accordance with" is the equivalent of "not repugnant to," "not in conflict with," or "not inconsistent with" the laws of the state, and does not limit or confine the taxing power of the city to the provisions of the general law. *City of Norfolk v. Norfolk Landmark Pub. Co.*, 28 S. E. 959, 960, 95 Va. 564.

#### IN ADDITION TO.

"In addition to," as used in Gen. St. c. 47, art. 2, § 1, providing a fine for betting on an election, and also, "in addition to the fine aforesaid," authorizing a civil action for the recovery of the money lost, is synonymous with "also," "moreover," and "likewise." *Commonwealth v. Avery*, 77 Ky. (14 Bush) 625, 636, 29 Am. Rep. 429.

"In addition to that," as used in a will wherein testator gave certain of his personal and real property to his wife, "and in

addition to that" certain money for life so long as she should remain a widow, introduced new and distinct matter, and the qualification as to the widow's devise in the last paragraph could not influence the estate devised in the paragraph which had gone before. *Hart v. White*, 26 Vt. 260, 269.

Where a circuit court to which an action of forcible entry and detainer has been taken by certiorari, from a justice of the peace, orders that a bond be given "in addition to" one originally taken, such additional bond does not supersede the original bond, since the term "in addition to" cannot be construed as meaning "in lieu of." *Walter v. McSherry*, 21 Mo. 78.

#### As besides.

"In addition to," as used in *Laws, 1889, c. 408, § 1, 2*, providing that in case the interest of a widow in the real estate of a deceased husband, "in addition to" her dower right, shall be less than \$1,000, then said appraisers shall set apart for the use of the widow, etc., is equivalent to "besides," and intended that a provision should be made for the widow besides the provision by means of dower. In *re Mulligan's Estate*, 24 N. Y. Supp. 321, 323, 4 Misc. Rep. 361.

A will devising certain property to testator's wife, to be enjoyed, accepted, and received by her in lieu of dower, and "in addition to what interests she would have as dowress if this devise was not so made to her," carries the idea that, as the devise is made in the form it is, the widow gets nothing as dowress, but that she will in fact get a greater interest than her dower would be. In this view, the latter expression may be deemed a statement in the nature or extent of the gift, and in that way a meaning be given to it not inconsistent with the words "in lieu of dower." *Nelson v. Brown*, 20 N. Y. Supp. 978, 980, 66 Hun, 311.

In *Boyett v. Hurst*, 54 N. C. 166, it was held that, under a statute which required the investment of the money of a ward, to be secured by a bond or note of some person "in addition to" the borrower, the note signed by a firm as the principal debtor and one of the members of it did not fill the requirements, for in such case the surety was one of the borrowers; but where a bond taken by the guardian for a loan of his ward's money was signed by the borrower's partner as surety in addition to the borrower, it is sufficient. *Watson v. Holton*, 20 S. E. 183, 115 N. C. 36.

The words "in addition" do not ordinarily mean "exclusive of," but are diametrically opposed to diminution or abatement, and signify an increase of, or accession to. In *re Daggett*, 9 N. Y. Supp. 652, 654, 2 Con. Sur. 230, 235.

#### IN AID OF.

See "Aid."

#### IN AMITY WITH.

See "Amity."

#### IN AND ABOUT.

"The words 'in and about,' in an agreement by a street railway company to pave the street in and about the rails in a permanent manner and keep them in repair, must be regarded as if written 'within and about' the rails, and requires the company to keep in repair not only that portion of the streets immediately adjoining its rails, but so much as is included between them, and, where it has laid double tracks, the space between such tracks. In *McMahon v. Second Ave. R. Co.*, 75 N. Y. 231, where the words in question were under consideration, the clause said clearly all the space within the defendant's rails fell within its agreement, although it was subsequently said that we need not put so wide a construction as that upon the agreement. 'In or about the rails' meant the two rails of each track and some space outside of each rail. Beyond doubt, it means so far outside as the street surface was disturbed in the act of laying the track." *City of New York v. Second Ave. R. Co. (N. Y.)* 31 Hun, 241, 245.

Where a single woman carried on trade and kept a horse and gig for the purpose of going around to her customers, such property was within a description of materials and other articles belonging to her "in and about her business," within the meaning of a deed of conveyance made by her in contemplation of marriage. *Dean v. Brown*, 5 Barn. & C. 336, 338.

A condition of an insurance policy required the insured to employ a watchman to be "in or about the premises" by day or night during the time that they are idle. Held, that the terms of the statute are not complied with, where the insured premises were idle for two months, by employing one watchman, who habitually slept in a building 300 feet away, and "it is too much to say that he was a watchman employed 'to be in or about the premises' during the nighttime." *Rankin v. Amazon Ins. Co. (Cal.)* 25 Pac. 260, 262.

#### IN AND FOR.

A statement in the caption of an indictment that the grand jury were sworn to inquire "in and for" the county implies that they were making inquiries for the entire county, and not for some portion of it. *Fizell v. State*, 25 Wis. 364, 367.

"In and for," as used in the allowance by justices of an indenture of apprentice

ship, reciting that "we justices," etc., "in and for the West Riding, do hereby assent and sign our allowances," means that they, being justices, and being in the county, and acting for it, sign, etc. *Reg. v. Inhabitants of Aldbrough*, 13 Adol. & El. (N. S.) 190, 195.

#### IN ANY CASE.

See "Any."

#### IN ANY MANNER.

See "Any."

#### IN ANY RESPECT.

In any respect untrue, see "Any."

#### IN ANY WISE.

The expression "in any wise," as used in a statute providing that the jurisdiction of justices of the peace shall not extend to any action wherein the title to any lands, tenements, hereditaments, or other real estate "may in any wise" come in question, "is not to be understood as synonymous with the terms 'by any possibility,' or 'under any circumstance,' for by such interpretation would be excluded not only all actions of trespass quare clausum fregit, but many others, as the action of trover may turn, in the course of pleadings, upon the title of lands." *Gregory v. Kanouse*, 11 N. J. Law (6 Halst.) 62, 63.

#### IN BARN.

Where a fire policy insured two barns and certain articles contained therein, and also a horse "in barn or in fields," and in an action on the policy the court instructed that recovery might be had for a horse in barn or in fields and destroyed in a barn built on the farm after the policy was issued, the phrase "in barn or in fields" could not be construed as referring only to barns built subsequent to the policy, the phrase being a general one and clearly indicating that the horse was insured if housed anywhere on the farm. *Trade Ins. Co. v. Barraciff*, 45 N. J. Law (16 Vroom) 543, 554, 46 Am. Rep. 792.

#### IN BEHALF OF.

See, also, "On Behalf of."

A suit brought by the chief magistrate of a state in "behalf of the state" is a suit in which the state is a party. *Georgia v. Brailsford*, 2 U. S. (2 Dall.) 402, 1 L. Ed. 433.

The word "behalf" means in the manner of, on account of, benefit, advantage; and in this sense a suit brought in the name of a state on a liquor dealer's bond for penalty

is held to be a suit on behalf of the state within provisions of the Texas constitution conferring jurisdiction on the district court in such cases. *State v. Eggerman*, 81 Tex. 569, 16 S. W. 1067. And hence a suit instituted in the name of a county on a bond given for the amount of fines and costs adjudged against a county convict hired to the principal is a suit in behalf of a state within such constitutional provision. *Hill County v. Atchison*, 49 S. W. 141, 142, 19 Tex. Civ. App. 664.

An averment in a declaration that certain notes were executed "in behalf" of a corporation means for it. *Wanner v. Emanuel's Church of Evangelical Ass'n*, 34 Atl. 188, 190, 174 Pa. 466.

Under Act 1867, § 2, providing that a party shall not be a witness where the adverse party sues or defends as an executor or administrator, except wherein a witness shall, "in behalf of" any party to said action, suit, or proceeding, testify to any conversation or admission by any adverse party, it was held that one called to testify for a party, whether his evidence be favorable or unfavorable to such party, was a witness of that party, testifying in his behalf within the statute. *Richerson v. Sternburg*, 65 Ill. 272, 274.

#### IN BEING.

See "Life or Lives in Being."

"In being," as used in Rev. St. § 4200, inhibiting devises to persons who are more remote from the immediate issue of persons "in being" at the death of the testator, will be construed to include a child in utero at the testator's death. *Phillips v. Herron*, 45 N. E. 720, 55 Ohio St. 478.

"An unborn child after conception, if it was subsequently born alive, and so far advanced to maturity as to be capable of living, is considered as 'in esse' from the time of its conception, where it is for the benefit of the child that it should be so considered." *Hone v. Van Schaick* (N. Y.) 3 Barb. Ch. 488, 509.

#### IN BULK.

In statutes relating to public warehouses, and declaring that no warehouse is public but those of a capacity of 50,000 bushels, and then only if the grain is "stored in bulk and the grain of different owners mixed together," or in which the grain is stored in such a manner that the identity of different lots cannot be accurately observed, the phrase "in bulk" is used in contradistinction to the storage of each owner's grain in kind and without mixing with one another's. *State ex rel. Wood v. Smith*, 21 S. W. 493, 497, 114 Mo. 180.

**IN CARE OF.**

See "Cara."

**IN CASE.**

"In case," as used in a devise of property to a certain beneficiary, to take effect in case he lives until he is twenty-one, "implied a condition as explicitly as 'if,' 'upon,' and the like, and express a contingency, which contingency was in this case dependent on attaining the designated age." *Appeal of Roberts*, 59 Pa. (9 P. F. Smith) 70, 72, 98 Am. Dec. 812.

A settlement in trust for the use of the settlor's daughters provided that "in case one or two of the said daughters should die without issue" the share or shares of such daughters should go to the use of the daughters of the survivor or survivors as tenants in tail general, and in case all three should die without issue then remainder without ultimate remainder to the use of the settlor in fee. The settlor died without disposing of the reversion. Held, that the limitation "in case one or two of the said daughters should die without issue," there being no issue generally, constituted a conditional remainder, which was not void for remoteness. *Cole v. Sewell*, 2 H. L. Cas. 186.

The expression "I give and bequeath to A. B. at the age of twenty-one," or "if he arrives at twenty-one," or "provided he lives to be twenty-one," or "in case of his arriving at twenty-one," or "when he arrives at the age of twenty-one," have all been held to be contingent legacies. *Gifford v. Thorn*, 9 N. J. Eq. (1 Stockt.) 702, 729.

**IN CASE OF DEATH.**

A codicil to a will providing that, "in case of a sudden and unexpected death," the testatrix gave the remainder of her property to be equally divided between certain persons, should not be construed as expressing a condition making the bequest contained in the clause dependent on the condition of the testatrix dying suddenly and unexpectedly, but should be understood as designed only to express the reason which led the testatrix to dispose of the residue at that time and to avoid the risk of further delay. *Skipwith v. Cabell's Ex'r* (Va.) 19 Grat. 758, 782.

Testator devised certain real estate to his wife for life, and on her death to his son, who was then required to pay certain sums to his brothers, and added, "in case of the death of either" of such sons "the property by me willed is to belong to their widows, as long as they remain such, and then to go to their children." In construing this will the court said: "The words 'in case of the death' are the words which create, as they always do to a greater or

less extent, uncertainty as to what the testator meant. Standing alone as a qualification upon a bequest made in absolute terms, they are generally construed to mean in case of the death of the donee before the death of the testator, and are construed to have been inserted to prevent the lapsing of the legacy. But in this case the court held, from the general tenor of the whole will, that he did not have any contemplation of the death of his sons before his own as a contingency to be provided for, and that by the words "in case of" he meant "at" or "upon" the death of his sons. *Ewing v. Winters*, 11 S. E. 718, 719, 34 W. Va. 23.

The clause "in case of," in a will devising certain property to certain beneficiaries for life, and after their death to A., and "in case of" his death to B., does not mean "at" or "upon," but has the same meaning as the word "if," and therefore, if A., is living at the time of the death of the life beneficiaries, he takes the property absolutely. *Hill's Lessee v. Hill* (Md.) 5 Gill & J. 87, 96.

"In case of death," as used in an employer's indemnity bond providing that any claim made in respect of the bond on such employé shall be in writing as soon as practicable after the discovery of any loss, "in case of" death of such employé within six months thereafter, and in all other cases within six months after the expiration of the bond, or within six months from the death of such employé, means occurring during the existence of the twelve-months term. *Lombard Inv. Co. v. American Surety Co.* (U. S.) 65 Fed. 476, 480.

**As death within testator's lifetime.**

The rule is well settled that in a bequest to A., and, "in case he dies," or "in the event of his death," simply, without any further words of contingency, then over to B., the contingency intended is the death of A. before the testator; for, death being a certain and inevitable event at some time, and in no sense contingent except as associated with other circumstances, as death without issue, or death before or after a certain other event, and the like, the testator cannot be supposed to have made the death of A. at any time the contingency upon which the limitation over to B. is to take effect; and the contingency of A.'s dying before the testator is adopted as the most reasonable interpretation of the testator's meaning. See *Hinkley v. Simmons*, 4 Ves. 160; *King v. Taylor*, 5 Ves. 806; *Cambridge v. Rouse*, 8 Ves. 12; *Webster v. Hale*, Id. 410; *Ommaney v. Beavan*, 18 Ves. 291; *Wright v. Stephens*, 4 Barn. & Ald. 674. But this technical rule of construction will yield where there are other expressions or dispositions in the will which indicate a contrary intention. *Sims v.*

Conger, 39 Miss. 231, 246, 77 Am. Dec. 671 (citing *Billings v. Sandom*, 1 Bro. C. C. 393; *Nowlan v. Nelligan*, Id. 489; *Douglas v. Chalmer*, 2 Ves. Jr. 501; *Chalmers v. Storil*, 2 Ves. & B. 222).

"In bequests of personal property the leaning in favor of vested interests, and the speaking of the one event which is sure to occur to all living as uncertain and contingent, have led the courts to interpret the words 'in case of the decease' of the first legatee, when followed by a second legacy of the same property, not to mean death at any time in the future, but death within a certain period, and, when no other period is indicated in the will, within the lifetime of the testator, and thus to substitute the second legacy in place of the first and make it vest immediately upon the testator's death." *Briggs v. Shaw*, 91 Mass. (9 Allen) 516, 517.

A will devising testator's property to his two brothers, and, "in case of" the death of either of such brothers, providing that the deceased brother's share should go to his children, "did not import any contingency, since death is the most absolute certainty pertaining to our existence, the only uncertain thing about it being the time of which it will occur. Hence, in such an expression, the 'time of death' must be construed as the contingency intended by the words, and the period to which the death is to be referred must be ascertained from the body of the will." *Small v. Marburg*, 25 Atl. 920, 921, 77 Md. 11.

Where there is a bequest to one person, and "in case of his death" to another, the gift over is construed to take effect only in the event of the death of the prior legatee before the period of payments or distribution, unless a contrary intention appears. *Post v. Van Houten*, 3 Atl. 340, 342, 41 N. J. Eq. (14 Stew.) 82.

In 3 Jarm. Wills (Randolph & T. Ed.) 606, it is said that, where a bequest is made to a person with a gift over in case of his death, a question arises whether the testator uses the words "in case of" in the sense of "at" or "from," and thereby as restrictive of the prior bequest of a life interest—that is, as reducing a gift to take effect on the decease of the prior legatee under all circumstances—or with the view to create a bequest in defeasance of or in substitution for the prior one in the event of the death of the legatee in some contingency. "The difficulty in such cases," continues the author, "arises from the testator having applied terms of contingency to an event of all others the most certain and inevitable, and to satisfy which terms it is necessary to connect with death some circumstance in association with which it is contingent. That circumstance is naturally the time of its happening, and such time, when the bequest is immediate

(i. e. in possession), necessarily is the death of the testator, there being no other period to which the words can be referred. Hence it has become an established rule that where the bequest is simply to A., and in case of his death, or if he die, to B., A., surviving the testator, takes absolutely." *Katzenberger v. Weaver*, 75 S. W. 937, 939, 110 Tenn. 620.

Where there is a bequest to one person, and "in case of his death" to another person, such and similar expressions, unexplained by the context, will be held to mean death happening before the period of distribution or payment. The reason for this rule is that the expression "in case of" naturally imports a contingency, which would not exist if the death contemplated is that of the first taker generally, for his death, generally, is certain to happen. *Brown v. Lippincott*, 49 N. J. Eq. (4 Dick.) 44, 46, 28 Atl. 497.

#### IN CASH.

See "Cash."

#### IN CHARGE.

See "Charge"; "Engineer in Charge."

#### IN THE CITY.

One who had resided in territory, annexed to the city, for three years immediately preceding the annexation of such territory, at once became eligible to a city office under a provision of the city charter requiring a residence of three years "in the city" in order to render one eligible to office therein. *Gibson v. Wood*, 49 S. W. 768, 769, 105 Ky. 740, 43 L. R. A. 699.

#### IN COMMON.

See "Fenced in Common"; "Tenant in Common."

Land is not held "in common" when a party segregates it from the adjoining land by the erection of a fence or otherwise. A person uses his land otherwise than in common when he segregates it from the adjoining land, his occupation being such that he and his neighbor cannot or do not use their land together or in common. This may be done by the erection of a fence, but it may be done otherwise. One person may use his land for growing grain, and another for pasture. *Hewitt v. Jewell*, 12 N. W. 738, 739, 59 Iowa, 37.

Where land is part of the uninclosed and general domain, whether such domain is owned in part by the United States or wholly by individuals, and the use to which the land in question is devoted does not call for

an inclosure, it may be said to be used in common. The word "common" is not used with reference to any right in the land itself; it is used solely with reference to the obligation to contribute to a partition fence. *Syas v. Peck*, 12 N. W. 304, 305, 58 Iowa, 256.

"In common," as used in Rev. St. § 2324 [U. S. Comp. St. 1901, p. 1426], which requires every claimant of mineral land to do a certain amount of work each year, but provides that when such claims are held in common such expenditure may be made upon any one claim, should be construed to mean contiguous claims held in common. *Chambers v. Harrington*, 4 Sup. Ct. 428, 429, 111 U. S. 350, 28 L. Ed. 452.

The words "in common," as used in a devise of real estate to certain persons and their issue, and, in default of such issue, remainder to the testator's right heirs, and the right heirs of his wife, as tenants "in common," indicate equality, there being nothing said to the contrary; and the wife's relatives take not more than each of the testator's own—they are all to take equal shares per capita. *Walker v. Dunshee*, 38 Pa. (2 Wright) 430, 439.

"In common," as used in a will devising property to a certain person for life, and after her death the remainder to her lawful issue, to have and to hold the same "in common" to them, their heirs and assigns, forever, are not such superadded words of limitation or distributive modification as will make the words "lawful issue" words of purchase. *Grimes v. Shirk*, 32 Atl. 113, 119, 169 Pa. 74.

#### IN CONFINEMENT.

See "Confine—Confinement."

#### IN CONFORMITY WITH.

See "Conformity."

#### IN CONNECTION WITH.

The words "in connection with that company's railways," as used in the order of court directing a receiver of a railroad to pay laborers and employes of the company for labor and services actually done "in connection with that company's railways," are the equivalent of "in the interest and upon the employment of that company in and about its railways and the operation and management thereof, and all matters connected with, relating to, and growing out of the proper and legitimate business of the company as the possessor and operator of such railways." The phrase was intended to and does embrace every employment for the performance of any service in promoting

the interest and enforcing and defending the rights of the company as a railway corporation in respect to its railways in its possession and under its management. *Gurney v. Atlantic & G. W. R. Co.*, 58 N. Y. 358, 371.

The words "in connection," in the conveyance of land on which a factory stood, together with all the rights and privileges in connection with the property conveyed, was construed to have been used in the sense of "connected," and therefore that the conveyance only passed a water right connected with the mill, and not an entire water right, used in connection with the property, which was also used by the grantor for the operation of a mill. *Horne v. Hutchins*, 51 Atl. 651, 654, 71 N. H. 128.

#### IN CONSEQUENCE OF.

An allegation in a complaint that certain injuries were caused "by reason and in consequence of" defendant's negligence is equivalent to an allegation that the injury was caused wholly by defendant's negligence, or without the fault of plaintiff, and is therefore a sufficient allegation that the plaintiff is not guilty of contributory negligence. *Benedict v. Union Agricultural Soc.*, 52 Atl. 110, 113, 74 Vt. 91.

#### IN CONSIDERATION.

The phrase "in consideration," as used in a will where testator devised real and personal property to S., "in consideration" of the testator being taken good care of for the remainder of his life, did not mean that the devise was on condition that he should be taken such care of, but was employed only to show the consideration or motive inducing the making of the devise. *Martin v. Martin*, 181 Mass. 547, 548.

Where a contract for the grading of certain lots recites that, "in consideration of the faithful performance of the specified work," the owner of the lots would pay a certain sum per cubic yard for the earth removed, the phrase "in consideration of the faithful performance of the specified work" imports an obligation to pay only when the whole work is performed. *Potts v. Point Pleasant Land Co.*, 8 Atl. 109, 110, 49 N. J. Law (20 Vroom) 411 (citing 1 Chit. Pl. 322).

In a contract reciting that it is made in consideration of one of the parties thereto buying certain goods, the phrase "in consideration of buying" "implies an agreement to buy as a consideration of the promise to sell, and thus the contract becomes a mutual contract executory in its nature, but imposing on the buyer the obligation to buy and the seller the obligation to sell." *W. P. Fuller & Co. v. Schrenk*, 68 N. Y. Supp. 781, 783, 58 App. Div. 222.

A written agreement stated that, "in consideration" that plaintiff should procure a purchaser for a certain piece of land at a certain price, defendant agreed to pay plaintiff all the money exceeding the stipulated price which the purchaser should pay for the premises, and that, in case defendant himself should sell the premises, he agreed to pay plaintiff 3 per cent. of the price paid to him therefor. Plaintiff performed services and spent money to procure a purchaser, but, before he succeeded in doing so, defendant sold the land himself. In an action by plaintiff for 3 per cent. of the amount defendant received for the land, it was contended that the statement that defendant's agreement was "in consideration" that plaintiff should procure a purchaser was a statement of the entire consideration for the contract in writing, and hence evidence of any other consideration was inadmissible to vary the terms of the written contract; but the court observed that the term "in consideration" might be used to define the conditions upon which the first branch of the agreement should take effect, rather than to set forth its consideration in a legal sense; but that, whether this were so or not, the term had no application to the last branch of the agreement, it being obvious that this last clause could never be supported by it as a consideration, inasmuch as the very contingency upon which the last clause was to become operative involved a defeat of that which was denominated the "consideration" in the first clause. *Goward v. Waters*, 98 Mass. 596, 598.

The words "in consideration thereof," in a conveyance of land with a certain reservation, and on condition that the grantee, in consideration thereof, erect and keep a bridge in repair, etc., at most imported that the undertaking to build the bridge was induced by the reservation of the use of a part of the water of the stream over which it was built in a particular way, and the consequent inconvenience occasioned to the grantee, not that the reservation was purchased by the agreement to build. *Paschall v. Passmore*, 15 Pa. (3 Harris) 295, 307.

#### IN CONTEMPLATION.

See "Contemplation of Assignment"; "Contemplation of Bankruptcy"; "Contemplation of Insolvency."

#### IN CONTROVERSY.

See "Amount in Controversy."

#### IN THE COURSE OF.

See "Course."

#### IN COURT.

See "Court."

#### IN CUSTODIA LEGIS.

See "Custody of the Law."

#### IN CUSTODY.

See "Custody."

#### IN DEED.

See "Warrant in Deed."

#### IN DEFAULT OF ISSUE.

The phrase "in default of issue" in a will is uniformly construed to mean an indefinite failure of issue, unless there be something in the context to qualify the general expression, or the reference be expressly to persons then existing. *George v. Morgan*, 16 Pa. (4 Harris) 95, 106; *Kay v. Scates*, 37 Pa. (1 Wright) 81, 83, 78 Am. Dec. 399; *Tinsley v. Jones* (Va.) 13 Grat. 289, 292.

#### IN DEPOT.

A bill of lading providing that a railroad company should be liable for the loss of the goods while "in depot" does not include cotton placed on the platform of a compress company to be compressed, and for which the railroad company had executed such bill of lading, binding itself to transport it. *Gulf, C. & S. F. Ry. Co. v. Pepperell Mfg. Co.* (Tex.) 37 S. W. 965.

#### IN THE DISCRETION OF.

See "Discretion."

#### IN DISPUTE.

See "Amount in Dispute."

#### IN DUE COURSE.

See "Holder in Due Course"; "Indorse in Due Course."

#### IN DUE FORM.

See "Due Form."

#### IN EACH CASE.

See "Each Case."

#### IN EACH YEAR.

See "Each Year."

#### IN EQUAL DEGREES.

See "Equal Degree."

#### IN ERROR.

See "Proceedings in Error."



**IN ESSE.**

See "In Being."

**IN THE EVENT.**

"In the event, however," as used in a will bequeathing a sum of money to the children of testator's sister, providing that "in the event, however," of the death of such children, refers to a future, not a past, event. *Westcott v. Higgins*, 58 N. Y. Supp. 938, 939, 42 App. Div. 69.

**IN EVERY INSTANCE.**

The phrase "in every instance," as found in Const. 1898, art. 9, providing that the accused in every instance shall have the right to be confronted with the witnesses against him and defend with counsel, was not intended to exclude dying declarations. *State v. Kline*, 33 South. 618, 625, 109 La. 603.

**IN EXECUTION OF.**

"In execution of the act," as used in 5 & 6 Wm. IV, c. 63, § 40, providing that no plaintiff shall recover in any action for any irregularity or other wrongful proceeding "in the execution of the act" if tender of sufficient amends shall have been made before action brought, and that if there had been no such tender of amends the defendant might pay money into court, did not mean that where irregularities occurred in attempting the execution of the act the defendant was entitled to a verdict on simply proving that what he did without the authority of the act he did in pursuance of it; that is, in the belief that under the statute he was justified in doing it. *Thomas v. Stephenson*, 2 El. & Bl. 108, 116.

**IN EXTREMIS.**

"In extremis" is used in law to denote such condition as will dispense with an oath, so as to authorize unsworn declarations made by a person since deceased, just before death, and with knowledge that he was about to die, admissible in evidence. *Gray v. Goodrich* (N. Y.) 7 Johns. 95, 96.

A good and nuncupative will made in extremis is one executed when the testator is overtaken by sudden and violent sickness, and has not had time and opportunity to make a written will. A long-standing and continued infirmity, as a chronic disease, would not be such extremity. *Stricker v. Groves* (Pa.) 5 Whart. 386, 397.

**IN FACT.**

See "Assignee in Fact"; "Attorney in Fact"; "Founded in Fact"; "Fraud in Fact"; "Surrender in Fact."

**IN FAVOR OF.**

As used in Act March 8, 1875 (18 Stat. 470, c. 137, § 1 [U. S. Comp. St. 1901, p. 508]), providing that the Circuit Courts of the United States shall not have cognizance of any suit, founded on contract, "in favor of an assignee," unless his suit might have been prosecuted in such court to recovery thereon if no assignment had been made, except in cases of negotiable notes and bills of exchange, cannot be construed to mean that, when the jurisdiction is invoked by the defendant by a removal from the state court, it cannot be deemed to be exerted in favor of the assignee, but rather in favor of the adverse party. The words "in favor of an assignee" were evidently used, not to distinguish between the plaintiff and the defendant in the suit, but between the assignee and his assignor, so as not to give the favor to the former of bringing a suit which was denied to the latter. *Clafin v. Commonwealth Ins. Co.*, 3 Sup. Ct. 507, 508, 110 U. S. 81, 28 L. Ed. 76.

**IN FEE.**

See "Fee."

**IN THE FIELD.**

The expression "in the field," as used in a warning to see if a town would pay bounties to "veterans re-enlisting in the field," means those soldiers who re-enlisted while they were yet held to military service under a former unexpired enlistment. A man who had been a soldier in the service ceased to be a soldier in the field when he received a full discharge from such service. The term "in the field" has a clear meaning, and signifies "in the military service for the purpose of carrying on the pending war." *Sargent v. Town of Ludlow*, 42 Vt. 726, 729.

**IN THE FIRST DEGREE.**

The words "in the first degree," as contained in a verdict finding defendant guilty of murder in the first degree, should be taken in their ordinary acceptance, and not in the legal sense which they may bear in other states under peculiar statutes. They naturally mean simply that the defendant was guilty of the first or highest degree of murder. *Hocker v. Commonwealth* (Ky.) 70 S. W. 291, 292.

**IN THE FIRST INSTANCE.**

As used in City Charter, § 1406, providing that the courts of special sessions of the city of New York should have in the first instance exclusive jurisdiction to hear and determine all charges of misdemeanors committed within the city of New York, except

charges of libel, the phrase "in the first instance" may well be regarded as words of limitation, and as disclosing an intent that the exclusive jurisdiction conferred upon courts of special sessions exists only where no other authorized proceeding is pending. *People v. McCarthy*, 61 N. E. 899, 900, 168 N. Y. 549.

#### IN THE FIRST PLACE.

See "Imprimis."

#### IN FORCE.

See "Full Force"; "Then in Force."

Where an assessment for street improvements was made under an ordinance which was declared invalid, and the Legislature thereafter authorized a reassessment as near as may be in accordance with the law "in force" at the time such reassessment is made, the contention that no reassessment can be made because there was no law in force is not tenable, since the statute itself provides a complete scheme for such reassessment. *Lewis v. City of Seattle*, 69 Pac. 393, 395, 28 Wash. 639.

#### IN FRAUD OF.

See "Founded in Fraud."

United States Revenue Act June 30, 1864, § 48, which provides for the forfeiture of goods on which taxes are imposed when they are found in the possession or custody of some person for the purpose of being sold or removed by such person "in fraud of the internal revenue laws," means in violation of the internal revenue laws. In re *Quantity of Tobacco* (U. S.) 20 Fed. Cas. 122, 123.

#### IN FRONT OF.

The words "in front," in a notice of sale stating that mortgaged premises would be sold in front of the office of the register of deeds in a certain county, should be construed as equivalent to "immediately in front," or "in front and near to." *Merrill v. Nelson*, 18 Minn. 366, 376 (18 Gil. 335, 339).

"Front of," as used in 43 Geo. III, c. 128, § 59, assessing a certain sum upon all halls, gaols, churchyards, etc., within the town of B., "for every yard, running measure, of the length in front of such hall," etc., means the same as "frontage" in popular parlance, and includes every part of the building which could be formed into a front by opening doors and windows in it so as to obtain communication with any street, being that part of the building which fronts or abuts on any public street. Jus-

tices of *Bedfordshire v. Bedford Improvement Com'rs*, 7 Exch. \*858, \*866.

"Front," as used in a notice that a person was injured on a sidewalk in a certain street at a point on the west side thereof, in "front" of the property, No. 117, occupied by a certain person and owned by certain other persons, means in the immediate front, and not across the street. *Cloughessey v. City of Waterbury*, 51 Conn. 405, 421, 50 Am. Rep. 38.

"Front," as used in a city ordinance proposing to vacate a street in front of certain blocks, and conveying to the owners of lots in those blocks what remained in such street in front of their lots, respectively, to a certain specified line on the margin of a river, means the land lying between those blocks and the river, bounded by the projecting of the lines of the blocks directly to the river, and not by diverging those lines from the corners of the blocks so that they should strike the river at right angles to its course. *Tracy v. City of Chicago*, 24 Ill. (14 Peck) 500, 506.

"In front of a dwelling house," as used in Gen. St. § 2683, authorizing the proper authorities to clear any water course through any person's land, but providing that such authority should not be construed to allow the draining of water into any "dooryard in front of any dwelling house," is not to be construed as meaning only that portion of the dooryard which lies strictly in front of the house—that is, between the house and street, and between lines drawn from the house to the street parallel to the sides of the house—but, as the words "in front of," plainly qualify "dooryard," they do not fix the place in the dooryard where water may not be drained, and, taken together, are equivalent to "front dooryard." *Borough of Torrington v. Messenger*, 50 Atl. 873, 874, 74 Conn. 321.

"In front of," as used in Laws 1897, p. 229, § 39, dividing tide and shore lines into classes of which the first is lands within or in front of the limits of any corporate city, will be held to refer only to lands adjoining the limits, and not those separated by a channel of navigable water. *State v. Bridges*, 64 Pac. 518, 24 Wash. 363.

#### IN FULL.

See "Indorsement in Full."

A receipt in favor of an administrator by several persons next of kin of the deceased, etc., acknowledging the receipt of their distributive shares "in full," should be construed as prima facie evidence only of such payment. Adding the words "in full" to the receipt does not make it conclusive, since a receipt is regarded as nothing more

than evidence of payment, which may be explained or controlled by other evidence. *Bard v. Wood*, 44 Mass. (3 Metc.) 74, 75.

The words "in full," as used in a receipt in full, are subject to explanation, and, when so explained, ought to be interpreted with reference to it. *Watts v. Baker*, 3 S. E. 773, 774, 78 Ga. 622.

The use of the words "in full of all demands," in a check given by the defendant to plaintiff after services had been rendered by plaintiff, will not be held to constitute a satisfaction of plaintiff's demand for wages, where defendant testified that it was drawn to pay for property bought of plaintiff, and that he did not know at the time of the claim for wages. *Krauser v. McCurdy*, 34 Atl. 518, 519, 174 Pa. 174.

"In full," as used in the codicil of a will providing that property given in the codicil to a certain beneficiary shall be in full of all bequests to him, should be construed to mean "in lieu." *Masons' Ex'rs v. Trustees of Methodist Episcopal Church at Tuckerton*, 27 N. J. Eq. (12 C. E. Green) 47, 51.

#### IN THE FULL CONFIDENCE.

See "Full Confidence."

#### IN FUNDS.

See "Fund"; "If in Funds"; "When in Funds."

#### IN GROSS.

See "Common In Gross"; "Easement in Gross"; "Powers in Gross"; "Right of Way In Gross"; "Sale in Gross"; "Servitude in Gross."  
Appurtenant distinguished, see "Appurtenance—Appurtenant"

A deed conveying a certain tract of land containing a certain number of acres, more or less, and not setting out metes and bounds by courses and distances, but reciting that the tract of land is "sold in gross" and not by the acre, is synonymous with a contract of hazard, and precludes any claim of abatement in the purchase money. *Green v. Taylor*, 10 Fed. Cas. 1120, 1126.

1 Rev. St. p. 730, § 63, declares that no person beneficially interested in a trust for the receipt of the rents and profits of lands can assign or in any manner dispose of such interest, but the rights and interests of every person for whose benefit a trust for the payment of a sum in gross is created are assignable. Held, that the words "sum in gross" only apply to one single entire sum, and not several sums, and hence the words do not include annuities payable annually, since they are several sums. *Hawley v. James* (N. Y.) 16 Wend. 61, 262.

#### IN HAND.

See "Assets in Hand"; "Funds in Hand"; "On Hand."

"Moneys in hand," as used by a testator in bequeathing all his moneys in hand, includes cash balance in the hands of his bankers, though the same carried interest, but it did not include moneys out on securities. *Valsey v. Reynolds*, 5 Russ. 12, 14.

"Money in the hands of a sheriff or other officer," as used in Rev. Code, § 2948, authorizing the attachment of money in the hands of a sheriff or other officer and its payment into court, does not mean public moneys, but means the money of private individuals deemed to be in the custody of the law—moneys for which the officer receiving it is answerable only to the individual entitled to demand and receive it. *Fruitt v. Armstrong*, 56 Ala. 306, 309.

#### IN HAND PAID.

The use of the expression "in hand paid," in a life policy which recites that it is issued in consideration of a certain sum in hand paid, is not conclusive on the question of payment, as it is a mere receipt, and is open to explanation by parol evidence of the actual facts. *Pitt v. Berkshire Life Ins. Co.*, 100 Mass. 500, 504.

#### IN THE HANDS OF.

A person assigned all the "right, title, and interest to the real and personal estate of C., intending hereby to convey all the right and title of or to property which I have or may have as heir of C., including also any right, title, or interest I may have or have unto any sum of money 'in the hands of B., derived from the sale by myself and mother of the farm occupied by father in his lifetime." Held, that the words "in the hands of," as used in the assignment, should be construed to include a sum of money derived from such sale and deposited in a savings bank by B., who holds the book issued for such deposit in the name of the assignor, although B., as administrator of C.'s estate, also holds a promissory note as part payment for the farm and the proceeds of a sale of the personal property of the estate. "When the money of one is spoken of as 'in the hands of' another, often no more is meant than that the latter is a debtor to the former. The phrase is colloquial and familiar, and not an accurate one. In the assignment in the case at bar it meant the sum of money which B., by his possession of the bankbook, then controlled, so far at least as to keep it from the assignor." *Swan v. Warren*, 138 Mass. 11, 14.

Within the meaning of Gen. St. § 1164, exempting from levy any pension moneys received from the United States "while in the hands of the pensioner," the proceeds of a pension check which the pensioner deposited in a savings bank in a single deposit and had entered on his passbook is "in the hands of" such pensioner and exempt from levy. *Price v. Society for Savings*, 64 Conn. 362, 30 Atl. 139, 42 Am. St. Rep. 198.

#### IN HER OWN NAME.

See "Own Name."

#### IN HIS OFFICE.

Where a statute authorizing the creation of drainage districts provides in express terms that the petition shall be presented to the town clerk, who should file the same "in his office," the direction imports that it shall be placed in the town clerk's office, and not filed with the clerk, so that it may be examined by persons interested in the contents thereof. *Bishop v. People*, 65 N. E. 421, 423, 200 Ill. 33.

#### IN HIS OFFICIAL CAPACITY.

Pen. Code, § 426, declares that the phrase "public moneys" includes all money received or held by county commissioners in their official capacity. Held, that an allegation that moneys were received by defendant, a county officer, "in his official capacity," should be construed to mean that the moneys were received as public moneys in his official capacity. *People v. Hamilton* (Cal.) 82 Pac. 526, 528.

#### IN HIS OWN RIGHT.

See "Own Right."

#### IN INVITUM.

See "Trust in Invitum."

#### IN ISSUE.

See "Contract in Issue."

#### IN ITS STEAD.

The phrase "in its stead," as used in a codicil wherein a bequest is revoked and "in its stead I give to her" a certain sum, is used in its ordinary and popular definition—in the room of; in lieu of; in the place of. They are expressions of substitution of one thing for another. Therefore, in using the words and the terms referred to, the testatrix indicated an intent to change the provision annulled, amended, or revoked, and to supersede the substance of the gift by the

substitution of something different. *Cruikshank v. Cruikshank*, 80 N. Y. Supp. 8, 12, 39 Misc. Rep. 401.

#### IN KIND.

Mansf. Dig. § 5749, providing that the collector of revenue shall be allowed commissions for collecting revenue, as follows: "For the first ten thousand dollars collected, five per cent. in kind"—only means that the commissions shall be paid out of the same fund in which the tax was collected, and does not authorize a further computation of commissions at that rate when the amount of the items collected, upon which the 5 per cent. has been computed, aggregates more than \$10,000. *Wilson v. State*, 10 S. W. 491, 492, 51 Ark. 212.

#### IN LAW.

See "Assignee in Law"; "Fraud in Law"; "Warrant in Law."

#### IN LIEU OF.

"In lieu of" signifies "instead of," "in place of," and, as used in a bill of sale reciting that it is given "in lieu of" a certain chattel mortgage, shows that it was intended simply as security for the debt due him, and was intended to take the place of the chattel mortgage. *Irwin v. McDowell* (Cal.) 34 Pac. 708, 709.

"In lieu of oxen," as used in a statute exempting from execution two horses kept and used for team work in lieu of oxen, means that the debtor cannot have both a yoke of oxen and also horses at the same time exempt. *Hickok v. Thayer*, 49 Vt. 372, 374.

"In lieu of dower," as used in a will in which the testator makes provision for his wife in the following language, "I loan to my wife certain land 'in lieu of dower,'" testator also conveying certain slaves to his wife "to her, her heirs and assigns forever," and bequeathing to her certain perishable property in fee simple, is construed so as to limit the estate of the wife in the land to her life. *Britt v. Rawlings*, 18 S. E. 336, 87 Ga. 146.

The phrase "in lieu and full satisfaction of dower," in a contract that the wife is to have and hold certain land as a jointure in lieu and full satisfaction of dower, means that she surrenders all claim to dower. *Bryan v. Bryan*, 34 S. W. 260, 261, 62 Ark. 79.

The phrase "in lieu of all other taxes," as used in Acts 1803, c. 89, § 4, providing that each insurance agent doing business in the state in counties of 50,000 inhabitants or over shall annually pay the sum of \$20 as a state

privilege tax in lieu of all other tax, is a positive exclusion of every other privilege tax. The phrase has no other office or meaning. It follows, therefore, that the municipal privilege tax laid on insurance agents by the act of 1889 was impliedly repealed by the act of 1893. *Hunter v. City of Memphis*, 26 S. W. 828, 829, 93 Tenn. (9 Pickle) 571.

Act 1847, § 1, which declares that each head of a family, at his election, "in lieu" of the property mentioned in Act March 26, 1845, § 11, subds. 1, 2, may select and hold exempt from execution any other property, real, personal, or mixed, not exceeding in value, etc., does not operate to confine the exemption to persons having the property named in the act of 1845 before referred to, but is so construed that, if a person has no property other than that named in the act of 1845, he may make the selections provided for in the act of 1847, § 1, and the same shall be exempt from execution. *State, to Use of Garrett, v. Farmer*, 21 Mo. 160, 162.

A bank charter providing that the bank should pay to the state an annual tax of a certain amount on its capital stock, which should be "in lieu of all other taxes," means that none other than the tax specified, however described, can be demanded. It limits the bank's liability to the specific tax. The term has the effect of exempting from taxation the property of the bank, as well as the individual property of the shareholders in the corporate stock and its shares. *State of Tennessee v. Bank of Commerce* (U. S.) 53 Fed. 735, 736.

By the original act of incorporation of a bank the Legislature provided that as a condition of passing the act the company should pay the state semiannually, at the rate of one-half of 1 per cent. per annum on the stock actually paid in, during the continuance of the charter, but before the bank was organized and went into operation under the act the section containing this provision was repealed by a supplement at the ensuing session of the Legislature, which enacted that "in lieu of other taxes" the bank should pay a tax semiannually at the rate of one-fourth of 1 per cent. on the whole of the capital stock actually paid in, during the continuance of the charter, and by a still later act a tax of one-fourth of 1 per cent. was imposed on 75 per cent. of the surplus or contingent fund of the banks of the state. Held, that the words "in lieu of other taxes," in the supplement to the charter, did not exempt the bank from the payment of the last-mentioned tax imposed on its surplus or contingent fund, nor would it warrant the inference that the state thereby agreed not to impose any tax thereafter. *State v. Bank of Smyrna* (Del.) 2 Houst. 99, 116, 73 Am. Dec. 699.

In entering into the employment of a railway company, the employé made application for accident insurance, and executed an assignment of his wages to be earned, which stated such assignment to be "in lieu of payments provided in my application for accident insurance." It was contended that such assignment constituted a payment of the premium, but the court held that on its face the language "in lieu of payment" imported an admission of nonpayment rather than payment—that the assignment was not accepted as payment—and hence, where the money had not been deducted from the wages, such premiums had not been paid. *York v. Railway Officials' & Employés' Accident Ass'n* (W. Va.) 41 S. E. 227, 231.

#### Existence of thing replaced implied.

"In lieu of" means instead of; in place of; in substitution for. As used in a contract providing that under certain conditions a party thereto shall receive 40 per cent. commission "in lieu of" 45 per cent., as before provided, the phrase indicates the prior existence of another definite rate which thenceforth is no longer to exist, because the circumstances which gave it existence themselves no longer exist. *National Sewing Mach. Co. v. Willcox & Gibbs Sewing Mach. Co.* (U. S.) 74 Fed. 557, 559, 20 C. C. A. 654.

#### As over and above.

Laws 1887, c. 713, § 3 (2 Rev. St. [8th Ed.] p. 1088), providing that, when a bequest is made to an executor "in lieu" of commissions, the excess of such devise, above a reasonable compensation for services, is subject to collateral inheritance tax, cannot be construed to include a bequest to an executor of a certain sum over and above his legal commissions and expenses. In re *Underhill's Estate*, 20 N. Y. Supp. 134, 135, 2 Con. Sur. 262.

#### As repealing words in statute.

"In lieu of," as used in Act Cong. Dec. 24, 1861, providing that from and after the date of the passage of this act, "in lieu of" the duties heretofore imposed by law on articles hereinafter mentioned, there shall be levied certain rates of duty, is equivalent to direct repeal. Terms more implicit and comprehensive to effect a repeal of the previous statutes relating to similar articles could not be employed. *Gossler v. Goodrich* (U. S.) 10 Fed. Cas. 836, 839.

#### IN LIKE MANNER.

See "Like Manner."

#### IN LIKE PROPORTION.

See "Like Proportion."

**IN LIKEWISE MANNER.**

See "Likewise."

**IN THE LINE OF DUTY.**

See "Line of Duty."

**IN LIQUIDATION.**

See "Liquidation."

**IN LOCO PARENTIS.**

The proper definition of a "person in loco parentis" to a child, is a person who means to put himself in the situation of a lawful father to the child, with reference to the office and duty of making provision for the child; or, as defined by Sir William Grant, M. R., it is a person assuming the parental character and discharging parental duties. *Brinkerhoff v. Mersells' Ex'rs*, 24 N. J. Law (4 Zab.) 680, 683 (quoting *Wetherby v. Dixon*, 19 Ves. 412); *Marsh v. Taylor* (N. J.) 10 Atl. 486, 488. The mere fact that a legacy has been given by a grandfather to his grandchild does not create the relation; there must be some indication in some form of an intention to establish it; it is a question of intention. *Von der Horst v. Von der Horst* (Md.) 41 Atl. 124, 126.

A husband is not bound to accept into his family the children of his wife by a former husband, but if he does so voluntarily, so long as the relation is permitted to continue he assumes the duties and obligations of a parent, so that it is said that a person "in loco parentis" means a person taking upon himself the duty of a father to make provision for the child. *Capek v. Kropik*, 21 N. E. 836, 837, 129 Ill. 509.

**IN THE MANNER.**

See "Manner."

**IN MY POSSESSION.**

The use of the phrase "in my possession" in a bequest of "stock in my possession," is sufficient to render the bequest specific, and to show that testator intended to devise the specific property, and not a quantity or species of the thing bequeathed. *Norris v. Thomson's Ex'rs*, 15 N. J. Eq. (2 McCart.) 493, 496. The words "in my possession," used with a bequest of a certain variety of bonds, is held to indicate an intention on the part of the testator to make a specific bequest. *Kunkel v. Macgill*, 56 Md. 120, 123.

**IN THE NAME OF.**

Const. § 97, declares that prosecutions by indictment shall be "in the name and by

the authority of" the state of North Dakota. Held, that those words simply required that the indictment should show that the prosecution was "in the name of" the state, which means by the authority of the state; therefore, where an indictment recited that it was presented by the grand jury of the state of North Dakota in and for G. county, it clearly appeared that the prosecution was in the name and by the authority of the state as required, though the term was not precisely set forth in the indictment. *State v. Kerr*, 58 N. W. 27, 28, 3 N. D. 523.

**IN NO CASE.**

See "No Case."

**IN OFFICE.**

See "Then in Office."

Under a statute providing that for any willful misdemeanor in office any public administrator may be indicted, etc., it is held that embezzlement by a public administrator of money received ex officio after his term of office has expired is a misdemeanor "in office" within the statute. *State v. Borowsky*, 11 Nev. 119, 124.

**IN OPEN COURT.**

See "Open Court."

**IN OPERATION.**

A statute declaring in full force the ordinances of a city or other corporation "in operation" at its date does not embrace one which had been judicially pronounced by the superior court to be inoperative before its passage. According to Webster and the best lexicographers, "operation" is defined to be the exertion of power, physical, mechanical, or moral; action, as of an army or fleet; movement of machinery. An ordinance which has been pronounced a nullity by a court of competent jurisdiction, and the proceedings under it set aside as illegal, cannot be said to be in operation; that is, working for the corporation. Instead of being in progress, its motion was completely arrested. *Allen v. City of Savannah*, 9 Ga. 286, 294.

**IN ORDER TO.**

In an indictment charging that defendant accused plaintiff of a personal crime in order to compel him to act against his will, the words "in order" are of similar import as "with intent" thereby to compel, as used in the statute, and hence are sufficient. *State v. Waite*, 70 N. W. 596, 597, 101 Iowa, 377.

"In order to pay any of my debts," as used in a will reciting that, "in order to pay

any of my debts" or any of certain legacies, the testator's executors should sell a certain house and lot, is not a limitation of the executor's power to sell the house and lot. In *re Adam's Estate*, 148 Pa. 394, 24 Atl. 189; *Appeal of Martin*, 23 Atl. 1072, 1073, 148 Pa. 394.

### IN PARI DELICTO.

The rule is well settled, as to executed contracts, that if the parties be in "pari delicto" they will be left where they have placed themselves. They do not come into court with clean hands. If, however, one party is but an instrument in the hands of another, then they cannot be said to be in pari delicto. In *Story's Eq. Jurisprudence*, vol. 1, § 300, he says: "And, indeed, in cases where both parties are in delicto, concurring in an illegal act, it does not always follow that they stand in pari delicto; for there may be, and very often are, very different degrees in their guilt. One party may act under circumstances of opposition, oppression, hardship, undue influence, or great inequality of condition or age, so that his guilt may be far less in degree than that of his associate in the offense." *Rozell v. Vansyckle*, 39 Pac. 270, 272, 11 Wash. 79.

### IN PARI MATERIA.

Statutes are in pari materia which relate to the same person or thing, or to the same class of persons or things. *United Society v. Eagle Bank*, 7 Conn. 456, 457; *People v. Aichinson* (N. Y.) 7 How. Prac. 241, 245; *Waterford & Whitehall Turnpike v. People* (N. Y.) 9 Barb. 161, 169; *Town of Highgate v. State* (Vt.) 7 Atl. 898.

The phrase "in pari materia" is applicable to public statutes or general laws made at different times and in reference to the same subject. *Waterford & Whitehall Turnpike v. People* (N. Y.) 9 Barb. 161, 169; *Plummer v. Murray* (N. Y.) 51 Barb. 201, 202; *Town of Highgate v. State* (Vt.) 7 Atl. 898. It does not apply to private acts of the Legislature conferring distinct rights on different individuals. *Town of Highgate v. State* (Vt.) 7 Atl. 898.

"The phrase 'statutes in pari materia' is applicable to private statutes or general laws made at different times, but in reference to the same subject. Thus the English laws concerning paupers and their bankruptcy act are construed together as if they were one statute, and as forming a united system. \* \* \* To illustrate further all the statutes of the same state relating to the property rights and contracts of married women, removing their common-law disabilities, authorizing them to engage in business, etc., are to be construed as one system." *State v. Gerhardt*, 44 N. E. 469, 476, 145 Ind. 439, 33 L. R. A. 313.

An act is not "in pari materia," though it may incidentally refer to the same subject, if its scope and aim are distinct and unconnected. *Wheelock v. Myers*, 67 Pac. 632, 634, 64 Kan. 47.

The term "pari materia" means "in reference to the same subject." The intention of the Legislature in enacting a statute is to be gathered from itself and other acts in "pari materia," and in that case there is no room for conjecture or construction, but the intent thus manifested will be carried into effect. *People v. New York Cent. Ry. Co.* (N. Y.) 25 Barb. 199, 201.

Statutes that are in pari materia are to be construed as though they had originally constituted one enactment. *People v. Aichinson* (N. Y.) 7 How. Prac. 241, 245; *Plummer v. Murray* (N. Y.) 51 Barb. 201, 202.

Consistent statutes relating to the same subject are called statutes "in pari materia," and are treated and construed together as though they constituted one act. This is true whether the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session, or on the same day. Where enactments separately made are read in pari materia, they are treated as having formed in the mind of the enacting body parts of a connected whole, though considered by such a body at different dates and under distinct and varied aspects of the common subject. *Sales v. Barber Asphalt Pav. Co.*, 66 S. W. 979, 980, 168 Mo. 671. "The design is to carry out the intention of the laws, and it is a rule that a code of statutes relating to one subject was intended by the Legislature to be consistent and harmonious in all its parts and provisions." *Plummer v. Murray* (N. Y.) 51 Barb. 201, 202. Thus, where two statutes relate to the same things, the same class of persons, and have the same object in view, as relief to an excessively burdened town as to its highways, they are in pari materia. *Town of Highgate v. State*, 7 Atl. 898, 59 Vt. 39.

A statute applicable to several actions and to challenges for cause therein is not in pari materia with one relative to challenge without cause in criminal actions. *People v. Aichinson* (N. Y.) 7 How. Prac. 241, 245.

The word "par," in the term "in pari materia," must not be confounded with "similes," which is used in opposition to it, as in the expression, "Magis pares sunt quam similes," intimating not likeness merely, but identity. *Waterford & Whitehall Turnpike v. People* (N. Y.) 9 Barb. 161, 169.

### IN PART.

"In part," as used by a testator in bequeathing to an association owning a public hall which was used for public meetings, for which a rent was customarily charged, \$15.-

000 "in part to secure a liberal policy in respect to the use of the hall for objects of public interest," does not mean that a part of the bequest was to be used for such purpose, but that the entire amount was to be so applied, as the testator, from knowledge derived during his long term as president of such association, knew that the bequest alone would not fully bring about the desired result. *In re Marston*, 8 Atl. 87, 97, 79 Me. 25.

#### IN PAYMENT OF.

A receipt on the foot of an account, reciting that certain notes are received "in payment of the above account," construed not to mean that the notes were taken in absolute payment thereof, but only to mean that the proceeds of the notes would be applied on the account when collected. *Glenn v. Smith* (Md.) 2 Gill & J. 493, 510, 20 Am. Dec. 452.

The passing of counterfeit money by A. to B., with intent that B. should pass it away generally for the joint benefit of the two, or even for the sole benefit of A., is not a passing "in payment," within the act of assembly in relation to passing counterfeit money in payment. If the money was given to B. with orders that he should pay some certain debt due from the prisoner, and the debt was so paid, there may be some doubt as to whether it would be a passing in payment; but if A. passed the money to B. in payment for good money, it was a passing in payment within the meaning of the act. *United States v. Venable* (U. S.) 28 Fed. Cas. 368.

#### IN THE PEACE OF THE STATE.

That part of the definition of common-law murder expressed in the terms "in the peace of the state" does not require that the assault and death should be within the state, but is equivalent to the phrase, in the English law, "in the King's peace," and refers rather to the state and condition of the person slain, as being or not being entitled to the protection of the state. Consequently, where an assault is committed within the state and the victim dies without the state, the common-law crime of murder has been committed, and an indictment drawn for such offense need not conclude "contra formam statuti," though it is only by statutory provision that the offender can be indicted and punished within the state where the assault was made. *State v. Dunkley*, 25 N. C. 116, 121. That part of the definition of common-law murder expressed in the terms "in the King's peace" refers not to the place of the assault and death, but to the condition of the person slain, as being or not being entitled to the protection of the English laws; for example, whether he be a subject or an

alien enemy, or traitor in arms, or, in more ancient times, an infidel or guilty of a praemunire. *State v. Dunkley*, 25 N. C. 116, 121.

#### IN PERSONAM.

See "Judgment in Personam"; "Jura in Personam."

Proceedings in personam "are proceedings which seek the recovery of a personal judgment." *Cross v. Armstrong*, 10 N. E. 160, 164, 44 Ohio St. 613.

Personal actions are said to be in personam. *Cunningham v. Shanklin*, 60 Cal. 118, 125.

#### IN PICKLE.

A fire policy was on a stock of eggs in pickle, situated, etc., and, at the time of the loss, only a portion of the eggs were in pickling vats, the remainder having been taken out preparatory to shipment. It was the business of the insured to place eggs in brine for the purpose of preserving them, taking them out to dry, and ship them as required by the course of his business. Held, that the phrase "in pickle" did not mean that the eggs were insured only when in vats, but it was competent in an action on the policy to show that it was intended they should be covered at any time while contained on the premises and undergoing the process of pickling in its various stages, including the process of drying, and while packed in crates until actual shipment. *Hall v. Concordia Fire Ins. Co.*, 51 N. W. 524, 526, 90 Mich. 408.

#### IN PLACE.

The phrase "in place," used with reference to minerals, signifies such as are unsevered from the soil. *Williams v. Gibson*, 4 South. 350, 352, 84 Ala. 228, 5 Am. St. Rep. 368.

The phrase "in place," as used in Act Cong. May 10, 1872, in relation to mining claims, in speaking of veins or lodes of quartz or other rock in place, "indicates the body of the country which has not been affected by the action of the elements, which may remain in its original state and condition, as distinguished from the superficial mass which may lie above it." *Stevens v. Williams* (U. S.) 23 Fed. Cas. 44.

Rev. St. § 2320, giving owners of a claim the right to follow the dip within the lines of an adjoining claim where the ore is "in place," should be construed to mean that ore is not in place where the mass overlying the ore is mere drift or a loose deposit. *Tabor v. Dexler* (U. S.) 23 Fed. Cas. 615.

Rev. St. § 2320, referring to veins and lodes in "rock in place," refers to a vein or



lode inclosed by the fixed and immovable rock forming the mass of the mountain. It is not enough that it be on the top of fixed or immovable rock, but there must be a hanging as well as a foot wall. *Leadville Co. v. Fitzgerald* (U. S.) 15 Fed. Cas. 93, 99.

"Rock in place," as used in United States mining laws, includes any mineral matter which is fixed solid and immovable, no matter where it was originally formed or deposited. The term does not merely include hard rock or quartz rock. It includes any combination of rock broken up or mixed up with minerals and other things. *Jones v. Prospect Mountain Tunnel Co.*, 31 Pac. 642, 645, 21 Nev. 339.

#### IN PLACE OF.

The words "in place of," as used in Rev. St. § 596, providing that it shall be the duty of every circuit judge, whenever in his judgment the public interest requires, to designate and appoint the district judge of any judicial district within his circuit to hold a district or circuit court "in the place of" or in aid of any other district judge within the same circuit, do not necessarily carry the implication of some existing judge to be aided. They may, without doing violence to language, be construed to mean that the designated judge is to take temporarily the place which was or had been filled by the regular judge. *McDowell v. United States* (U. S.) 74 Fed. 403, 405, 20 C. C. A. 476.

#### IN THE PRESENCE OF.

See "Presence."

#### IN PRÆSENTI.

A grant to one "in præsentī" imports a transfer, subject to limitations mentioned, of a present interest in the lands designated. A grant to a state by Congress, for the use of railroads, of alternate sections of land along the proposed route of the railroad, is a grant in præsentī, and takes effect upon the sections by relation as of the date of the act of Congress when the route is definitely fixed. *Van Wyck v. Knevals*, 1 Sup. Ct. 336, 337, 106 U. S. 360, 27 L. Ed. 201.

#### IN PROGRESS.

New York City Charter 1873, c. 335, § 9, requires any work undertaken for the city to be let by contract, with the exception of "work in progress" at the adoption of the charter. Prior to the passage of the charter a plan for the drainage of a boulevard throughout its whole length had been prepared and approved by the proper authorities. The sewers were divided in five sections or districts, each independent of and

entirely distinct from the others, having a different outlet, and capable of being separately constructed without regard to the others. A separate assessment was made for the work in each section. When the charter was adopted, some work had been done on one of the sections. Held, that the words "work in progress" in the charter did not include all of the drainage plan—that is, those sections whereon no work had been done prior to the charter—and hence an assessment for constructing sewers in the sections whereon no work had been done prior to the charter, the improvement having been done by days' work and not by contract, was illegal and void. In *re Blodgett*, 91 N. Y. 117, 121. Nor does it include work on a subsection of a street which has been divided for the purpose of the work and work commenced on the other subsections. *Boas v. City of New York*, 32 N. Y. Supp. 967, 85 Hun, 311.

The words "in progress," in a city charter requiring public letting of all contracts except such works as are now in progress, characterizes work on a sewer, on which excavation was commenced the day before the charter took effect, by a force of 54 men and a number of teams. *Smith v. City of New York*, 31 N. Y. Supp. 783, 785, 82 Hun, 570.

#### IN PROPORTION TO.

"In proportion to its value," in a constitutional provision requiring that all property shall be taxed in proportion to its value, only means that no species of property from which tax may be collected shall be taxed higher than any other species of property, and does not operate to preclude the Legislature from exempting certain property from taxation. *Williamson v. Massey* (Va.) 33 Grat. 237, 241.

#### IN PURSUANCE OF.

The phrase "in pursuance of," as used in the recital in municipal bonds to the effect that they are issued in pursuance of the provisions of a given statute, is equivalent to an assertion that in issuing the bonds the provisions of the statute have been followed or conformed to. *Bates v. Independent School Dist.* (U. S.) 25 Fed. 192, 194.

"In pursuance of," when used in a bond of a municipal corporation which recites that the bond is issued "in pursuance of" statute, imports, in favor of bona fide purchasers, a full compliance with the statute, and precludes inquiry as to whether the precedent conditions were performed before the bonds were issued. *Independent School Dist. of Steam-Boat Rock v. Stone*, 1 Sup. Ct. 84, 87, 106 U. S. 183, 27 L. Ed. 90.

It is not putting an improper interpretation on the expressions "in pursuance of the act" or "in the execution of the act" to hold that a party is within the protection of a provision of that sort though he has not acted in exact execution of the act. A man may be acting in pursuance of an act of Parliament though his endeavors may be unsuccessful. *Read v. Coker*, 13 C. B. 850, 863.

#### IN REGARD TO.

An admonition of the court to the jury that they should not talk to each other or allow any person to talk to them, or form any opinion "in regard to this case," until it should be finally submitted to them, embraces in it everything involved in the trial, and is equivalent to an admonition not to converse on any subject connected with the trial. *State v. McKinney*, 3 Pac. 356, 363, 31 Kan. 570.

#### IN REM.

See "Judgment in Rem"; "Jura in Rem"; "Right in Rem"; "Strictly in Rem."

A proceeding in rem is a proceeding instituted against a thing, and not against a person. *In re Storey's Will*, 20 Ill. App. (20 Bradw.) 183, 190.

A suit in rem is, in a very proper sense, a suit against the owner of the thing, even though he may be unknown, and may in fact have no knowledge of the suit; and especially is this true when the owner appears in the suit and claims the thing attached. *In re Norwich & N. Y. Transp. Co. (U. S.)* 18 Fed. Cas. 440, 446.

A proceeding in rem, in a strict sense, is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants. But in a larger and more general sense the term "proceeding in rem" is applied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein. *Arndt v. Griggs*, 10 Sup. Ct. 557, 561, 134 U. S. 316, 33 L. Ed. 918; *Lantry v. Parker (Neb.)* 55 N. W. 962, 964.

"A proceeding brought to determine the status of the thing itself—the particular thing—and which is confined to the subject-matter in specie, is in rem, the judgment being intended to determine the state or condition, and, pro facto, to render the thing what the judgment declares it to be. Process may be served on the thing itself, and by such services and making proclamation the court is authorized to decide upon it without notice to persons, all the world being parties." *Cross v. Armstrong*, 10 N. E. 160, 164, 44 Ohio St. 613.

The object and purpose of a proceeding purely in rem is to ascertain the right of every possible claimant, instituted on an allegation that the title of the former owner has become devested, and notice of the proceeding given to the whole world to appear and make claim to it; but there is another class of cases which may be considered as proceedings "in rem," though in form they are proceedings inter partes, as attachments of property. Where the court has jurisdiction of the property and not of the person of the defendant, that is a proceeding in rem. *Peters v. Dunnells*, 5 Neb. 460, 465.

A proceeding in rem is that in which the process is served on the thing itself, and the mere possession of the thing itself, by the service of the process and making a proclamation, authorizes the court to decide upon it, without notice to any individual whatever. *Herman's Law of Estoppel*, c. 1. Its effect and purpose is to ascertain the right of every possible claimant, and it is instituted on an allegation that the title in the former owner, whoever he may be, has become devested, and notice is given to the whole world to appear and make claim for it. *Woodruff v. Taylor*, 20 Vt. 65, 73; *Stroupper v. McCauley*, 45 Ga. 74, 76.

A judgment in rem is generally said to be a judgment declaratory of the status of some subject-matter, whether this be a person, or a thing. Thus the probate of a will fixes the status of the document as a will; so a decree establishing or dissolving a marriage is a judgment in rem, because it fixes the status of the person. A judgment or forfeiture against specified articles of goods for violation of the revenue laws is a judgment in rem. In such case the judgment is conclusive against all the world, and, if the expression "strictly in rem" may be applied to any class of cases, it should be confined to such as these. Chief Justice Marshall says: "I have always understood that where a process is to be served on the thing itself, and where the mere possession of the thing itself, by the service of a process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever, it is a proceeding in rem, to which all the world are parties. \* \* \* The claimant is a party, whether he speaks or is silent, whether he asserts his claim or abandons it." But usage has distinguished as proceedings in rem a class of cases in which, while the seizure of the thing will be in aid of jurisdiction, yet it is essential that some form of notice be given to the particular person or persons. The proceeding thus assumes a phase of actions in personam, and a judgment will not be binding upon any one who was not before the court. In this class are attachment suits and all actions brought for the recovery of title to land. And, so far as a widow's suit for dower is in the na-

ture of a proceeding in rem, it falls unquestionably in the latter class of cases. *Bartero v. Real Estate Sav. Bank*, 10 Mo. App. 76, 78.

Decisions in such cases are binding and conclusive, not only on the parties litigating in such case, but on all others. Every one who can possibly be affected by the decision has a right to appear and assert his own rights by becoming an actual party to the proceeding. *Cunningham v. Shanklin*, 60 Cal. 118, 125.

The phrase "in rem," in the sixteenth section of chapter 66 of the Code of 1881, providing that the claim against the separate estate of a married woman, for the payment of which she has charged the same, shall be enforced only in the court of equity in rem and in personam, means quasi in rem, and the suit is inter partes. *Dulin v. McCaw*, 39 W. Va. 721, 724, 726, 20 S. E. 681.

#### **Actions in personam distinguished.**

"In rem" is a technical term used to designate proceedings or actions instituted against the thing, in contradistinction to personal actions, which are said to be in personam. *Cunningham v. Shanklin*, 60 Cal. 118, 125.

"Action in rem" is understood to be a technical term taken from the Roman law and there used to distinguish an action against a thing from one against a person, the terms 'in rem' and 'in personam' always being the opposite one of the other; an act in personam being one directed against a specific person, while an act in rem was one done with reference to no specific person, but against or with reference to a specific thing, and so against whom it might concern or all the world." *Cross v. Armstrong*, 10 N. E. 160, 164, 44 Ohio St. 618.

#### **Actions included.**

Proceedings in rem include not only those instituted to obtain decrees or judgments against property as forfeited in the admiralty or the English exchequer, or as a prize, but also suits against property to enforce a lien or privilege in the admiralty courts, and suits to obtain a sentence, judgment, or decree of other courts upon the personal status or relations of the party, such as marriage, divorce, bastardy settlement, or the like. *Cunningham v. Shanklin*, 60 Cal. 118, 125 (citing *Bouv.*).

#### **Admiralty proceedings.**

A "proceeding in rem," as used in the admiralty courts, is not a remedy afforded by the common law. It is a proceeding under the civil law. *Griswold v. The Otter*, 12 Minn. 580 (Gil. 364, 368) (quoting *The Moses Taylor v. Hammons*, 71 U. S. [4 Wall.] 427, 18 L. Ed. 397).

A proceeding in rem in admiralty is to enforce a lien against the offending vessel, irrespective of the ownership of it, and no personal judgment can be entered against the shipowner as such. The decree in a proceeding in rem is enforced directly against the res by a condemnation and sale thereof, or against the obligors on the bond that stand in the place of the res, and for the purpose of the judgment is the res; while a proceeding in personam is direct against the shipowner to enforce his personal liability for a debt, wholly irrespective of any lien on the ship growing out of the maritime contract on which the proceeding is founded. *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.* (U. S.) 94 Fed. 180, 186, 80 C. C. A. 135.

#### **Attachment or replevin.**

Attachment suits partake of the nature of suits "in rem," and are distinctly such when they proceed without jurisdiction having been acquired of the person of the debtor in the attachment suit. *Blanc v. Tennessee Coal, Iron & R. Co.*, 37 N. Y. Supp. 906, 907, 2 App. Div. 248.

Proceedings in attachment, while in the nature of proceedings in rem, are not based on any allegation that the right of property is to be determined between any other persons than the parties to the suit. No notice is sought to be given to any other person, and the judgment, being only as to the status of the property as between the parties of the record, is, as to all other persons, a mere nullity. *Woodruff v. Taylor*, 20 Vt. 76; *Mankin v. Chandler* (U. S.) 16 Fed. Cas. 625. The same rule applies to proceedings in replevin, and actions brought for the recovery of title to land. *Stroupper v. McCauley*, 45 Ga. 74, 76.

#### **Bankruptcy proceedings.**

See "Bankruptcy."

#### **Divorce.**

An action for divorce is a proceeding in rem. *Atkins v. Atkins*, 2 N. W. 466, 472, 9 Neb. 191.

A judgment in an action for divorce is in the nature of a judgment in rem. It determines the question of marriage relations or a personal status as against all the world, and is therefore conclusive, not only upon the parties litigating in the cause, but upon strangers. *McGill v. Deming*, 11 N. E. 118, 122, 44 Ohio St. 645.

A suit for divorce, so far as it affects the marital status of the parties, is a proceeding quasi in rem, but so far as it relates to collateral matters, such as alimony and costs, it is in personam. *McFarlane v. McFarlane*, 73 Pac. 208, 204, 43 Or. 477.

**Ejectment.**

The statutory action of ejectment, brought against a nonresident, is an action in rem. *Lantry v. Parker*, 55 N. W. 962, 87 Neb. 353.

**Foreclosure, partition, and quieting title.**

"In rem," as used in Civ. Code, § 17, as amended by proviso in effect September 1, 1886, providing that absence from the state, death, or other disability of a nonresident should not operate to extend the period within which actions in rem shall be commenced, should be construed to include an action to foreclose a mortgage on real estate, which, so far as it seeks to subject the mortgaged property to the payment of the debt, is clearly a proceeding in rem. "A proceeding by creditors of the property against their debtors is also a proceeding in rem. *Peters v. Dunnells*, 5 Neb. 460, 465. Such are cases commenced by attachment against the property of debtors or instituted to partition real estate, foreclose mortgages, or enforce a lien. So far as they affect property of the state, they are substantially proceedings in rem in the broader sense which we have mentioned. *Arndt v. Griggs*, 10 Sup. Ct. 557, 561, 134 U. S. 316, 33 L. Ed. 918.

A judgment on a mechanic's lien is not a judgment in rem, and does not conclude those claiming under a title adverse to the title of those who created the lien. *Strouper v. McCauley*, 45 Ga. 74, 76.

Proceedings in partition or to quiet title are not strictly proceedings in rem, for they are not taken directly against property, but they are regarded, so far as they affect property, as proceedings in rem sub modo, in respect of which, while there must be reasonable notice to the parties, personal service is not essential to jurisdiction, and constructive service may be substituted. When, however, constructive service by publication is substituted by statute in place of personal citation, a strict compliance with the statutory provisions is exacted. *Meyer v. Kuhn* (U. S.) 65 Fed. 705, 712, 13 C. C. A. 298.

**Proceeding for distribution under will.**

A proceeding for distribution under a will is in the nature of a proceeding in rem; the res being the estate which is in the hands of the executor under the control of the court, and which he brings before the court for the purpose of receiving direction as to its final distribution. *Snyder v. Murdock*, 73 Pac. 22, 24, 26 Utah, 233.

**Proceeding to sell real estate of intestate.**

A proceeding to sell the real estate of an indebted intestate is a proceeding in rem, to which there are no adversary parties. *Allan v. Hoffman*, 2 S. E. 602, 606, 83 Va. 129.

A proceeding in rem under the statute to sell real estate of a decedent for the payment of debts against the estate is not strictly speaking an action, but is purely a proceeding in rem, where the principal question involved was the question of debts outstanding against the estate, the question of personal property available for the payment therefor, and the necessity to sell the land for which license is sought for the payment of the same. The proceeding is not adversary in its character, in the sense in which the term is used in an action, as when so much of the estate descends to the heirs as exists after the payment of the debts. The failure to appoint a guardian ad litem for minor heirs in such a proceeding will not, therefore, affect the validity of a sale of the real estate for the payment of the debts of the estate of a decedent. *McClay v. Foxworthy*, 25 N. W. 86, 88, 18 Neb. 295.

**Specific performance.**

A bill for the specific execution of a contract to convey real estate is not strictly a proceeding in rem, but, when such a proceeding is authorized by a statute on publication without personal service of process, it is substantially of that character. *Shepherd v. Ware*, 46 Minn. 174, 175, 178, 48 N. W. 773, 774, 24 Am. St. Rep. 212.

**IN RESPECT TO.**

An equitable action brought by the people to vacate letters patent is an action in respect to lands, within the meaning of the statute of 1801, providing that the people will not sue any person "for or in respect to any lands," etc., by reason of any rights acquired 40 years before the suit or proceeding for the same be commenced. *People v. Clarke*, 9 N. Y. (5 Seld.) 349, 368.

The phrase "in respect thereof," in a covenant in a lease requiring the lessee to pay for all taxes, charges, or assessments on the demised premises, or on the lessors and their assigns in respect thereof, technically and grammatically relates and has reference to the preceding words "demised premises and privileges," so that the words describe a tax imposed on the lessors in respect of or in relation to the leased premises; but it does not include a tax imposed by Laws 1896, c. 908, §§ 8, 21, subd. 5, on rents reserved under leases in fee. *Woodruff v. Oswego Starch Factory*, 74 N. Y. Supp. 961, 963, 70 App. Div. 481.

Gen. St. c. 164, § 13, providing that a married woman may be sued upon any contract by her made in respect to her property held in her own right, means contracts connected with and growing out of that property, and entered into with a view to improve, protect, use, enjoy, manage, or dispose of such property for her support or ben-

alt. A contract by a married woman for groceries sold to her on her promise to pay the same from her wages is not such a contract within the meaning of the statute. *Muzzey v. Reardon*, 57 N. H. 378, 381.

#### IN THE SAME MANNER.

See "Same Manner."

#### IN SATISFACTION.

See "Satisfaction—Satisfy."

#### IN SATISFACTORY MANNER.

See "Satisfactory."

#### IN THE SECOND INSTANCE.

Where an indorser indorsed a note, "to be liable in the second instance," such words should be construed to make a suit against the maker of the note a condition precedent to the indorser's liability. *Bartlett v. Byers*, 35 Ga. 142.

#### IN SERVICE.

A ship of war afloat, manned in a serviceable condition and able to proceed to sea, is in service, though more men and stores may be needed to make the sea service effective, and an officer on such a vessel is in service, if subjected to the restrictions, regulations, and requirements incident to service at sea. *Aulick v. United States* (U. S.) 27 Ct. Cl. 109, 112.

Prize Act 1864, directing that the prize money should be distributed among inferior officers in amounts in proportion to their respective rates of pay in the service, naturally implies the rates of their pay at the time of the capture, by relation to which the subsequent distribution is made, and not those rates as affected by promotions after the capture and before decree or distribution, though such promotions, so far as affects rank, and possibly ordinary pay, date from the day of the capture. *United States v. Steever*, 5 Sup. Ct. 765, 769, 113 U. S. 747, 28 L. Ed. 1133.

#### IN SESSION.

Assembled distinguished, see "Assemble."

##### Courts.

The phrase "in session," within the meaning of a charge that accused used contemptuous words in the courtroom while the court was "in session," expresses not only the idea that at the time the judge was sitting on the bench and engaged in the discharge of official functions, but was also open to the construction of meaning that the court had convened for a term and not adjourned.

*State v. Root*, 67 N. W. 590, 595, 5 N. D. 457, 57 Am. St. Rep. 568.

Rev. St. § 829 [U. S. Comp. St. 1901, p. 636], which fixes the marshal's compensation for attending the Circuit or District Court while in session, means that the court is open by its own order for the transaction of business. *McMullen v. United States*, 13 Sup. Ct. 127, 146 U. S. 360, 36 L. Ed. 1007.

"In session," as used in Rev. St. § 828 [U. S. Comp. St. 1901, p. 635], allowing the clerk of the federal courts \$5 a day for his attendance on the court while actually in session, means not only when the judge is present in person, but includes as well a day when, in obedience to an order of the judge, the officers of the court are present, and the journal is opened by the clerk, and the court is adjourned to another day. *United States v. Pitman*, 13 Sup. Ct. 425, 147 U. S. 669, 37 L. Ed. 324.

Pub. St. c. 212, § 48, authorizing the commissioner to admit a prisoner already convicted to bail "when the court is not in session," means when the court is not in actual session, and does not refer only to time elapsing between the regular terms, so that a temporary adjournment is a time when the court is not in session. *Commonwealth v. Gove*, 24 N. H. 211, 151 Mass. 392.

##### Legislature.

"In session," as used in Const. art. 6, § 9, authorizing the Governor, when the Senate is not in session, to fill temporarily a vacancy in the office of justices of the Supreme Court indicates a present acting or being of the Senate as a body. When the sittings are terminated by a long adjournment, and the actual meetings of the body thus interrupted, although the session is continued, the Senate is not "in session," within the intent and meaning of that section, and an appointment made by the Governor during such an adjournment is valid. *People v. Fancher*, 50 N. Y. 288, 291.

#### IN SIGHT.

"In sight," as used in relation to ore body, means ore-bearing rock so separated and blocked off by being worked around on two or more sides that it is subject to examination and measurement. *Mudsill Min. Co. v. Watrous* (U. S.) 61 Fed. 163, 167, 9 C. C. A. 415.

#### IN SO DOING.

The phrase "in so doing," as used in an indictment that the defendant committed an assault with the intent in so doing of committing murder, is equivalent to the words "then and there," and means that the defendant then and there made an assault with the

intent to commit murder. *State v. Murphy*, 35 La. Ann. 622, 623.

#### IN SOCAGE.

See "Guardianship in Socage."

#### IN SOLIDO.

Pothier, in his treatise on Obligations (paragraph 261), says: "An obligation is contracted in solido on the part of the debtors when each of them is pledged for the whole, but so that a payment by one liberates them all." *Henderson v. Wadsworth*, 6 Sup. Ct. 40, 44, 115 U. S. 264, 29 L. Ed. 377.

#### IN SPECIE.

See "Specie."

#### IN THE STATE.

1 Rev. St. N. Y. p. 127, § 3, provides that a person convicted in the state of an infamous crime shall not be entitled to the right of suffrage, unless he shall have been pardoned by the executive, and by the terms of such pardon shall be restored to all the rights of a citizen. Held, that the term "convicted in the state" imported by implication a further limitation, and meant not only that the defendant must have been convicted within the territorial limits of the state, but also in the courts provided by the state for the trial of such crimes as that charged against the defendant, and did not include nor apply to crimes defined by the statutes of the United States, or to convictions therefor in the federal courts, though located within the state. *United States v. Barnabo* (U. S.) 24 Fed. Cas. 1007, 1008.

#### IN A STATE OF CULTIVATION.

See "State of Cultivation."

#### IN STATU QUO.

"In statu quo" means being placed in the same position in which the party was at the time of the inception of a contract which is sought to be rescinded. Where a vendee rescinds a contract for the sale of land for defect of title, and sues to recover payments made, the rule that the vendor must be placed in statu quo is satisfied, as to rents which might probably have accrued to the vendor while the premises were in the possession of the vendee, by the vendor's possession of purchase money. *Daly v. Bernstein*, 6 N. M. 380, 393, 28 Pac. 764.

#### IN STORE.

The expression "in store," as used in an instrument reciting that the person signing

the instrument received of G. so many bushels of wheat in store, is to be construed as showing a contract of bailment, and not a sale of the wheat. *Goodyear v. Ogden* (N. Y.) 4 Hill, 104, 106.

#### IN SUCH MANNER.

See "Such."

#### IN THAT CASE.

The phrase "in that case," in a will devising property and directing that, if the beneficiary die without lawful heirs, then in that case the property shall be divided, etc., operates to require the word "then" to be construed as an adverb of time, meaning at that time. *Harris v. Smith*, 16 Ga. 545, 557.

#### IN TRADE.

See "Payable in Trade."

#### IN TRANSIT.

See "Stoppage in Transitu"; "Transit."

Goods are "in transit" so long as they are on their passage, and until they come into the actual or constructive possession of the vendee, or of some person acting for him. *More v. Lott*, 13 Nev. 376, 383.

"In transit" means literally in course of passing from one point to another, and such is its common acceptation. Cotton still remaining on a compress company's platform, for which a railroad company has executed a bill of lading, providing that the company shall be liable for loss or damage to the cotton while in transit, is not "in transit," so as to bind the company. *Amory Mfg. Co. v. Gulf, C. & S. F. Ry. Co.*, 37 S. W. 856, 857, 89 Tex. 419, 59 Am. St. Rep. 65; *Gulf, C. & S. F. Ry. Co. v. Pepperell Mfg. Co. (Tex.)* 37 S. W. 965.

#### IN TRUST.

See, also, "Held in Trust"; "Power in Trust."

In trust or otherwise, see "Otherwise."

The use of the term "in trust" in a will rebuts the idea that an absolute estate was intended to be granted to the person mentioned. *Darrah v. Darrah*, 52 Atl. 183, 184, 202 Pa. 492.

The words "in trust," as used in the Maine Statutes providing that the estate of any deceased persons shall be settled in another county whenever the judge of probate shall be interested therein in trust, means any indirect representative interest which the judge might have strictly as trustee, or as executor, administrator, or guardian. In *re Marston*, 8 Atl. 87, 89, 79 Me. 25.

Where a legacy is given to a person or corporation, and that person or corporation is to have the perpetual use of income to be derived from the legacy, and there is no limitation over (that is, no remaindermen), such a legacy is an absolute gift to the person or corporation, even though the words "in trust" are annexed to the gift; these words being regarded as precatory words. *In re Daniels' Will*, 84 N. Y. Supp. 684, 686, 41 Misc. Rep. 299.

There is no doubt that the words "in trust," in a will, may be construed to create a use, if the intention of the testator or the nature of the devise requires it; but the ordinary sense of the term is descriptive of a fiduciary estate or technical trust, and the sense ought to be retained until the other sense is clearly established to be that intended by the testator. In the present case there are strong reasons for construing the words to be a technical trust. The devise looked to the issue of a person not then in being, and of course, if such issue should come in esse, a long minority must follow. During this period, it was an object with the testator to uphold the estate in the father for the benefit of his issue; and this could be better accomplished by him as a trustee than as a guardian. If the estate to the issue were a use, it would vest the legal estate in them as soon as they came in esse; and if the first-born children should be daughters, it would vest in them, subject to being divested by the subsequent birth of a son. A trust estate would far better provide for these contingencies than a legal estate. There is, then, no reason for deflecting the words from the ordinary meaning. *King v. Mitchell*, 83 U. S. (8 Pet.) 326, 332, 352, 8 L. Ed. 962.

#### IN TRUST AND ON CONDITION.

The expression, in the habendum clause of a deed, that the conveyance was "in trust and on condition" that the edifice should henceforth and forever be used for public worship, meant that the parties intended the title to be in trust, and the words "on condition" were not used in their technical sense as creating a condition. *Sohler v. Trinity Church*, 109 Mass. 1, 19.

#### IN TURN.

The provision in a charter that the vessel shall be loaded by a coal company "in turn" must be strictly construed, and it shuts out a practice of the company to give preference to its own vessels, or to sell coal to local customers from the supply which would otherwise have been available for loading at its docks, to the delay of the chartered vessel. *Donnell v. Amoskeag Mfg. Co.* (U. S.) 118 Fed. 10, 13, 55 C. C. A. 178.

In a charter party by which the owner agreed that the ship should proceed to the Tyne and there load a cargo of coal, and proceed therewith to Algiers and deliver the same there on payment of a certain freight, and the charterer engaged that the vessel should be unloaded at a certain average rate per day, and that, if detained for a longer period, he would pay for such detention at a certain rate, to be reckoned from the time of the vessel being ready to unload and in turn to deliver, the words "in turn to deliver" would mean the turn of delivery in conformity with regulations of the port of Algiers, according to which vessels might commence unloading as soon as they entered within the mole. *Robertson v. Jackson*, 2 C. B. 412, 427, 428.

#### IN USE.

"In use" is defined to be "in employment." *Astor v. Merritt*, 4 Sup. Ct. 413, 419, 111 U. S. 202, 28 L. Ed. 401.

An insurance company insured a threshing machine against loss by fire, "then not in use." The property, which had not been used for threshing for some two weeks, was hauled out in the country and left standing near a farmhouse, preparatory to its intended use a few days later, and while standing there the separator was destroyed by fire, which was not caused by hazard incident to the actual use or operation of either the machinery or the separator. Held, that the term "in use" was used in its most obvious and natural meaning, to wit, use in the business or work for which it was designed, viz., threshing, and evidently the object of the limitation of the risk contained in the policy was to exclude any possible liability on the part of the insurer for loss by fire so peculiarly liable to occur during the actual operation of steam threshing machines; and hence the separator was not "in use," within the terms of the policy, when the loss occurred. *Minneapolis Threshing Mach. Co. v. Fireman's Ins. Co.*, 58 N. W. 819, 820, 57 Minn. 35, 23 L. R. A. 576, 47 Am. St. Rep. 572.

#### IN VIEW OF.

"In view of all the circumstances," as used in a definition of ordinary care as that degree of care which ought reasonably to be expected from a person of ordinary prudence in view of all the circumstances, is not substantially different from "under like circumstances," so as to be an erroneous deviation from the stereotyped definition. *Anderson v. Union Terminal R. Co.*, 61 S. W. 874, 879, 161 Mo. 411.

#### IN THE WHOLE.

"In the whole," as used in a tax deed declaring that for the nonpayment of taxes

certain property was sold for a certain sum in the whole, which was the amount of taxes assessed and due and unpaid on said blocks, etc., mean, not that the blocks were sold in gross, but that the amounts as stated in the certificate opposite each block, and for which they were sold, aggregated \$80; it not being necessary to expressly recite that the blocks were sold separately. *Hotson v. Wetherby*, 60 N. W. 423, 424, 88 Wis. 324.

#### IN A WORD.

The expression "in a word," as used in an instrument given to a person desiring credit in the purchase of goods, certifying that those signing it had a personal and intimate acquaintance with him, and that they could testify to his strict adherence to truth, punctuality in contracts, and perseverance in business, and concluding, "In a word, we look upon him as an honest and responsible man, worthy of all credit," means "to sum up." *Clopton v. Cozart*, 21 Miss. (13 Smedes & M.) 363, 368.

#### IN WORDS AND FIGURES AS FOLLOWS, TO WIT.

The phrase "in words and figures as follows, to wit," used in an indictment for forgery as preliminary to setting out the forged warrant, imports the same exactness as the word "tenor," which when so used requires the indictment to contain an exact copy. *McDonnell v. State*, 24 S. W. 105, 58 Ark. 242.

#### IN WORK.

In a notice by a manufacturer to a purchaser of goods that the order for goods was that day put in work, the words "in work" meant that the manufacture of the shoes was begun. *Manss-Bruning Shoe Mfg. Co. v. Prince*, 41 S. E. 907, 51 W. Va. 510.

#### IN WRITING.

See "Write—Writing."

#### IN YARD.

A contract whereby one of the parties agreed to deliver oil "in yard suitable to vessel in Baltimore" imposed on him the duty of delivering the oil at the ship's side. *Camden Oil Co. v. Schlens*, 59 Md. 31, 43.

#### INABILITY.

Inability is defined as the state of being unable, physically, mentally, or morally; want of ability; lack of power, capacity, or means; and, as used in reference to the power of a deputy commissioner during the absence of inability of the commissioner to transact any ordinary duties of the commis-

sioner, is not confined to simple physical inability to examine the bill and sign the approval, but may depend on the necessities growing out of such pressure of other official business as renders it impossible for the commissioner to attend to all the work of the office. *People v. Fielding*, 55 N. Y. Supp. 530, 537, 36 App. Div. 401.

In Laws 1881, c. 184, tit. 3, § 8, making it the duty of the mayor to appoint one of the justices of the peace of the city, who shall exercise the jurisdiction of the city judge in case of the inability of the latter to act, "inability" is not limited to mere physical inability, but includes any duty of paramount importance, such as sickness in the family of the judge or other contributory cause which prevents his attendance to his official duties. *People v. Schirmer*, 8 N. Y. Supp. 76, 55 Hun. 160.

#### Absence.

"Inability," as used in Const. art. 4, § 6, providing that the duties of Governor shall, in case of his inability to discharge the powers of the office, devolve upon the Lieutenant Governor, will not be held to embrace absence. *In re Munger*, 41 N. Y. Supp. 882, 884, 10 App. Div. 347.

#### Financial embarrassment.

St. 9 & 10 Vict. c. 95, § 24, relating to the removal of county court clerks for inability, does not include the instances of a very great pecuniary embarrassment and want of money to pay debts, existing before and at the time of dismissal. *Reg. v. Owen*, 15 Adol. & El. (N. S.) 476, 485.

#### As incompetency.

The term "inability," as used in a contract for the employment of a teacher, providing that, if by his inability or negligence the interests of the school suffer, the school board may annul the contract, means the same as "incompetency," as found in the statute authorizing the dismissal of a school teacher for incompetency. *Armstrong v. Union School Dist. No. 1*, 28 Kan. 345, 349.

#### INABILITY TO PAY.

"Inability to pay" and "insolvency" are synonymous, but solvency does not mean ability to pay at all times, under all circumstances, and everywhere on demand, nor does it require that a person should have in his possession the amount of money necessary to pay all claims against him. Difficulty in paying particular demands is not insolvency. *Walkenshaw v. Perzel* (N. Y.) 32 How. Prac. 233, 240.

#### INACCURATE DESCRIPTION.

Where papers were served on defendant, whose place of abode was stated to be "G.



Place, in said borough," whereas his place of abode was "N. Road," in the same borough, and not "G. Place," it was not a mere inaccuracy of description, within a statute providing that such inaccuracy should not be prejudicial, but it was a wrong place. The description of the place was accurate.—*Reg. v. Coward*, 16 Q. B. 819, 828.

## INACCESSIBLE.

Whether or not a witness beyond the jurisdiction of this state is "inaccessible," in the sense in which that word is used in Code, § 3782, is in each particular case a question for determination by the trial judge in the exercise of a sound discretion. *Atlanta & O. Air Line Ry. Co. v. Gravitt*, 20 S. E. 550, 551, 98 Ga. 369, 26 L. R. A. 553, 44 Am. St. Rep. 145.

## INADEQUACY.

See "Gross Inadequacy"; "Grossly Inadequate Consideration."

## INADEQUACY OF REMEDY AT LAW.

Within the rule that, if the remedy at law is adequate, in theory it deprives equity of jurisdiction, by "inadequacy of remedy at law" is meant, not that it fails to produce the money (that is a very usual result in the use of all remedies), but that in its nature or character it is not fitted or adapted to the end in view. *Safe Deposit & Trust Co. v. City of Anniston (U. S.)* 98 Fed. 661, 663; *Crawford County v. Laub*, 81 N. W. 590, 591, 110 Iowa, 355.

Inadequacy of remedy at law, to entitle a party to equitable relief, exists where the case made demands preventive relief, as, for instance, the prevention of multiplicity of suits, or the prevention of irreparable injury. The mere assertion that the apprehended acts will inflict irreparable injury is not enough, but facts must be alleged from which the court may reasonably infer that such would be the result. *Cruickshank v. Bidwell*, 20 Sup. Ct. 280, 283, 176 U. S. 73, 44 L. Ed. 377.

## INADEQUACY OF REMEDY BY DAMAGES.

The expression "inadequacy of remedy by damages" means that the damages obtainable at law are not such compensation as will in effect, though not in specie, place the parties in the position in which they formerly stood. *Western Union Telegraph Co. v. Rogers*, 11 Atl. 13, 15, 42 N. J. Eq. (15 Stew.) 311.

## INADEQUATE DAMAGES.

Damages are called inadequate within the definition of irreparable injury, when

those which can be obtained at law are not such as will compensate and place the parties in a position in which they formerly stood. *Insurance Co. of North America v. Bonner*, 42 Pac. 681, 682, 7 Colo. App. 97.

## INADEQUATE PRICE.

"Inadequate price," is a term applied to indicate a want of sufficient consideration for a thing sold, or such a price as under ordinary circumstances would be insufficient. *Bouv. Law Dict.* So that a statement by the court in one of its conclusions of fact that the sum paid for a stock or goods was an "inadequate consideration" is not equivalent to a finding that the sale was fraudulent. *State ex rel. Friedman v. Purcell*, 33 S. W. 13, 14, 181 Mo. 312.

The "inadequacy of price," which in and of itself will justify a court of equity in setting aside a transfer of realty is defined as an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it. Where defendant induced an ignorant old man to take \$5 in consideration for a deed to land worth \$1,000, the inadequacy of price was so great as to amount to conclusive evidence of fraud, and justify the court in setting the transaction aside. *Stephens v. Ozbourne*, 64 S. W. 902, 903, 107 Tenn. 572, 89 Am. St. Rep. 967.

## INADMISSIBLE.

An objection that testimony is "incompetent and inadmissible" is too general to put the court below in error. *McKarsie v. Citizens' Building & Loan Ass'n (Tenn.)* 53 S. W. 1007, 1010.

## INADVERTENCE.

"Inadvertence," as used in Code, § 274, providing that the judge may in his discretion, etc., relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, does not mean any inadvertence, but is confined to a reasonable inadvertence, occasioned by some fact or some thing that has or has not been done, by which the complaining party ought to have knowledge, and which, if he had had such knowledge, might have prevented the judgment, order, or other proceedings of which he complains. *Skinner v. Terry*, 12 S. E. 118, 119, 107 N. C. 103.

"Inadvertence" is a lack of heedfulness or attention. In an action against a school township, based on orders fraudulently issued by a township trustee without consideration, the facts were held not to show inadvertence sufficient to authorize the set-

ting aside of a default judgment against the township; it appearing that the summons had been duly served on the trustee and that plaintiff was not a party to the fraud. *Davis v. Steuben School Tp.*, 50 N. E. 1, 5, 19 Ind. App. 694.

"Inadvertence," as used in Act Cong. July 13, 1866, c. 184, § 9, 14 Stat. 143, amending Act Cong. June 30, 1864, c. 173, § 158, providing that if it appears to any revenue collector that any "instrument has not been duly stamped at the time of making or issuing the same, by reason of accident, mistake, inadvertence, or urgent necessity, and without any willful design to defraud," etc., it shall be lawful for such collector to affix the proper stamp and remit the penalty, includes a mere omission to affix a revenue stamp as required by law. *Green Mountain Cent. Institute v. Britain*, 44 Vt. 13, 15.

The term "inadvertence," in Code, §§ 4501, 4502, allowing the Supreme Court after the term to vacate or correct mistakes in judgments given through inadvertence or oversight, does not apply to any judgment which was given upon the deliberate consideration and judgment of the court, though the court may have since adopted a different ruling as correct. It will be seen that the case provided is where judgment is given through inadvertence or oversight, and not where an opinion is formed from inadvertence and oversight. *Russell v. Culyar*, 51 Tenn. (4 Heisk.) 154, 176.

The terms "mistake, inadvertence, surprise, or excusable neglect," in Code, § 274, providing that the court may in its discretion within one year, without notice thereof, relieve the party of judgment taken against him from such neglect, were construed to apply to the case of the judgment taken against a defendant who attended court for four days during the return term, and then left his case in charge of counsel, who failed to look after the case, thinking the action had been brought in another county, where it should properly have been brought, thus permitting a default judgment to go against his client. *Taylor v. Pope*, 11 S. E. 257, 258, 106 N. O. 267, 19 Am. St. Rep. 530.

The words "inadvertence, mistake, surprise, or excusable neglect," in Hill's Ann. Laws Or. § 102, authorizing a court to set aside its judgment at any time within a year, if the judgment has been procured against a party asking such relief through his mistake, inadvertence, surprise, or excusable neglect, included a judgment procured in violation of an agreement to extend the time to answer. "It is probable that the species of surprise primarily contemplated by these statutes is that which results from the taking of a judgment against a party in violation of an agreement or understanding that the case shall be continued, or not pressed,

or not brought to trial, though that is also a kind of fraud." *Thompson v. Connell*, 48 Pac. 467, 468, 81 Or. 231, 65 Am. St. Rep. 818 (quoting 1 Black, Judgm. 386).

#### INADVERTENTLY.

An allegation, in a bill for relief against a judgment on a note, stating that the note was "inadvertently drawn," may be construed as an allegation that it was drawn by mistake. *Fishback v. Woodford*, 24 Ky. (1 J. J. Marsh.) 84, 87, 19 Am. Dec. 55.

#### INAPPRECIABLE.

The word "inappreciable" (or unappreciable) is one of a new coinage, not to be found in Johnson's or Richardson's Dictionaries. The word "appreciate" first appears in our dictionaries in the last edition of Johnson, by Todd (1827), with the explanation "to estimate," "to value." Assuming that to be the true meaning, the compound adjective signifies that the quantities were not capable of being estimated or valued; so inconsiderable as to be incapable of value or price. *Embrey v. Owen*, 6 Exch. 353, 367.

#### INATTENTION.

Act Cong. July 7, 1838, § 12 (5 Stat. 306), which declares that officers and others employed on any steamboat, by whose "misconduct, negligence, or inattention" the life or lives of any person or persons on board shall be destroyed, shall be deemed guilty of manslaughter, is so construed that intent is not a necessary ingredient of the offense provided for in the statute. *United States v. Warner* (U. S.) 28 Fed. Cas. 404.

#### INBOARD.

A certificate of insurance stated that a cargo was insured according to the terms of the policy "inboard cargo boat W. S. A." The policy provided that the company should not be liable unless by special agreement indorsed thereon for damage to goods on deck, but also provided that it would be lawful for said boats to load in such manner as is customary in navigation on the canal on which the boat plied, without regard to marine law, etc. Held, that the word "inboard" is used in contrast to "outboard." It does not necessarily mean under deck, but seems to mean a cargo not projecting over the rail of the vessel. *Allen v. St. Louis Ins. Co.*, 46 N. Y. Super. Ct. (14 Jones & S.) 175, 181.

#### INCAPABLE.

The meaning of the word "incapable," when applied to capability of administration of estates, cannot be limited in its applica-

tion to the mere case of mental or physical incapability. It must be understood to include the idea of unfitness and unsuitableness. *Drew's Appeals*, 58 N. H. 319, 320.

One may be of good habits, a church member, and an elector, and be capable of doing odd jobs of work and caring for himself to a certain extent, and still be incapable of managing his affairs, within the meaning of the statute authorizing the appointment of a conservator for such incapacity. *Appeal of Cleveland*, 72 Conn. 340, 44 Atl. 476.

In Code Civ. Proc. §§ 5794, 5795, providing that, in case one of the several executors or administrators to whom letters shall have been granted shall die, become lunatic, be convicted of an infamous offense, or otherwise become incapable of executing the trust, the remaining executor or administrator shall proceed and complete the execution of the will or administration, and if all such executors or administrators become incapable the probate court shall issue letters of administration with the will annexed to the widow or next of kin, "incapable" is not synonymous with the word "incompetent," as used in section 5979, providing that, whenever the probate judge has reason to believe that any executor or administrator has been incompetent to act, he may suspend the powers of such executor or administrator. Where a sole testatrix has been adjudged insane, she has become incapable, and not merely incompetent to act. *In re Blinn*, 33 Pac. 841, 842, 99 Cal. 216.

The phrases "incompetent," "mentally incompetent," and "incapable," as used in the chapter relating to guardians of insane and incompetent persons, shall be construed to mean any person who, though not insane, is by reason of old age, disease, weakness of mind, or from any other cause, unable unassisted to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons. Code Civ. Proc. Cal. 1903, § 1767; Rev. St. Utah 1898, § 4001; *In re Daniels*, 73 Pac. 1053, 1054, 140 Cal. 335.

#### Absence.

"Incapable," as used in Code Civ. Proc. § 342, providing for removal of a cause to the Supreme Court from the county court where the county judge is incapable to act, will not be held to include mere absence. *In re Munger*, 41 N. Y. Supp. 882, 884, 10 App. Div. 347.

"Incapable," as used in a statute relating to the appointment of a new trustee in the place of a trustee who should become incapable to act, means personal incapacity, and not the absence of an absconding trustee who had become bankrupt. *In re Watts' Settlement*, 9 Hare, 106, 108.

#### INCAPABLE OF MANUAL DELIVERY.

Code Proc. § 235, which provides that the execution of an attachment on "any debts or other property incapable of manual delivery to the sheriff shall be made by leaving a certified copy of the warrant of attachment" with the debtor or other individual holding such property, would include a judgment on which an attachment was sought to be levied. *In re Flandrow*, 84 N. Y. 1, 4.

#### INCAPABLE OF WORKING.

"Incapable of working," as used in the by-laws of a mutual benefit association, providing a certain benefit to persons so disabled by sickness as to be incapable of working, applies to a person, though by unreasonable, excessive, and harmful effort and exertion he succeeds in working for two days, and then by reason thereof suffers a relapse. *Genest v. L'Union St. Joseph*, 6 N. E. 380, 381, 141 Mass. 417.

#### INCAPACITY.

See "Physical Incapacity."

"Incapacity," as used in a will wherein testatrix left certain property to a nephew for the purposes of a collegiate education, with the declaration that, if through his own disinclination or incapacity he should fail to carry out the intention, then the money should pass to another, does not mean the death of the beneficiary while at college and before graduating. Of course, his death would make him incapable of graduating; but that is not the term that would be used, if it was meant that he would not graduate because he might die before doing so, and his death, which prevented him from graduating, whatever he might have done if his life had been spared, is not included in the word. *Ellicott v. Ellicott*, 45 Atl. 183, 186, 90 Md. 321, 48 L. R. A. 58.

#### INCARCERATION.

In cases where incarceration in the penitentiary or in the territorial prison is provided as a penalty for any offense, it shall be held to mean incarceration in either the territorial prison or in any prison in any other state or territory in which this territory has the right by contract or otherwise to incarcerate persons so convicted. Rev. St. Okl. 1903, § 2068.

#### INCEPTION.

The word "inception" means initial stage, so that "inception of a mechanic's lien," as used in *Sayles' Civ. St. art. 3171*, as amended in 1889, providing that any mortgage on land at the time of the inception of a mechanic's lien shall not be affected there-

by, means the beginning of the erection of any building. *Oriental Hotel Co. v. Griffiths*, 33 S. W. 652, 662, 88 Tex. 574, 30 L. R. A. 765, 58 Am. St. Rep. 790.

In Rev. St. art. 3301, relative to mechanics' liens, and providing that such a lien shall attach to the building on which the work was done, but that any lien, incumbrance, or mortgage on the land or improvement at the time of the inception of the lien shall not be affected thereby, the term "inception" relates to the date when there was a contract made under which the work was done or material furnished. *Sullivan v. Texas Briquette & Coal Co.*, 63 S. W. 307, 308, 94 Tex. 541.

An inception of a note is when it was first given or when it first became the evidence of the existing contract. It has no legal inception until it is delivered to some person as evidence of a subsisting debt. Merely writing and signing a note, and retaining it in the hands of the drawer, forms no contract. Where a note drawn payable to a certain person, or bearer, was never delivered to him, and he had never had any interest in it, there was no inception as to him. *Marvin v. McCullum* (N. Y.) 20 Johns. 288, 289.

## INCEST.

Incest is defined as the carnal copulation of a man and woman related to each other in any of the degrees within which marriage is prohibited by law. *State v. Herges*, 57 N. W. 205, 55 Minn. 464.

Incest is illicit carnal connection between parties who are related to one another within certain degrees of consanguinity or affinity. *Dinkey v. Commonwealth*, 17 Pa. (5 Harris) 126, 129, 55 Am. Dec. 542.

When the parties to an act or series of acts of unlawful carnal intercourse are related to each other within the degrees of consanguinity or affinity wherein marriage is prohibited by law, their offense is called "incest." *Territory v. Corbett*, 3 Mont. 50, 55.

Incest is defined as the sexual intercourse between persons so nearly related that marriage between them would be unlawful. *Stand. Dict.* It is criminal sexual intercourse between persons related within the degrees wherein marriage is forbidden by the law of the country, so that, if a man has sexual intercourse with a woman with whom he could not, because of relationship, either by consanguinity or affinity, lawfully contract marriage, such intercourse should be regarded as incestuous within the provisions of the Civil Code, providing that, if any person shall commit incestuous fornication, he shall be punished, etc. Hence sexual inter-

course between a man and his stepdaughter is incestuous. *Taylor v. State*, 35 S. E. 161, 162, 110 Ga. 150.

In a criminal recognizance, the description of the offense which defendant is held to answer as "the crime of incest" is sufficient, and the facts constituting the crime need not be set forth. *Daniels v. People*, 6 Mich. 381, 386.

### Adultery, fornication, and rape distinguished.

The commonly accepted legal meaning of "fornication" is illicit sexual connection between a man and woman as husband and wife, not being such. By Rev. St. § 4580, when a man commits fornication with a single woman, both of them shall be punished. The offense is limited to a man and a single woman, thus creating a clear distinction between "fornication" and "adultery," which latter crime can be committed only by a married man or with a married woman. The crime of rape may be committed upon an unmarried woman, not the wife of the defendant. The crime of incest can be committed only with a woman of certain consanguinity or relationship with the man. The crimes of incest, adultery, and fornication differ, therefore, only as to the persons, while the crime of rape differs from the other crimes against chastity both as to the person and the manner of sexual connection, as by force and against the will of the woman. *State v. Shear*, 8 N. W. 287, 51 Wis. 460.

### Consent or use of force.

A person may be convicted of incest, though he accomplished his purpose by such force as to render him also guilty of rape. *Smith v. State*, 19 South. 306, 108 Ala. 1, 54 Am. St. Rep. 140.

Under the laws of Idaho persons being within the degrees of consanguinity within which marriages by law are declared to be incestuous and void, who shall intermarry with each other or who shall commit fornication or adultery with each other, are guilty of incest. Under such definition the crime of incest may be committed by one party to the act without the consenting mind of the other party thereto. *People v. Barnes*, 9 Pac. 532, 2 Idaho (Hasb.) 161.

The crime is incest only where the carnal connection is by mutual consent, and if the intercourse was accomplished by force the crime is rape, and not incest. *People v. Hariden* (N. Y.) 1 Parker, Cr. R. 344, 346.

Assent by both parties is a necessary ingredient of the crime of incest. If the carnal intercourse is obtained by force, the crime is rape, and not incest. This decision seems to rest to some extent upon the peculiar wording of the Iowa statute, un-

der which the case arose; the court remarking in the course of the argument that "the theory of the state was that if a man has carnal knowledge with a woman related to him within the prohibited degrees he is necessarily guilty of incest, and if he has carnal knowledge of her by force he is also guilty of rape, so that the crime of rape committed by one person on another related within the prohibited degrees necessarily includes incest, and that the guilty person may be charged with both in the same indictment, and convicted of the latter, if not of the former. In answer to this contention the court says that consent, of course, excludes rape, and that whether force and want of consent exclude incest must be determined by the construction which should be put upon the section of the Code punishing the crime of incest. The Code of 1873 declares (section 4030) that if any persons within the prohibited degrees carnally know each other they shall be deemed guilty of incest. In construing this section it is to be observed that to constitute the crime of incest the parties must have carnal knowledge of each other. It is not sufficient that the man should have carnal knowledge of the woman, unless it follows that in such case she would necessarily have carnal knowledge of him. We come, then, to the question whether it can be said that a woman who is ravished has carnal knowledge of the man, within the meaning of the statute. In our opinion it cannot. The very use of the word 'knowledge' indicates that the connection is to be deemed one of the mind, as well as of the body. It is further to be observed that a person is not to be deemed singly guilty of incest, for the language is 'they shall be deemed guilty of incest.' Again, it is easy to see that incest and rape have each a distinct element of criminality. The use of force is criminal, but the criminality is essentially different from the corruption of the mind of the other party where force is wanting." *State v. Thomas*, 4 N. W. 908, 909, 53 Iowa, 214, 10 Cent. Law J. 327.

#### Single act.

A single act of unlawful sexual intercourse falls within the definition of incest. *State v. Brown*, 23 N. E. 747, 748, 47 Ohio St. 102, 21 Am. St. Rep. 790.

#### INCESTUOUS.

The word "incestuous" is an adjective, and qualifies a noun, whether it stands for a person or thing, and attaches to it the character of incest. An incestuous person is one guilty of incest. An incestuous cohabitation or sexual intercourse is a cohabitation or sexual intercourse between persons related within the degrees of consanguinity within which marriage is prohibited. So the term "incestuous" is a proper term to apply to a

marriage which is contracted between parties related to each other in the degrees within which such contracts are prohibited by law. *Territory v. Corbett*, 8 Mont. 50, 55.

"Incestuous connection," according to Worcester, means "sexual intercourse between persons who by reason of consanguinity or affinity cannot lawfully be united"; according to Webster, "the crime of cohabitation or sexual commerce between persons related within the degrees wherein marriage is prohibited"; and according to the Imperial Dictionary, "the crime of cohabitation or sexual commerce between persons related within the degrees where marriage is prohibited by the laws of a country." Used in an indictment, the words sufficiently charge the crime of incest. *Hintz v. State*, 17 N. W. 639, 640, 58 Wis. 493.

#### INCH.

See "Hydraulic Inch"; "Miner's Inch"; "Theoretical Inch."

The owner of a canal and water power agreed to convey the right to draw from the canal sufficient water to run a mill of a certain size, the grantee to pay one-quarter the cost of enlarging the canal, so as to obtain sufficient water to run the mill, and also for a mill belonging to the owner of the canal. The deed was for 2,000 "inches of water" under an 11-foot head. The apertures constructed by the grantee in the flume leading to his mill, and which were used for a number of years, aggregated in superficial area 1,980 square inches. The water discharged from an aperture of 2,000 square inches would have been 62 per cent. of the theoretical discharge, due to a stream having a cross-section of like area and moving at a velocity due to the head. The theoretical discharge would have almost equaled the capacity of the canal. Held, that the words "inches of water" would be construed to give the grantee a right to as much water as would, under a head of 11 feet, flow through a simple orifice of 2,000 square inches area in the side of a flume. The words "inch of water" have not acquired any fixed, technical meaning, as have the words "foot of lumber," etc., which must control when used in a grant, and their meaning depends upon the circumstances surrounding the making of the grant, intention of the parties, etc. The term "inches" must be construed as "square inches," because it is plain that lineal inches would be utterly insensible. An inch of water, as defined by Webster's International Dictionary, means "a unit of measure of quantity of water, being the quantity which will flow through an orifice one inch square, or a circular orifice one inch in diameter, in a vertical surface, under a stated constant head." *Jackson Milling Co. v. Chandos*, 52

N. W. 759, 762, 82 Wis. 437 (citing *Janesville Cotton Mills v. Ford*, 52 N. W. 764, 82 Wis. 416, 17 L. R. A. 564).

## INCHOATE.

Imperfect; unfinished; begun, but not completed; as a contract not executed by all the parties. *Black, Law Dict.*

### INCHOATE INTEREST.

An inchoate interest in real estate is not a present interest therein, and therefore is not the subject of grant or conveyance. *Rupe v. Hadley*, 113 Ind. 416, 421, 16 N. E. 391.

A wife's inchoate interest in real estate is not a present interest which can be transferred, but only a contingent right which will be barred or extinguished by her joining in a deed of conveyance with the husband. *Hudson v. Evans*, 81 Ind. 596, 598.

The inchoate interest of the wife in the lands of her husband is not a present estate; so long as the title of the husband remains vested in him; but such inchoate right alone cannot be conveyed. *Davenport v. Gwilliams*, 133 Ind. 142, 145, 81 N. E. 790, 22 L. R. A. 244.

Under the statute of Indiana the inchoate interest of a wife in her husband's lands is more than an incumbrance. It is an estate in the land itself. *Bever v. North*, 107 Ind. 544, 547, 8 N. E. 576 (approved *Tanguay v. O'Connell*, 182 Ind. 62, 63, 81 N. E. 469).

"Inchoate interest," as used in Act March 11, 1875, providing that in all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute, means an imperfect interest, one that is begun and not completed. There may be an inchoate interest in an estate in which the husband has an equitable interest, as well as where he has an absolute interest in fee simple. Where a married man has an equitable interest merely in land, his wife has an inchoate interest in the land by virtue of her marriage, because, if her husband retains that interest up to the time of his death, the inchoate right becomes consummate. The fact that the husband has the power of disposition over the land does not deprive her interest of its inchoate character. *Warford v. Noble* (U. S.) 2 Fed. 202, 204.

### INCHOATE RIGHT OF DOWER.

An inchoate right of dower is merely a right to such interest in the lands of the

husband as may be allowed by the law which shall be in force at his death. It is not a fixed or accrued right to an ascertained or established quantum of interest, to become vested upon the contingency of the husband dying before the wife. *Guerin v. Moore*, 25 Minn. 462, 465.

"It is the settled law of this state that the wife's inchoate right of dower on lands is a subsisting and valuable interest, which will be protected and preserved to her, and that she has a right of action to that end." *Simar v. Canaday*, 53 N. Y. 304, 13 Am. Rep. 523. In *Mills v. Van Voorhies*, 20 N. Y. 412, referred to with approval in the case last cited, the court goes so far as to say: "The inchoate rights of the wife are as much entitled to protection as the vested rights of the widow." And most recently the Court of Appeals has restated the rule thus: "The inchoate right of dower is a valuable, subsisting, separate, and distinct interest, which is entitled to protection, and for which the wife may maintain a separate action." *Clifford v. Kampfe*, 147 N. Y. 383, 386, 42 N. E. 1. So far have the courts gone in extending protection that it has been held to be a fraud upon the rights of a future wife, for which she shall have her action, for the husband, before marriage, to divest himself of his real property for the purpose of cutting off the wife's future dower rights. *Poillon v. Poillon*, 76 N. Y. Supp. 488, 490, 87 Misc. Rep. 729 (citing *Youngs v. Carter* [N. Y.] 10 Hun, 194; *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211). So, also, *Hach v. Rohins*, 59 S. W. 232, 233, 158 Mo. 182.

Inchoate dower "is not an estate but it is nevertheless a right or interest in the land, of which a wife may not be deprived except by proceedings to which she has been made a party." *Dingman v. Dingman*, 39 Ohio St. 172, 178 (citing *Ketchum v. Shaw*, 28 Ohio St. 503, 506).

"Inchoate right of dower" of a widow is a contingent right of value, which does not pass by conveyance, though one entitled thereto may, under certain circumstances, release it. A widow has no estate in the land of her deceased husband until the dower has been assigned. *Smith v. Shaw*, 150 Mass. 297, 22 N. E. 924; *State v. Wincroft*, 76 N. C. 38. It is an incident of land that is liable to be taken by the right of eminent domain, and when so taken in the lifetime of the husband the wife is not entitled to any portion of the money, or to have any portion thereof set aside for her benefit on the contingency of her surviving her husband. *Flynn v. Flynn*, 50 N. E. 650, 651, 171 Mass. 312, 42 L. R. A. 98, 68 Am. St. Rep. 427.

The wife's inchoate right of dower is not a vested right, in the sense that it is not subject to change, or even abolishment, by the Legislature, so long as it merely re-

mains an expectancy; that is, during the life of the husband. *McNeer v. McNeer*, 32 N. E. 681, 142 Ill. 388, 19 L. R. A. 256; *Mitchell v. Violet*, 104 Ky. 77, 47 S. W. 195. Though it is a valuable right, which the law will recognize and protect. *Helm v. Board* (Ky.) 70 S. W. 679.

## INCIDENT—INCIDENTAL.

"Incident" is a thing necessarily depending upon, appertaining to, or following another that is more worthy or principal. Thus timber trees are incident to the freehold, and so is a right of way. *Cromwell v. Phipps* (N. Y.) 6 Dem. Sur. 60, 66, 1 N. Y. Supp. 276, 278; *In re Bellesheim's Estate*, Id.

"Burrill's Law Dictionary defines 'incident' as 'Belonging or appertaining to; following; depending upon another thing as more worthy. \* \* \* A thing may be necessarily or inseparably incident to another, or usually so.' Webster defines it thus: 'Something necessarily appertaining to or depending on another, which is termed the principal.'" *Thomas v. Harmon* (N. Y.) 46 Hun, 75, 77.

A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or water course, or of a passage for light, air, or heat, from or across the land of another. *Civ. Code Mont.* 1895, § 1078; *Mount Carmel Fruit Co. v. Webster*, 73 Pac. 828, 823, 140 Cal. 183; *Smith v. Denniff*, 60 Pac. 398, 399, 24 Mont. 20, 81 Am. St. Rep. 408.

### To importation.

The failure of goods shipped from a foreign country to correspond in quality with the description in the contract of sale was not a risk "incident to the importation," assumed in the contract by the purchaser; such risks being confined to a cause subsequent to the selection of the goods in the foreign country. *Maynard v. Weeks*, 64 N. E. 78, 181 Mass. 368.

### To sale or conveyance.

A stipulation for a new lease on the surrender of a lease for lives is a matter "incident to the sale or conveyance," within St. 55 Geo. III, c. 184, and does not require an agreement stamp in addition to the ad valorem stamp. *Phillipps v. Phillipps*, 11 Adol. & E. 796.

## INCIDENTAL BUSINESS.

The necessary and incidental business referred to in the articles of association of a corporation, which state that its business shall be the manufacture of clothing of every description, and the sale of clothing so man-

ufactured, and the transaction and sale of all other business necessary and incidental to such manufacture and sale of clothing, does not include a purely mercantile business, such as the buying and selling of ready-made clothing. *Nicollet Nat. Bank v. Frisk-Turner Co.*, 74 N. W. 160, 161, 71 Minn. 413, 70 Am. St. Rep. 334 (citing *Hood v. New York & N. H. R. Co.*, 22 Conn. 1, 502).

The business of a licensed warehouseman cannot be regarded as "incidental" to that of a railroad, so as to entitle a corporation organized for the purpose of operating a railroad to a license to carry on the business of a warehouseman. *State v. Southern Pac. Co.*, 28 South. 372, 374, 52 La. Ann. 1822.

## INCIDENTAL EXPENSES.

Other incidental expenses, see "Other."

The adjective "incidental," as used in appropriation bills to qualify the word "expenses," has a technical and well-understood meaning. It is usual for Congress to enumerate the principal classes of expenditure which they authorize, such as clerk hire, fuel, light, postage, telegrams, etc., and then to make a small appropriation for the minor disbursements incidental to any great business, which cannot well be foreseen, and which it would be useless to specify more accurately. For such disbursements a round sum is appropriated under the head of "incidental expenses." *Dunwoody v. United States* (U. S.) 22 Ct. Cl. 269, 280.

Under a contract between a city and railroad company by which the latter was to pay all and any "expenses incidental to the issue of bonds," which were to be issued by the city to raise money to be loaned to the railroad company, an income tax on the bonds is not included. *Baltimore v. Baltimore & O. R. R. Co.*, 77 U. S. (10 Wall.) 543, 551, 19 L. Ed. 1043.

"Incidental expenses," as used in a statute relating to the reclamation of swamp lands, and providing that commissioners should assess on the land reclaimed or benefited a tax proportioned to the whole expense and to the benefit which would result from such works, the incidental expenses to be paid out of the funds raised should be construed to include the expenses of collecting the assessments, among which are proper attorney and counsel fees in prosecuting suits for their recovery. *Reclamation Dist. No. 108 v. Hagar* (U. S.) 4 Fed. 368, 370.

"Incidental expenses," as used in a judge's order providing that, in default of payment of the debt, the plaintiff should be at liberty to find judgment, issue execution, and levy the debt and costs, together with the costs of execution, sheriff's poundage, officers' fees, and all other incidental expenses, did

not include the costs of a rule to return the writ. *Hutchinson v. Humbert*, 8 Mea. & W. 638.

The phrase "incidental expenses," when used in an appropriation, shall include expenses of postage, printing, and stationery. *Rev. Laws Mass. 1902, p. 75, c. 6, § 32.*

#### Of city or town.

*Rev. Laws, § 2751*, authorizing towns to vote money for necessary incidental expenses, should be construed to include the cost of building town houses for the accommodation of its meetings and for its municipal officers. *Bates v. Bassett*, 15 Atl. 200, 202, 60 Vt. 530, 1 L. R. A. 166.

The meaning of the words "incidental expenses," as used in *Comp. Laws Dak. § 772*, providing that supervisors shall have charge of such affairs of the town as are not by law committed to other officers, and they shall have power to draw orders on the town treasurer for the disbursement of such sums as may be necessary for the defraying of the incidental expenses of the town, cannot be extended so as to include other than the expenses necessarily incident to the ordinary conduct of the town business, and do not include road machines, the purchase of which was not authorized by the electors. *F. C. Austin Mfg. Co. v. Twin Brooks Tp. (S. D.)* 91 N. W. 470, 472.

#### Of counsel.

The word "incidental," as used in *Code Cr. Proc. § 308*, authorizing, when services are rendered by counsel appointed by order of the court in a capital case, the court to allow the incidental expenses of such counsel, is associated with the word "personal," and is used conjunctively, and does not confer authority on the counsel to make contracts of a special character involving a large liability. The word "incidental" must be construed in accordance with its ordinary meaning, which is, of minor importance, occasional, casual, as incidental expenses, often used in the plural to mean minor expenses. *Cohn v. Palmer*, 79 N. Y. Supp. 762, 766, 78 App. Div. 506 (citing *Cent. Dict.*; *People v. Cantwell*, 70 N. Y. Supp. 755, 756, 61 App. Div. 598); *In re Waldheimer*, 82 N. Y. Supp. 916, 917, 84 App. Div. 366 (quoting *Cent. Dict.*).

The incidental and personal expenses, which under *Cr. Code, § 308*, are to be allowed to counsel assigned by the court in a capital case, are limited to such expenses as are incurred by counsel on his personal account. Merely because such expenses have been incurred as will ordinarily be borne by a party defendant in the proper presentation of his case does not, under the limitations of the statute, justify casting the amount of such expenses on the county. Thus the expense for an interpreter that counsel may un-

derstand his client is a personal and incidental expense, within the meaning of the statute, but the cost of a daily transcript of evidence is not such an expense. *People v. Grout*, 75 N. Y. Supp. 290, 87 Misc. Rep. 430.

#### Of estate.

A will giving all the rest and remainder of testator's estate, real and personal, to his executors, to hold in trust, receive the rents, issues, and common profits thereof, and, after defraying the "expenses incident to said estate," to make certain distribution of the balance, should be construed to include grading and flagging the sidewalks, and grading and paving the streets in front of the premises, and fencing the lots, all of which, though they are improvements of a permanent character and go to the benefit of the estate and of those in remainder, are expenses incident to the real estate, and also to include assessments for municipal improvements. *Stephen's Ex'rs v. Milnor*, 24 N. J. Eq. (9 C. E. Green) 358, 373.

#### INCIDENTAL LABOR.

As used in mechanic's lien statutes, allowing liens for work and labor performed in the construction, repair, etc., of a building, and other work and labor incidental thereto, the term "incidental" means labor directly done for, and connected with or actually incorporated into, the building or improvement. It will not do to extend the protection given to services indirectly and remotely associated with the construction work. *Rara Avis Gold & Silver Min. Co. v. Bouscher*, 12 Pac. 433, 434, 9 Colo. 385.

#### INCIDENTAL POWER.

Corporations possess what are known as "incidental powers," but incidental powers are such as are necessary in order to enable a corporation to carry into execution the specific powers conferred upon it by its charter. *First M. E. Church v. Dixon*, 52 N. E. 887, 890, 178 Ill. 260.

An "incidental power" is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it. *Buffet v. Troy & B. R. Co.*, 40 N. Y. 168, 176; *Hood v. New York & N. H. R. Co.*, 22 Conn. 1, 16; *Franklin Co. v. Lewiston Sav. Bank*, 68 Me. 43, 45, 28 Am. Rep. 9; *State ex rel. Jackson v. Newman*, 51 La. Ann. 833, 25 South. 408, 72 Am. St. Rep. 478; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 283, 22 N. E. 798, 799, 8 L. R. A. 497, 17 Am. St. Rep. 319; *Burke v. Mead*, 64 N. E. 880, 883, 159 Ind. 252.

The exercise of a power that might be beneficial to the principal business is not necessarily incidental to it. *Nicollet Bank v.*



*Frisk-Turner Co.*, 74 N. W. 160, 161, 71 Minn. 413, 70 Am. St. Rep. 334; *Burke v. Mead*, 64 N. E. 880, 883, 159 Ind. 252.

A corporation charter, granting to a corporation all the powers incident, necessary, and useful to corporations, authorizes the corporation to give a chattel mortgage to secure the price of property purchased by it. *Badger v. Batavia Paper Mfg. Co.*, 70 Ill. 302, 306.

Incidental power is accessory or additional power connected with the main subject, and yet additional. The denial to the orphans' court of incidental power or constructive authority by Acts Md. 1798, c. 101, § 20, subd. 15, does not mean the denial of such authority as is necessarily implied in that which is expressly granted. *Middletown v. Parke*, 8 App. D. C. 149, 160 (quoting *Webster Dict.*).

#### Of bank.

Where authority is given in an act to transact a banking business and all incidental powers necessary to carry it on, these powers are such as are required to meet the legitimate demands of the authorized business, and to enable the bank to conduct its affairs within the scope of its charter safely and prudently. This necessarily implies the right of the bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. *First Nat. Bank of Charlotte v. National Exch. Bank of Baltimore*, 92 U. S. 122, 127, 23 L. Ed. 679; *Western Nat. Bank v. Armstrong*, 14 Sup. Ct. 572, 574, 152 U. S. 346, 38 L. Ed. 470; *Nebraska v. First Nat. Bank (U. S.)* 88 Fed. 947, 949. And to adopt reasonable and appropriate measures for the collection and securing of debts due to it. Consequently a bona fide compromise by a national bank of a contested banking claim against it, whereby the bank paid a larger sum than would have been exacted in satisfaction of the demand, so as to obtain a transfer of certain railroad stocks, it being honestly believed that by turning the stocks into money under more favorable circumstances a loss which would otherwise accrue from the transaction might be diminished, was not ultra vires, though the bank had no authority to deal in stocks. *First Nat. Bank of Charlotte v. National Exch. Bank of Baltimore*, 92 U. S. 122, 127, 23 L. Ed. 679.

The words "by discounting and negotiating notes, drafts, and bills of exchange," contained in the eighth section of the national currency act of 1864, did not limit the mode of exercising the incidental powers necessary to carrying on the business of banking, but was a description of the kind of banking authorized; and the proper reading of the provision is that the company may carry on banking "by discounting and negotiating

promissory notes," etc., and may exercise all such incidental powers as shall be necessary for that purpose. *Shinkle v. First Nat. Bank of Ripley*, 22 Ohio St. 516, 524.

"Incidental," as used in Laws 1831, c. 178, conferring power on certain associations to carry on the business of banking, by discounting bills, notes, and other evidences of debt, by receiving deposits, by loaning money on real and personal security, and by exercising such incidental powers as shall be necessary to carry on such business, means "casual or accidental; beside the main design; occasional." Taken in connection with the word "necessary," the two may, and probably must, mean to authorize those occasional acts of power, which are necessitated by the mutual wants of the banks and their customers, but which may not fall within the strict letter of the enumerated powers. *Curtis v. Leavitt*, 15 N. Y. 9, 165.

#### Of gas and electric companies.

Where a charter in express terms confers on a corporation the power to maintain and operate works for the manufacture and sale of gas, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist. There is no necessary connection between manufacturing gas and buying stock. *People v. Chicago Gas Trust Co.*, 23 N. E. 798, 799, 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319.

The manufacture and sale of all kinds of electric appliances, apparatus, and supplies is not incident to the business of generating electricity. *Burke v. Mead*, 64 N. E. 880, 883, 159 Ind. 252.

#### Of railroad.

The maintenance and operation of stages and steamboats are not within the incidental power of the directors of a railroad. They are unnecessary in running cars over such railroad. It would be absurd to hold that the directors, under the idea of incidental power, might do everything which they thought would bring passengers onto their road. Such a limit is no limit. If they could do this under such pretense, they could by direct appropriation of the company's funds to build manufacturing villages along the road, and run steamboats in connection with their road, for this might increase their business. *Hood v. New York & N. H. R. Co.*, 22 Conn. 1, 16.

#### Of surrogate.

Under a statute giving a surrogate certain powers, including that of ordering and approving the sale of real property of estates to pay debts, and authorizing him "to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred," the surrogate has no power to compel the purchaser at a sale of real estate to

accept the title tendered by the administrator and pay the purchase price. Such jurisdiction is not incidental to any power conferred upon the surrogate by such statute. *Cromwell v. Phipps* (N. Y.) 6 Dem. Sur. 60, 65, 1 N. Y. Supp. 276.

### INCIDENTAL PRINTING.

"Incidental printing," as used in Sess. Laws 1855, p. 24, § 4, declaring it to be the duty of the territorial printer to do the "incidental printing" for each house of the Legislative Assembly of this territory, does not include the printing of the constitutional convention, or that of any body claiming to act as such. *Goodrich v. Moore*, 2 Minn. 61, 65 (Gil. 49, 52), 72 Am. Dec. 74.

### INCIDENTAL PURPOSES.

Laws 1863, c. 155, § 19, subd. 5, authorizes a school district to vote a tax for repairs, fuel, and appendages. A tax for a certain amount was voted for "incidental purposes," in addition to one for teachers' wages and one for building a schoolhouse. Held, that the words "incidental purposes" should be construed as synonymous with, and to mean the same thing as, "for repairs, fuel, and appendages," as used in the statute. *State v. Wolfgram*, 25 Wis. 468, 476.

### INCITE.

To incite is defined by Webster as "to move to action; to stir up; to arouse to spur on." Thus an instruction containing the words "requested, advised, and incited" was held equivalent to the statutory words "aid, abet, or procure." *Long v. State*, 86 N. W. 810, 815, 23 Neb. 83.

### INCLINATION DIP.

The term "inclination dip" is used in the mining law to designate a dip, "as to its inclination from a perpendicular to a horizontal, as so many degrees from the perpendicular or from the horizontal. A vein is thus described as having a dip of 20 degrees, 30 degrees," etc. *King v. Amy & Silversmith Consol. Min. Co.*, 24 Pac. 200, 202, 9 Mont. 548.

### INCLOSE.

Webster defines "inclosed" to mean "surrounded; shut in; confined on all sides." *Union Pacific Ry. Co. v. Harris*, 28 Kan. 206, 210.

In a deed of "the following described lands, to wit, two acres \* \* \* and four acres, \* \* \* inclosing the lands where the said grantor's mill and house now stand," the deed should be read as if it had said the mill and house were confined within the six acres of land conveyed. That signification

must be adopted, as it gives effect to the intention of the parties, and not a narrower one, which would defeat it. "Inclose" and "include" are words of common derivation, and have several common significations, of which one is "to confine within." *Campbell v. Gilbert*, 57 Ala. 569.

### INCLOSED LAND.

"Inclosed," when applied to lands, as defined by Webster, is "separated from common grounds by a fence." Worcester defines it as "parted off or shut in by a fence; set off, as private property." Inclosed lands, therefore, are lands surrounded by a fence. *Kimball v. Carter*, 27 S. E. 823, 825, 95 Va. 77, 88 L. R. A. 570.

The expression "inclosed real estate," as used in Rev. Ord. St. Louis, art. 17,188, § 981, providing that it shall be unlawful for any person, without the consent of the owner or his agent, to enter on any inclosed or improved real estate, lot, or parcel of ground in the state, means real estate which is fenced. It does not refer to that which is embraced within the walls of the house. *City of St. Louis v. Babcock*, 56 S. W. 731, 732, 156 Mo. 154.

"Inclosed land," as used in Act 1883, making it a misdemeanor to willfully enter, go upon, or pass over any field, orchard, garden, or other inclosed or cultivated land of another after being personally forbidden so to do by the owner or person entitled to possession for the time being, does not include a wharf which is bounded on one side by a river, on another by a railroad embankment trestle, and on the two sides by lumber piles, which had been placed there, not for the purpose of forming an inclosure, but merely for the convenience of the occupants of the wharf. It would seem that the inclosed land referred to is land which is inclosed for the purpose of preventing trespass thereon. *Daniels v. State*, 16 S. E. 97, 98, 91 Ga. 1.

The expression "inclosed lands," as used in St. 3 Geo. IV, c. 126, relating to the right of commissioners of turnpike roads to enter inclosed lands, was not synonymous with "private lands," but meant lands which were actually inclosed and surrounded with fences. *Tapsell v. Crosskey*, 7 Mees. & W. 441, 446.

In order to constitute inclosed lands it is not necessary that such land should be confined within an actual and sufficient fence, but if the same is in any manner inclosed, sufficient to protect the land from depredation, by artificial or natural means, it would be sufficient. *Haynie v. State* (Tex.) 75 S. W. 24, 25.

### Cattle guards on railroad.

Within the meaning of Laws 1874, c. 94, § 5, providing that railroads must be inclosed

with a good and lawful fence to prevent domestic animals from being on such road, the word "inclosed" does not mean only building fences along its sides, but the railroad must be inclosed with fences and other barriers, and whenever for that purpose cattle guards are necessary at the crossing of public highways or other public places, cattle guards must be put in. *Atchison, T. & S. F. R. Co. v. Shaft*, 6 Pac. 908, 914, 33 Kan. 521; *Union Pac. Ry. Co. v. Harris*, 28 Kan. 206, 210.

#### **Inclosed on all sides.**

"Inclosure," as used in a will directing that testator's executors shall inclose a certain cemetery with a fence, etc., means that such cemetery is to be "shut in on all sides." A field with a fence on three sides only could not in any proper sense be spoken of as "inclosed," unless the fourth side was bounded by some natural obstruction or occupied by some artificial erection which rendered a fence impracticable or unnecessary. *Appeal of Hall*, 3 Atl. 783, 785, 112 Pa. 42.

"Inclosed fields," as used in *Wag. St. pp. 310, 311, § 43*, requiring railroad companies to fence their tracks along inclosed or cultivated fields, does not require such fields to be protected by the owner with a lawful fence on all sides. *Biggerstaff v. St. Louis, K. C. & N. Ry. Co.*, 60 Mo. 567.

The word "inclosed," as used in *St. Mont. c. 373, § 1*, declaring that, if any cattle shall break into any ground inclosed by a lawful fence, the owner of the animal shall be liable to the owner of such inclosed premises for all damages sustained by such trespass, is held to require a substantial compliance with the statute; an immaterial variation in the height of the fence from a lawful fence not being sufficient to prevent the fence from being a lawful one, nor to render the ground uninclosed, while a fence not entirely surrounding the premises does not render them inclosed, within the meaning of the statute. *Smith v. Williams*, 2 Mont. 195, 201.

#### **Unfenced land.**

Lands situate on the Downs, although private property, but not fenced off, are not "inclosed lands," within *St. 3 Geo. IV, c. 126, § 97*, providing that if the surveyors convey materials taken from any common river or brooks, etc., over any "inclosed lands" or grounds, they must make compensation for any damage done to such lands. *Tapsell v. Crosskey*, 7 Mees. & W. 441, 446.

#### **INCLOSURE.**

See "Substantial Inclosure."

Other erection or inclosure, see "Other."

"Inclosure," as used in *Rev. St. 1895, arts. 4523, 4524*, requiring railroad companies

to place cattle guards at points entering a field or inclosure, applies to a large fenced pasture as well as a small field. *Southern Kansas Ry. Co. v. Isaacs*, 49 S. W. 690, 26 Tex. Civ. App. 466.

#### **Close distinguished.**

The word "close" is equivalent to the word "inclosure," and as used in *Slade's St. p. 450, § 3*, providing that it shall be lawful for any person to impound any swine, cattle, horses, etc., which shall be found damage feasant or doing damage in his inclosure, means land inclosed by a legal fence, except such part of the fence as the owner or the keeper of the cattle or the adjoining proprietor is bound to repair. *Porter v. Aldrich*, 39 Vt. 326, 330.

"Inclosure," as used in a statute authorizing a person to impound any beast found in his inclosure doing damage, means more than the word "close," which embraces land possessed by a party, though inclosed only by imaginary lines. "Inclosure" signifies land inclosed with some visible and tangible obstruction, such as a fence, hedge, ditch, etc. *Dudley v. McKenzie*, 54 Vt. 685, 687.

#### **Fence required.**

In *Tayl. St. 793, § 1*, giving the right to distrain beasts doing damage within the inclosure of the distrainer, "inclosure" means a tract of land surrounded by an actual fence. *Taylor v. Welbey*, 36 Wis. 42, 44 (citing *Pettit v. May*, 34 Wis. 666; *Bouv. Law Dict.*).

An inclosure imports land inclosed with something more than the imaginary boundary line. There should be some visible or tangible obstruction, such as a hedge, fence, ditch, or something equivalent, for the protection of the premises against encroachment by cattle. *Kimball v. Carter*, 27 S. B. 823, 825, 95 Va. 77, 88 L. R. A. 570; *Porter v. Aldrich*, 39 Vt. 326, 329; *Dudley v. McKenzie*, 54 Vt. 685, 687; *Peck v. Williams*, 54 Atl. 381, 382, 24 R. I. 583, 61 L. R. A. 351.

The term "inclosure," in *Gen. St. c. 100, § 4*, authorizing any person to impound any beast found in his inclosure doing damage, does not require that the land claimed to be an inclosure shall be fenced, unless fencing is required by law. "We think, when a landowner has done upon and around his own land, by way of fence, improvement, and occupancy, all that the law requires to cast the duty on others to keep their cattle off from his land, that such land, in the sense of the word as used in the statute giving the right to impound, is the 'inclosure' of the owner." *Keith v. Bradford*, 39 Vt. 34, 41.

An "inclosure," within the meaning of *Pen. Code, § 504*, providing that the words "building, room, or any part of a building" includes a railway car, vessel, booth, tent,

shop, or other erection or inclosure," does not mean a place inclosed by a fence. *People v. Haight*, 7 N. Y. Supp. 89, 54 Hun, 8.

#### **Inclosed on all sides.**

Within 1 Rev. St. 1876, p. 497, providing that no person shall take away any part of his fence forming a partition fence between him and the inclosure of any other person without giving a certain notice, does not apply to land only partially inclosed. To constitute an inclosure the fences, including the partition fence, must surround the adjoining land or some part of it. *Gundy v. State*, 63 Ind. 528, 530.

The term "inclosure," when used in reference to stock running at large, includes a field which is only partially surrounded by a fence, but the unfenced portion of which borders on a stream having such steep banks that cattle do not cross. *Missouri Pac. Ry. Co. v. Shumaker*, 27 Pac. 128, 127, 46 Kan. 769.

Within the meaning of Code N. Y. § 85, declaring that for the purpose of constituting an adverse possession land shall be deemed to have been possessed where it has been protected by a substantial inclosure, a fence which surrounds the land in question, and also an adjoining tract owned by another party, is not an inclosure. To constitute such an inclosure as is intended, it must be an inclosure of the lot alone, upon the lines claimed by the party, and not embracing premises adjoining, extending in part a great distance from the lines. *Doolittle v. Tice* (N. Y.) 41 Barb. 181, 184.

## **INCLUDE.**

Webster defines the word "include" as synonymous with "comprise," "comprehend," or "contain," and gives this apt example: "The word duty includes what we owe to God, to our fellow men, and to ourselves. It also includes a tax payable to the government." *Farmers' Nat. Bank of New Jersey v. Cook*, 32 N. J. Law (3 Vroom) 847, 351.

#### **As in addition to.**

"Include" is defined as "to confine within, to hold, to attain, to shut up"; and synonyms are "contain," "inclose," "comprise," "comprehend," "embrace," and "involve." *Webst. Dict.* So that, as used in Comp. Laws S. D. § 1409, providing that the sheriff shall be entitled to certain fees for summoning jurors, including mileage, the sheriff is not entitled to the mileage in addition to the fee. *Neher v. McCook Co.*, 78 N. W. 998, 999, 11 S. D. 422.

The use of the word "including," in a legacy of \$100, including money trusted in a certain bank, cannot be construed as mean-

ing in addition to, and therefore the devisee is not entitled to the sum of \$100 in addition to the sum trusted at the bank, but only \$100, including such sum. *Brainard v. Darling*, 132 Mass. 218, 219.

A bequest of \$14,000 including certain notes, etc., is to be construed as embracing or constituting the notes as a part of the \$14,000, and not to mean that the notes are to pass in addition to that sum. *Henry's Ex'r v. Henry's Ex'r*, 81 Ky. 342, 344.

1 Stat. 73, relating to the jurisdiction of courts, declares that the District Courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on the waters which are navigable from the sea, etc., and of all seizures on land, or other waters other than aforesaid made, and of all suits for penalties and forfeitures incurred under the laws of the United States. Held, that the term "including" classes the seizures enumerated with civil causes of admiralty and maritime jurisdiction, thereby shutting out a trial by jury. It also has a cumulative meaning, and extends the jurisdiction of the court to cases of such seizure. *The Little Ann* (U. S.) 15 Fed. Cas. 623.

#### **As a part of.**

"Include" has two shades of meaning. It may apply where that which is affected is the only thing included, and it is also used to express the idea that the thing in question constitutes a part only of the contents of some other thing. It is more commonly used in the latter sense. In Civ. Code La. art. 2924, which provides that the owner of any promissory note, bond, or other written evidence of debt, for the payment of money, to order or bearer, or transferable by assignment, shall have a right to collect the whole amount of such promissory note, notwithstanding it may include a greater rate of interest or discount than 8 per cent. per annum, etc., construing the words "may collect the whole amount of such promissory note," etc., "notwithstanding such promissory note," etc., together with the phrase "may include a greater rate of interest," etc., it implies that the character of writings in view were those which evidenced a complete contract, including principal and interest of its own, and not one which, properly speaking, had no capital, and included nothing but usurious interest upon another contract. *Dumas v. Boulou* (La.) 1 McGlouin, 275, 278.

Where a corporate charter provided that the directors of the corporation should consist of nine persons, including the president and was subsequently amended so as to authorize a board of eleven directors, including the president, and declared that six directors,

including the president, should constitute a quorum to transact business, the words "including the president" were used to designate what should constitute a quorum, and to indicate that the president, when present, should be considered as one of the six directors essential to form a quorum, and not to make him an essential member to a quorum, without whose presence all the other directors could not constitute a quorum to transact business. *Meyer v. Johnston*, 53 Ala. 237, 239.

"Included," as used in Act Feb. 28, 1891, c. 384, 26 Stat. 796 [U. S. Comp. St. 1901, p. 1382], providing that indemnity should be granted where certain sections were included within any reservation, is used in its secondary sense, as defined by Webster: "To comprehend, as a genus the species, the whole a part"—and relates to those sections which are a constituent part of the reservation, but not to those which, although shut in by its outer lines, are distinct from the reservation. In defining the word "include" the court said: "Webster defines a nut to be 'the fruit of certain trees and shrubs, consisting of a hard shell inclosing a kernel.' Thus it appears that the word 'shell,' in the expression 'The shell of a nut includes the kernel,' indicates with certainty that the verb 'includes' has its primary meaning, namely, 'to confine within, to shut up,' etc. If the expression were, 'The nut includes the kernel,' there the verb 'includes' would have its secondary signification, and imply that the kernel was a part of the nut." *Hibberd v. Slack* (U. S.) 84 Fed. 571, 577.

#### As word of limitation.

"Including" is not a word of limitation. Rather is it a word of enlargement, and in ordinary signification implies that something else has been given beyond the general language which precedes it. Neither is it a word of enumeration, as by the express terms of the language of gift. In a bequest "of all my personal property," including furniture, plate, etc., the word "including" was not held to limit the bequest to the property enumerated after the wording, but to cover all of testator's personal property. *In re Goetz*, 75 N. Y. Supp. 750, 751, 71 App. Div. 272.

"Including," as used in Comp. St. p. 578, § 9, providing that the clerk must insert in the entry of judgment the necessary disbursements, "including the fees of officers allowed by law, the fees of witnesses, of commissions, the compensation of referees, and the expense of printing papers on appeal," does not necessarily confine the items of disbursements recoverable to those enumerated. *Cooper v. Stinson*, 5 Minn. 522 (Gil. 416).

The word "including," in a mortgage on a railroad, etc., including all depots, warehouses, and structures, etc., does not indicate a restrictive intention, but rather the

contrary. These particulars, having been already more particularly described, may have been inserted out of abundant caution, and not for the purpose of confining the mortgage to the railway and its superstructure. *Calhoun v. Memphis & P. R. Co.* (U. S.) 4 Fed. Cas. 1045, 1047.

#### INCLUDING SURVEY.

See, also, "Inclusive Survey."

As the term is used in reference to the public lands, it means a survey, for location purposes, of lands previously surveyed and appropriated by other persons. *Scott v. Yard*, 18 Atl. 359, 360, 46 N. J. Eq. (1 Dick.) 79.

#### INCLUSIVE.

A bequest in which the testator gave a legacy of a sum of money, inclusive of the note of the legatee held by the testator, is so construed that the note is a part of the legacy, and not in addition thereto. *In re Peppers Estate*, 25 Atl. 1063, 1064, 154 Pa. 340.

Gen. St. p. 83, § 2, providing that a notice of town meetings shall be given by a warning set on a sign post at least "five days inclusive" before the meeting is to be held, means five days inclusive of the day on which the notice is posted but exclusive of the day on which the meeting is to be held. *Brooklyn Trust Co. v. Town of Hebron*, 51 Conn. 22.

"Inclusive," as used in a notice of the sums expended for a pauper since the 5th day of October, 1858, and up to December 31st, inclusive, applies only to the latter date; for it may properly be construed the same as if it had read to and including the day of the date, or the 31st of December. *Monroe v. Acworth*, 41 N. H. 190, 201.

#### INCLUSIVE SURVEY.

An "inclusive survey" is one which includes within its boundaries prior claims excepted from the computation of the area within such boundaries and excepted in the grant. *Stockton v. Morris*, 19 S. E. 531, 39 W. Va. 432.

#### INCOMBUSTIBLE.

The words "fireproof" and "of incombustible materials" are often used in connection with houses that are not absolutely proof against fires, but are intended as referring to houses built of brick, stone, iron, or other material, on the outside, so as to form barriers that will resist the action of ordinary fires. *Chimine v. Baker* (Tex.) 75 S. W. 330, 331.

## INCOME.

See "Annual Income"; "Clear Income"; "Full Income"; "Net Income"; "Whole Income"; "Yearly Income."

As estate, see "Estate."

As personal property, see "Personal Property."

"Income is defined as that gain which proceeds from labor, business, or property of any kind; the profits of commerce or business." Appeal of Braun, 105 Pa. 414, 415; Thorn v. De Breteuil, 83 N. Y. Supp. 849, 856, 86 App. Div. 405.

The word "income" means the gain which accrues from property, labor, or business. In its ordinary and popular meaning it is strictly applicable to the periodical periods in the nature of rent, which are usually made under coal and other mineral leases. Appeal of Eley. (Pa.) 2 Kulp, 467, 469.

An accurate definition of "income" is given by Learned, P. J., in *People v. Davenport* (N. Y.) 30 Hun, 177, as that which is earned, remaining itself intact. *Thorn v. De Breteuil*, 83 N. Y. Supp. 849, 856, 86 App. Div. 405.

"Income," as defined by Webster, is "that gain which proceeds from labor, business, property, or capital of any kind, as the produce of a farm, the rent of houses, the proceeds of professional business, the profits of commerce or of occupation, or the interest of money or stock in funds, etc.; revenue; salary; especially the annual receipts of a private person or a corporation from property." *Mundy v. Van Hoose*, 30 S. E. 782, 786, 104 Ga. 625; *Remington v. Field*, 17 Atl. 551, 552, 16 R. I. 509; *Sowards v. Taylor*, 42 Ill. App. 275.

In a will providing for the conversion of the estate into money and its investment in certain securities, and directing the income to be paid over to the widow and for the benefit of the son, the term "income" is used as a whole, and, of course, embraces all its parts. The earnings, or interest on the actual capital and share of the deceased as partner in the firm property while the firm business is carried on after his death, in accordance with the terms of the partnership agreement, are income. *In re Slocum*, 62 N. E. 130, 181, 169 N. Y. 153.

The words "income" and "revenue" provided for each year, in Const. art. 10, § 12, providing that no county, city, or town shall become indebted in any one year for a greater amount than its income without the assent of two-thirds of the voters, means income derived from any source, and not that derived from taxation alone. *Lamar Water & Electric Light Co. v. City of Lamar*, 26 S. W. 1025, 1030, 128 Mo. 188, 32 L. R. A. 157.

"Income," as used in a will providing that a certain person should have sufficient income from testator's property that he might possess at the time of his death for the support of such person during her natural life, has reference to what shall be received by the beneficiary of the will, and not what sum of money the estate would produce during the year by way of income. The income of the beneficiary, according to the words used by the testator, means that sum of money yearly equal to her reasonable support, without reference to how it was derived, whether from the income of the property or from a sale of the property itself. *Sowards v. Taylor*, 42 Ill. App. 275, 281.

"Income," as used in the chapters relating to the nature and ownership of property, includes the rents and profits of real property, the interest of money, dividends upon stock, and other produce of personal property. Rev. Codes N. D. 1899, § 3322; Civ. Code S. D. 1903, § 238; Civ. Code Cal. 1903, § 748.

#### Accumulated surplus or increase of corporate stock.

The word "income" has a broader meaning than "dividend," but hardly broad enough to include things not separated in some way from the principal. It is not synonymous with "increase." The value of stock may be increased by good management, prospects of business, and the like; but such increase is not income. It may also be increased by an accumulation of surplus; but so long as that surplus is retained by the corporation, either as surplus or increased stock, it can in no proper sense be called "income." It may become producing, but it is not income. *Spooner v. Phillips*, 62 Conn. 62, 24 Atl. 524, 16 L. R. A. 461; *Mills v. Britton*, 29 Atl. 231, 236, 64 Conn. 4, 24 L. R. A. 536; *Smith v. Hooper*, 51 Atl. 844, 846, 95 Md. 16.

Where the profits of a manufacturing or banking corporation have been accumulating for many years, until the market value of the stock is more than double its original price, and the owner dies, directing the "income" of his estate to be applied to particular objects for limited periods, these extraordinary accumulations are as much a part of his capital as any other portion of his estate, and must therefore be regarded as forming a part of the principal, from which the future income is to arise. Where the income is given merely for a limited period, and the stock itself is otherwise disposed of, a bequest of the income is in many respects like a bequest of the stock itself. Appeal of Earp, 28 Pa. (4 Casey) 368, 375.

The term "income," in a devise of testator's estate, in trust to pay a certain annuity from the income to a certain beneficiary and the remainder to other benefi-

claries, includes an increase after testator's death of the corporation stock of a corporation in which part of the funds of the estate were invested, to be distributed to the old stockholders on the payment of \$75 per share. The case is not within the decision in *Appeal of Earp*, 28 Pa. (4 Casey) 368, though following clearly within its principle. There the actual earnings of Earp's stock, made before his death, were held to constitute a part of his capital through his decease, while the earnings made after were income only. The principle established in that case is that earnings on profits of stock made after death are income, and not capital, even though in the form of capital by the issue of new stock. *Appeal of Wiltbank*, 64 Pa. (14 P. F. Smith) 256, 259, 3 Am. Rep. 585.

Testator bequeathed to his wife for life "the use, interest, and income" of his estate, part of which consisted of bank stocks. The bank afterwards reduced its capital by returning to the stockholders one-half of it, with a premium of 40 per cent. to be paid out of the surplus. Held, that the word "income" included the 40 per cent. premium returned to testator's estate, and passed under the will to the widow. In re *Warren*, 11 N. Y. Supp. 787, 2 Con. Sur. 411.

A will devising testator's residuary estate to his daughter, and providing that the "income, profits, and interest" of the estate so devised should be applied and expended in her education and support, cannot be construed to include additional stock issued to the shareholder of a bank on the recovery of sums supposed to have been lost, in consequence of which supposed losses the bank had reduced the par of its shares. *Parker v. Mason*, 8 R. I. 427, 429.

Where a dividend has been declared by a corporation on its capital stock, payable in new stock certificates based on accumulated profits, it is received as income by the stockholders, and not as capital, it being the substance and intent of the corporation, however, to distribute earnings, and there was no addition made to the capital; for, notwithstanding that there resulted an increase of capital stock, the corporation had neither more property nor more capital. So that, under a will creating a trust and providing that the income of the trust should be applied as income, and none of it be devoted to a single fund to replace any loss of the principal by depreciation in value of the securities, a stock dividend declared out of the surplus, the undivided profits of the stock of the corporation in which the trust fund was invested, went to the life tenant, and not to the remainderman. *Lowry v. Farmers' Loan & Trust Co.*, 64 N. E. 796, 797, 172 N. Y. 137.

The word "capital," in a will bequeathing certain shares of the capital stock of a

corporation to testator's wife, for her use and benefit for life, with the remainder over to his children, was construed to include accumulated surplus earnings actually used in the business and distributed among the stockholders as additional stock. Such stock is not "income," and therefore belongs to the remainderman as against the life tenant. *Chester v. Buffalo Car Mfg. Co.*, 75 N. Y. Supp. 428, 70 App. Div. 443.

#### Advance in value.

Mere advance in value in no sense constitutes the "income" specified in the revenue law as income of the owner for the year in which the sale of the property was made. Such advance constitutes and can be treated merely as increase of capital. *Gray v. Darlington*, 82 U. S. (15 Wall.) 63, 21 L. Ed. 45 (cited in *Re Graham's Estate*, 47 Atl. 1101, 1108, 198 Pa. 216).

The words "dividends and income," in a will devising property in trust, the dividends and income thereof to be paid to his daughter, with remainder over after her death, do not include the increase in the value of the corpus, caused by the investment of the funds and stocks, and their sale and investment in other stocks at a profit. *Smith v. Hooper*, 51 Atl. 844, 846, 95 Md. 18.

A life tenant, entitled to the income of a certain legacy, which was invested, was not entitled to the gain over the original amount invested, arising from an increase in the value of the subject of the investment as it existed in the lifetime of the testator. The court said: "We have ourselves held the contrary in *Hubley's Estate* (Pa.) 16 Phila. 327. It is true that in *Oliver's Estate* [24 Wkly. Notes Cas. 139] it was decided that a profit arising, not from any intrinsic increase in the value of the lands, but from a speculative and temporary excitement taking place after the death of the testator, and resulting in an extraordinary profit purely due to such cause, belonged to the life tenant, who under the will was in terms entitled to all the profits; but in the present case the rise has not been shown to be of any such exceptional character." *Thomson's Estate*, 11 Pa. Co. Ct. R. 198, 200.

#### Annuity.

The income of a fund is not an annuity, but simply profits to be earned, and which may vary more or less. *Booth v. Ammerman* (N. Y.) 4 Bradf. Sur. 129, 133.

There is a distinction between "income" and "annuity." The former embraces only the net profits after deducting all necessary expenses and charges. The latter is a fixed amount, directed to be paid absolutely and without contingency. *Carr v. Bennett* (N. Y.) 3 Dem. Sur. 433, 442; *Ex parte McComb* (N. Y.) 4 Bradf. Sur. 151, 152.

There is no difference in principle between the gift of income and the gift of an annuity with respect to the time each begins to accrue, and an annuity is payable from the death of the testator, unless a different time is prescribed in the will. It is true that an annuity usually consists of a gross sum, while income must depend on the earnings of the estate, or some part of it, after deducting legal charges and commissions, and, if not earned, cannot be paid. But this is a contingency which affects, not the quality of the gift, but its amount and the certainty of its payment. If the estate is sufficient for the liquidation of debts and other charges, and is so invested as to be productive of income from the death of the testator, a bequest of income to a legatee for life must invest him with a title to such income from the date of the testator's demise, unless there is some provision in the will from which a contrary intent is to be inferred. *In re Stanfield's Estate*, 81 N. E. 1013, 1015, 135 N. Y. 292.

A will giving to testator's wife the dividends and income of certain shares of bank stock does not imply an annuity. Income includes all cases where the interest of a certain sum is given. Where the profits or earnings of the property, though payable at fixed periods, might vary from time to time, it was properly called "income," because it was not a fixed sum, nor to be made a sum certain. *Pearson v. Chace*, 10 R. I. 455, 456.

#### Capital distinguished.

See "Capital."

#### Damages for land taken.

Under a will devising property in trust, the rents, issues, and income thereof to be paid to the cestui que trust, the term "income" cannot be construed to include the damages received from a railroad corporation in payment for a part of the real estate taken for its use; they being a substituted capital, of which the interest only is payable to the cestui que trust. *Gibson v. Cooke*, 42 Mass. (1 Metc.) 75.

#### Dividend.

The income of an estate, which belongs to one having a life estate, includes the profits of capital. The dividends of a copartnership, in which a decedent was interested and which continued after his death, do not constitute a part of the corpus of his estate, any more than interest on money constitutes a portion of the principal invested. It has been held that the words "dividends" and "income," as used in a will bequeathing stock, mean the same thing. *Heighe v. Littig*, 63 Md. 301, 305, 52 Am. Rep. 510.

The profits resulting from the business of an unincorporated association, which are

divided among the shareholders with no impairment of the principal, are income, and the life tenant under the will of the person who owned such shares at the time of his death is entitled to such profits. *In re Thomson's Estate*, 26 Atl. 652, 653, 153 Pa. 333.

#### Gift of, as conveying title.

"The income of an estate means nothing more than the profit it will yield after deducting the charges of management or the rent which may be obtained for the use of it. The rent and profit of an estate, or the income or the net income of it, are all equivalent expressions." Hence, a bequest of the income, or any portion of it, of a farm, makes the beneficiary a tenant in common of that portion of the land itself. *Andrews v. Boyd*, 5 Me. (5 Greenl.) 199, 203; *Earl v. Rowe*, 35 Me. 414, 420, 58 Am. Dec. 714.

"It is a settled rule of law that a gift of the income of real estate is a gift of the real estate itself. A gift of the income for life is the gift of a life estate. A gift of the perpetual income is the gift of a fee." *Sampson v. Randall*, 72 Me. 109, 111; *Fuller v. Fuller*, 84 Me. 475, 24 Atl. 946; *Wilson v. Curtis*, 38 Atl. 365, 366, 90 Me. 463; *Fogler v. Titcomb*, 42 Atl. 360, 361, 92 Me. 184; *Reed v. Reed*, 9 Mass. 372, 373; *Blanchard v. Brooks*, 29 Mass. (12 Pick.) 47, 63; *Brombacher v. Berking*, 39 Atl. 134, 136, 56 N. J. Eq. 251 (citing *Traphagen v. Levy*, 45 N. J. Eq. [18 Stew.] 448, 452, 18 Atl. 222; *Gulick v. Gulick's Ex'rs*, 27 N. J. Eq. [12 C. E. Green] 498); *In re Kelly's Estate*, 44 Atl. 289, 193 Pa. 45; *In re Siddall's Estate*, 36 Atl. 570, 180 Pa. 127 (citing *Garret v. Rex* [Pa.] 6 Watts, 14, 31 Am. Dec. 447; *Appeal of Pennsylvania Co.*, 83 Pa. 312; *Appeal of Sproul*, 105 Pa. 438); *In re Engel's Estate*, 36 Atl. 727, 729, 180 Pa. 215.

A devise to a widow of one-third of the income of the estate in lieu of dower gives the devisee an interest in the income merely, and not in the realty. *Bowen v. Payton*, 14 R. I. 257, 258.

A conveyance of a person's interest in real estate and in the income, by one to whom the income from certain property was to be paid during her life, and on her death the income should be paid to her children, refers to the income derivable under the trust, and does not convey a right to the lands and profits, nor operate as a conveyance of an estate for life. *Harvey v. Brisbin*, 8 N. Y. Supp. 676, 677, 50 Hun. 376.

The unqualified gift of an income of a fund confers an absolute, and not merely a life, interest in the principal, unless a contrary intention of the testator duly appears. *Blann v. Bell*, 13 Eng. Law & Eq. 188.

A devise of the income, rents, and use of the real estate is equivalent to a devise



of the real estate for the time fixed in the will. In *re France's Estate*, 75 Pa. (24 P. F. Smith) 220, 224.

A will devising and bequeathing the income of all testator's property, both real and personal, to his wife for life, but providing that out of the income his wife should pay all necessary expenses, etc., means "all benefit and profit whatsoever coming from the property, whether for use or otherwise; and the necessary implication follows that the widow was given the right to use or occupy the same, or obtain the income, profit, or benefit therefrom." In *re Turflier's Estate*, 24 N. Y. Supp. 91, 94.

#### **As gross earnings or profits.**

"Income" means that which comes into or is received from any business or investment of capital, without reference to the outgoing expenditures. The term, when applied to the affairs of individuals, expresses the same idea that "revenue" does when applied to the affairs of a nation. *Bates v. Porter*, 15 Pac. 732, 739, 74 Cal. 224; *People v. Board of Sup'rs of Niagara County* (N. Y.) 4 Hill, 20, 23. See, also, *Mundy v. Van Hoose*, 30 S. E. 782, 786, 104 Ga. 625.

The terms "income or articles or objects charged with an internal tax," in Act 1866, 14 U. S. Stat. 147, requiring stagecoach operators to make returns of their gross receipts, and that returns or lists of income or articles or objects charged with an internal tax shall discriminate between receipts in coin and receipts in legal tender currency, are comprehensive, and include gross receipts of express companies and stage proprietors. *Wells v. Shook* (U. S.) 29 Fed. Cas. 679.

An ordinance imposing a tax of 1 per cent. per annum upon the gross earnings of banks and bankers, and upon interest on notes, judgments, etc., and upon commissions or income derived from certain kinds of business, and taxing real estate at the rate of 2½ per cent. per annum, is not in conflict with the provision of the Constitution requiring that the taxation on all species of property shall be uniform. Gross earnings and interest, coming in from any source, labor, capital, investment of any sort, or money loaned, are not property, in the sense of the Constitution, but are merely income. Certainly the gross earnings of a laboring man are nothing but his income. So it would seem the earnings of a salaried officer are income, and so the income from capital employed in a bank or railroad or manufacture would seem to be income only. The net income after the expenses are paid becomes property, when invested, or if it be money lying in a bank or locked up at home. But to call it property, when it is all consumed as fast as it arises—going on the back, in the stomach, or in carriages and horses, which are taxed, or in

travel or frolic—to call such income, so used, property, would seem to be perversion of the term. It seems to us that it is not property, and it has been held not to be, since the *Hart-ridge Case*, in 8 Ga. 23. The Legislature has taxed it differently from property from that day to this. The fact is, property is a tree; income is the fruit; labor is a tree; income, the fruit; capital, a tree; income, the fruit. The fruit, if not consumed as fast as it ripens, will germinate from the seed which it incloses, and will produce other trees, and grow into more property; but so long as it is fruit, merely, and plucked to eat, and consumed in the eating, it is no tree, and will produce itself no fruit. *Waring v. City of Savannah*, 60 Ga. 93, 99, 100.

"Income and revenue," as used in Act Ark. July 21, 1868, § 8, providing that, in case any railroad company should fail to pay the taxes imposed by the statute for a certain time, it should be the duty of the treasurer of the state to seize and take possession of the income and revenues of the company until the amount of such defaults should be fully paid up and satisfied, means all the income and revenues of the company, and necessarily embraces the earnings of its road. *Tompkins v. Little Rock & Ft. S. R. Co.* (U. S.) 15 Fed. 6, 14.

College grounds and buildings and other property occupied and used by the owner or owners thereof for a college or school, at which charges for board and tuition are made, are taxable as properties used for the purpose of private or corporate profit or income. *Mundy v. Van Hoose*, 30 S. E. 782, 786, 104 Ga. 292.

#### **Increase of slaves.**

The word "income," in a devise of real and personal estate and negroes in trust, the income arising therefrom to be applied to the mutual benefit of certain beneficiaries, is broad enough to include the increase of the slaves. "The word is certainly not less extensive than 'profits,' which, in the case of *Hope v. Hutchins*, 9 Gill & J. 77, was held to include the increase of slaves." *Holmes v. Mitchell*, 4 Md. 532, 533.

#### **Interest.**

When applied to a sum of money, or money in the public debt, the term "income" is equivalent to "interest." *Ogilvie's Imperial Dict.*, verbo "Income." Thus a bequest of the "income" of \$5,000 was construed to be a bequest of the annual proceeds or interest of that sum of money, and not an annuity of that amount. *Appeal of Sims*, 44 Pa. (8 Wright) 345, 347; *Pearson v. Chace*, 10 R. I. 455, 456.

Where testator devised real estate, and directed that all income arising from the same should be paid to a certain person, the

phrase "income arising from the same" meant the current proceeds from the estate, and did not embrace the interest which would accrue from the investment of the proceeds. Appeal of Eley, 103 Pa. 300, 308.

Where by one clause of a will the interest of a certain sum of money is directed to be paid to testator's wife during life, and by another clause the residue of testator's estate is to be invested, and the income paid during life to certain persons named, it is manifest that the draftsman has used the words "income" and "interest" indifferently, and as synonymous terms. In Appeal of Sims, 44 Pa. (8 Wright) 845, it was said: "The word 'income' means the gain which proceeds from property, labor, or business. Bouvier's Law Dict. When applied to a sum of money, or money in the public debt, it is equivalent to 'interest.' Sometimes 'interest' and 'income' are used together, without any distinction between them, as in Appeal of Biddle, 99 Pa. 278." In re Murphy, 80 N. Y. Supp. 530, 532, 80 App. Div. 238.

#### As money or receipts.

The term "income," within the meaning of Act July 14, 1870, which imposes a tax on gains, profits, and income, must be taken to mean money, and not the expectation of receiving it or the right to receive it at a future time. The amount of a note taken in 1871 on a patent right, but not due until 1872, and paid in that year, is not taxable as the income of 1871. United States v. Schillinger (U. S.) 27 Fed. Cas. 973.

The word "income" primarily means the profit arising from an invested fund for a business or profession. The word in Acts 1861, § 8, authorizing the commissioners to deposit the income of a certain fund, has the same meaning as the words "moneys or receipts," and is to be construed as embracing all receipts of money, whether of principal or interest, from the mortgages or other securities in which the fund has been previously invested. Such a construction was reached by construing the statute in reference to other statutes relating to the same subject-matter. State v. McCarty (Ind.) 1 Wils. 205, 219.

#### Money from sales of property.

A fund resulting from sales of materials, manufactured iron, products from the land, or general personal property of a corporation, all indicating a final winding up of the business of the corporation, can in no sense be called income. Gehr v. Mont Alto Iron Co., 34 Atl. 638, 639, 174 Pa. 430.

Where a corporation sells part of its original franchise and property, and distributes the proceeds of the same as a dividend among its stockholders, such dividend was regarded, as between a life tenant and re-

mainderman of part of the stock, as capital, and not as income. Appeal of Vinton, 99 Pa. 434-442, 44 Am. Rep. 116.

#### As net earnings or profits.

The income of an estate embraces only the net profits after deducting all necessary expenses and charges. Ex parte McComb (N. Y.) 4 Bradf. Sur. 151, 152; Andrews v. Boyd (Me.) 5 Greenl. 199, 201; Earl v. Rowe, 35 Me. 414, 420, 58 Am. Dec. 714.

In a statute providing that a widow should be endowed of such part of lands which cannot be divided by metes and bounds as will produce an income equal to one third part of the income, the term "income" means "net profits." Johnson v. Perley, 2 N. H. 56, 60, 9 Am. Dec. 35.

In a mortgage of railroad property, providing that, until default in the payment of interest, the mortgagor shall remain in possession and operate the road, take the tolls, rents, and income, and apply them to the payment of the current expenses, "income" means what is left after paying the expenses of earning income. Poland v. Lamolile Valley R. Co., 52 Vt. 144, 177.

In St. 1838, c. 9, § 3, providing that a certain railroad is required to make an annual payment from its income to the sinking fund, to aid in the construction of the road, the term "income" should be construed to mean the amount of money remaining in the corporation on making up its annual account, after deducting from all its receipts the necessary expense of repairs and management, and also the amount of interest on the debt of the commonwealth which the corporation is bound to pay in behalf of the commonwealth. Opinion of Justices, 46 Mass. (5 Metc.) 598.

Under a deed of trust providing that the beneficiary should receive the income or dividends on certain shares of stock for her sole use, it was the clear intention that the tenant for life should receive all the net earnings accruing from the stock which should be distributed to the shareholders during her lifetime, and it makes no difference whether such dividend be declared as a regular dividend or an extra dividend or bonus. Lord v. Brooks, 52 N. H. 75.

Where a testator devised in the fifth clause of his will certain property in trust, "the profits and income" of which were to be distributed at certain times, and in the sixth paragraph employed the words "the aforesaid income," and in paragraph 7 the words "said income," and in paragraph 8 the word "income," the words "profits and income," used in paragraph 5, meant nothing more than was intended by the single word "income" in the other paragraphs. Beers v. Narramore, 22 Atl. 1061, 1064, 61 Conn. 13.

**Option to purchase new stock.**

The term "income," in a will directing that the rents, dividends, increase, and income in a fund composed of corporation stock and other property shall be paid to testator's children, does not include, when considered in connection with the corporation stock, anything more than dividends; and therefore a profit on the sale of a right to subscribe for additional stock goes to the trustees, and not to the beneficiaries. *Brinley v. Grou*, 50 Conn. 66-77, 47 Am. Rep. 618; *Appeal of Moss*, 83 Pa. 264, 24 Am. Rep. 164; *Appeal of Biddle*, 99 Pa. 278-283; *In re Thompson's Estate*, 26 Atl. 652, 653, 153 Pa. 333.

**As produce of farm.**

A testator died seised of a certain farm, which for some years prior to his death he had leased on shares. His will directed that the farm should be rented until the youngest child should become of age, and he further directed that his wife should live on the farm, and that she and her minor children should have "one-half the income of said farm" for their support. He then further directed that the farm should not be sold until the youngest child became of age, and that in the meantime it should be rented. The executors leased the farm on shares, as testator had been accustomed to do. Held, that testator, by the phrase "one-half of the income," meant that the widow should have one-half of the annual product of the farm, to wit, all that did not belong to the tenant, and that he did not intend her to take merely one-half of the amount annually realized by his executor. *Appeal of Thompson*, 100 Pa. 478, 481.

Laws 1889, c. 462, provides that the portion of the property of a certain incorporated hospital society "from which no income is derived" shall be exempt from taxation so long as the same shall be used exclusively for the purpose for which such society was chartered. The society had a farm used exclusively for its charter purposes, and which was not self-supporting. The farm products were almost entirely used in the hospital, but occasionally insignificant articles were sold, and the proceeds applied to the support of inmates of hospital buildings on the farm. Held, that such proceeds were not income, within the meaning of the statute, so as to render the property subject to taxation. *People v. Purdy*, 12 N. Y. Supp. 307, 58 Huh. 386.

The term "income," in a devise by testator to his wife of all the income of his estate, real and personal, only includes the rent from leased real estate, and therefore the wife is only entitled to a third of the rent, and not one-third of the gross products of such land. *Pursel v. Pursel*, 14 N. J. Eq. (1 McCart.) 514, 521.

**Profits distinguished.**

It is undoubtedly true that "profits" and "income" are sometimes used as synonymous terms; but, strictly speaking, "income" means that which comes in or is received from any business or investment of capital, without reference to the outgoing expenditures, while "profits" generally mean the gain which is made upon any business or investment when both receipts and payments are taken into account. "Income," when applied to the affairs of individuals, expresses the same idea that "revenue" does when applied to the affairs of a state or nation; and no one would think of denying that our government has any revenue, because for a stated period the expenditures may exceed the amount of the receipts. *People v. Niagara County Sup'rs* (N. Y.) 4 Hill, 20. In *Appeal of Sims*, 44 Pa. (8 Wright) 845, it was said: "The word 'income' means the gain which proceeds from property, labor, or business. When applied to a sum of money, or money in the public debt, it is equivalent to 'interest.'" Sometimes "interest" and "income" are used together, without any discrimination between them, as in *Appeal of Biddle*, 99 Pa. 278. In *re Murphy*, 80 N. Y. Supp. 530, 532, 80 App. Div. 238.

**Profits of partnership.**

A testator devised to his widow the income of his entire estate for life. His executors permitted his surviving partner to continue the business for two years and five months. Held, that the profits on testator's interest in the partnership over and above its value as appraised at the time of his death is income belonging to the widow. In *re Rogers*, 74 N. Y. Supp. 829, 87 Misc. Rep. 54.

**Rents or royalties.**

Under a will directing trustees to collect the "income, issue, and profits" of testator's estate, and, after the payment of expenses and taxes, to pay the remaining income to testator's wife for life, the rents of testator's real estate are included. *Appeal of Lindley*, 13 Wkly. Notes Cas. 69, 40 Leg. Int. 303; *Appeal of Perotz*, 102 Pa. 235, 256.

The term "income and produce," as used in a will devising land to trustees, to receive and collect the income and produce thereof, includes rents that became due from tenants soon after the testator's decease. *Sohier v. Eldredge*, 103 Mass. 345, 350.

In a will settling the shares of property of some of the testator's children in trust, the interest or income of the shares to go to them during life, "income" means the gain which accrues from property, labor, or business. In its ordinary and popular meaning, it is strictly applicable to the periodical payments in the nature of rent which are usually made under coal and other mineral

leases. Appeal of Eley (Pa.) 40 Leg. Int. 435, 14 Pittsb. Leg. J. 876, 377, 103 Pa. 300, 306. See, also, Raynolds v. Hanna (U. S.) 55 Fed. 783, 797; Appeal of Wentz, 103 Pa. 301, 307; Appeal of Bedford, 17 Atl. 538, 540, 126 Pa. 117.

The term "income," in a will requiring the trustee to pay over the annual income of the estate, and giving authority to lease land for coal mining purposes, includes, as a part of the income, the proceeds derived from such lease. Appeal of Shoemaker, 103 Pa. 392; Appeal of Bedford, 17 Atl. 538, 540, 126 Pa. 117; McClintock v. Dana, 103 Pa. 386, 391, 15 Pa. Law J. 336, 338.

The income of the estate includes oil produced after the testator's death, accruing as royalty under an oil lease of his land made by him before his death in consideration of a royalty of part of the oil. In re Woodburn's Estate, 21 Atl. 16, 138 Pa. 606, 21 Am. St. Rep. 932.

A statute provided that the guardian should improve his estate frugally, and apply the income to the maintenance of the ward. It was held that the word "income" did not require the guardian to lease the real estate, so as to derive an income from it, but that he might farm the land himself; rent being only one form of income; it being defined by Webster to be the gain which proceeds from labor, business, or property of any kind, the produce of a farm; the rent of a house, etc. Remington v. Field, 17 Atl. 551, 552, 16 R. I. 509.

#### **Value synonymous.**

See "Value."

#### **As yearly income.**

The term "income," as used in Gen. St. c. 11, § 4, which provides that no income derived from property subject to taxation shall be taxed, means the income for the year, and is the result of the year's business. It is the net result of many combined influences—the use of the capital invested; the personal labor and services of the members of the firm, and the skill and ability with which they lay in, or from time to time renew, their stock; the carefulness and good judgment with which they sell and give credit; and the foresight and address with which they hold themselves prepared for the fluctuations and contingencies affecting the general commerce and business of the government. To express it in a more summary and comprehensive form, it is the creation of capital, industry, and skill. It does not include the income from a profession, trade, or employment. Wilcox v. Middlesex County Com'rs, 103 Mass. 544, 546.

#### **INCOME TAX.**

An "income tax" is a tax which relates to the product or income from property or

from business pursuits. Levi v. City of Louisville, 30 S. W. 973, 974, 97 Ky. 394, 28 L. R. A. 480.

The term "income tax" includes a tax on the gross receipts of a corporation or business. Parker v. North British Ins. Co., 7 South. 599, 600, 42 La. Ann. 423.

### **INCOMPATIBLE.**

See "Absolutely Incompatible."

#### **INCOMPATIBLE OFFICE.**

"Offices are said to be incompatible and inconsistent, so as to be executed by the same person, first, when, from the multiplicity of business in them, they cannot be executed with care and ability; or, second, when, their being subordinate and interfering with each other, it induces a presumption that they cannot be executed with impartiality and honesty." People v. Green (N. Y.) 46 How. Prac. 169, 170.

At common law, offices subordinate and interfering with each other are "incompatible offices," as where one officer is judicial, and the other ministerial, and the ministerial officer is directly subordinate to the judicial. Hence the offices of a justice of the peace and associate judge of the court of common pleas were not incompatible offices, though the incumbent, as judge, might be called on to give judgment in the common pleas on a judgment rendered by himself as a justice of the peace, and his acceptance of the office of judge did not amount to a surrender of the office of justice of the peace. Commonwealth v. Sheriff, etc., of Jail of Northumberland County (Pa.) 4 Serg. & R. 275, 276.

By election to "another incompatible office" is meant another office in the same corporation; so that members of the corporation of regents of a university, who accepted offices under the trustees as members of the faculty of the college of medicine in the university, which was a separate corporation, were not elected to other offices in the corporation of the regents, but to offices in another corporation, and hence it was not "another incompatible office" which they held, making the offices which they first held as professors under the corporation of the regents of the university vacant. Regents of University of Maryland v. Williams (Md.) 9 Gill & J. 365, 422, 31 Am. Dec. 72.

### **INCOMPETENT—INCOMPETENCY.**

See "Mentally Incompetent."

One is incompetent who is wanting in the requisite qualifications for the business intrusted to him. Metropolitan West Side Elevated Ry. Co. v. Fortin, 67 N. E. 977, 979, 203 Ill. 454.

By the competency of a person to make a will is meant intelligence sufficient to understand the act he is performing, the property he possesses, the disposition he is making of it, and the persons or objects he makes the beneficiaries of his bounty. Imperfect memory, caused by sickness or old age, forgetfulness of the names of the persons he has known, idle questions, or requiring a repetition of information, will not be sufficient to establish incompetency, if he has sufficient intelligence remaining to fulfill the above definition. *Sehr v. Lindenmann*, 54 S. W. 537, 540, 153 Mo. 276.

"Incompetent," as used in *How. Ann. St.* 1882, § 6314, which provides that when the relations or friends of any insane person, or of any person who is mentally incompetent to have the charge and management of his property, shall apply to the judge of probate to have a guardian appointed for him, the judge shall cause notice to be given, etc., to the supposed insane or incompetent person, is synonymous with "incapable," as used in the succeeding section (6315), which provides that if, after a full hearing and examination upon any such application, it shall appear to the judge of probate that the person in question is incapable of taking care of himself and managing his property, he shall appoint a guardian of his estate, etc. In *re Leonard's Estate*, 54 N. W. 1082, 1083, 95 Mich. 295.

"Incompetent," as used in *Code Civ. Proc.* § 5979, providing that, whenever the probate judge has reason to believe that an executor or administrator has become incompetent to act, he may suspend the powers of such executor or administrator until the matter can be investigated, is not synonymous with the word "incapable," as used in sections 5794 and 5795, providing that in case one of several executors or administrators shall die, become lunatic, be convicted of an infamous offense, or otherwise become incapable of executing the trust, the remaining executor or administrator shall complete the execution of the will or administration, and, if all such executors or administrators shall die or become incapable, the probate court shall issue letters of administration with the will annexed to the widow or next of kin or others. The Legislature has classified death, insanity, and conviction of an infamous offense under the designation "incapable," and other matters affecting the integrity or qualification for the discharge of the duties of an administrator as "incompetency." The embezzler, the thief, the man who hesitates at no fraudulent scheme to despoil an estate, or who is so careless and indifferent as to habitually and grossly neglect his duties, may have capacity to properly discharge all the duties of an administrator, but the man who is insane or civiliter mortuus is incapable. The word "incompetent" was used to designate a different class

from those characterized as incapable. A sole testatrix, who has been adjudged insane, has become incapable, and not merely incompetent to act. In *re Blinn*, 33 Pac. 841, 842, 99 Cal. 216.

The term "incompetency," as used in the statute providing for the removal of assignees in insolvency for incompetency and misconduct, has no technical meaning, and the two words are intended to embrace all the reasons for which an assignee ought to be removed. In *re Cohn*, 78 N. Y. 252.

The word "incompetency," as used in a contract of employment whereby the employer was authorized to discharge the employé in the event either of incompetency or of such continued illness or decrease of physical or vocal faculties as to prevent one from doing service for a period of more than two weeks, means such incompetency as is produced from physical causes arising after the contract is entered into. *Brand v. Goodwin*, 3 N. Y. Supp. 807, 810.

The phrases "incompetent," "mentally incompetent," and "incapable" mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons. *Rev. St. Utah* 1898, § 4001; *Code Civ. Proc. Cal.* 1903, § 1767; In *re Daniels*, 73 Pac. 1053, 1054, 140 Cal. 335.

By "incompetency," as used in the title relating to the removal of officers, is meant gross ignorance of official duties or gross carelessness in the discharge of them, or an officer may be found to be incompetent when, by reason of some serious physical or mental defect, not existing at the time of his election, he has become unfit or unable to discharge promptly and properly the duties of his office. *Rev. St. Tex.* 1895, art. 3533.

#### **Drunkard.**

The term "incompetent" does not include a drunkard generally, but the latter will only be held incompetent, in reference to a particular act, on proof that his understanding was clouded or his reasoning dethroned by actual intoxication. *Wright v. Fisher*, 32 N. W. 605, 610, 65 Mich. 275, 8 Am. St. Rep. 886.

#### **Ignorance and inexperience.**

"Incompetency," as used in *Sp. Laws* 1891, p. 70, creating a police commission for the city of Galveston, and investing it with exclusive jurisdiction to determine all charges against police officers for incompetency, is sufficiently broad to include the inability of a police officer to read or write the Eng-

Has language. *Steinback v. City of Galveston* (Tex.) 41 S. W. 822, 824.

A person who cannot write, or read writing, and has no experience in keeping accounts or in settling estates, is incompetent, within the meaning of Rev. Code, c. 46, § 3, providing that, when two persons who claim a right to administer are in equal degree, the court may, in its discretion, grant the administration to one or both, or, if the person applying shall be deemed incompetent, then the court may grant administration to some discreet person. The word "incompetent" does not apply to the mind, or have regard to mental incapacity, but is obviously used in the sense of "unfit." This may be on account of mental incapacity or bodily infirmity or ignorance and inexperience in matters of business, such as keeping accounts, deciding upon the justness of claims, and many things of the kind which require a considerable degree of experience and capacity for the transaction of the business. *Stephenson v. Stephenson*, 49 N. C. 472, 473.

A complaint in an action against a veterinary surgeon for malpractice, alleging that he was and is incompetent to treat sick and diseased horses, etc., will not be construed to charge such surgeon with ignorance, since incompetency may arise from physical defects, as impaired vision or other like cause. When it is sought to charge one employed in a profession requiring skill with ignorance, it must be done by an allegation stating that fact, and should not be left to mere inference, to be deduced from the use of vague and indefinite terms. *Barney v. Pinkham*, 29 Neb. 350, 352, 45 N. W. 694, 26 Am. St. Rep. 389.

Within the meaning of the rule of law that an employer owes it as a duty to servants to exercise reasonable care to select co-servants who are not incompetent, "incompetent" should not be construed as synonymous with "inexperienced," since a servant may be inexperienced, and yet not incompetent. *Chicago, etc., R. Co. v. Champion*, 36 N. E. 221, 223, 9 Ind. App. 510, 53 Am. St. Rep. 357.

Where an employé in a sawmill was injured through the incompetency of the sawyer employed therein, who had charge and control of the carriage on which the injured party was working, it was immaterial whether the incompetency of such sawyer arose from the fact that he had never handled such a carriage, or from his lack of practice; it appearing that he had not worked in such a mill for several years. *Curran v. A. H. Stange Co.*, 74 N. W. 377, 379, 98 Wis. 598.

#### Ineligibility.

Incompetency includes disqualification as well as inability or incapacity, so that though

the appointment of a veteran to an office may have been unlawful, as having been made without an examination, he cannot be removed, under Laws 1896, c. 21, forbidding the removal from office of any honorably discharged soldier, except for incompetency and misconduct, after hearing upon due notice, without such notice being given. *People v. Board of Health*, 44 N. Y. Supp. 597, 598, 15 App. Div. 272.

"Incompetency," as used in Laws 1896, c. 821, providing that no honorably discharged Union veteran holding a position shall be discharged, except for incompetency or misconduct, shown, etc., refers to capacity or fitness to fill a place, not eligibility to appointment; and the incumbent of an office, who is a veteran, is not entitled, by virtue of the statute, to a hearing upon notice, as to his legal qualification or eligibility, at the date of his appointment, before he can be removed. *People v. Board of Health*, 47 N. E. 785, 786, 153 N. Y. 518.

#### Negligent distinguished.

"Incompetency" and "negligence" are not convertible terms, for the most competent may sometimes be negligent; and evidence of acts of former unskillfulness furnishes no legitimate ground of presumption either that a fellow servant was negligent when another was injured, or, unless communicated to or known by the master before the accident happened, that the master was derelict in retaining such servant in his service. *City of Baltimore v. War*, 27 Atl. 85, 86, 77 Md. 593.

There is a difference between incompetency, so called, and negligence. There is certainly a difference between the ability to perform work, and negligence in performing it. *Olsen v. North Pacific Lumber Co.* (U. S.) 100 Fed. 384, 386, 40 C. C. A. 427. See, also, *Texas Cent. Ry. Co. v. Rowland*, 22 S. W. 134, 136, 3 Tex. Civ. App. 158.

A complaint in an action against a veterinary surgeon for malpractice, alleging that he was and is incompetent to treat sick and diseased horses, etc., will not be construed to charge him with want of due care. *Barney v. Pinkham*, 29 Neb. 350, 352, 45 N. W. 694, 26 Am. St. Rep. 389.

#### As unsatisfactory.

The word "incompetency," as used in a contract of employment whereby the employer, in the event of the incompetency of the employé, may discharge the employé, is not a synonym for "unsatisfactory"; and, when the reason for a discharge is incompetency, there must be something more than arbitrary caprice, to authorize the act, and the court may review the action of the employer, notwithstanding a provision in the contract making him the sole judge. *Brand v. Good-*

win, 8 N. Y. Supp. 339, 340 (affirming decision of General Term, which affirmed Brand v. Goodwin, 3 N. Y. Supp. 807, 810).

#### **As unreliable.**

Incompetency exists not alone in physical or mental attributes, but in the disposition with which a person performs his duties; and, though he may be physically and mentally able to do all that is required of him, his disposition toward his work, his employer, and fellow servants may make him an incompetent man. Incompetence goes to reliability in all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such person in the general employment. *Maitland v. Gilbert Paper Co.*, 72 N. W. 1124, 97 Wis. 476, 65 Am. St. Rep. 137 (citing *Coppins v. New York Cent. R. Co.*, 122 N. Y. 557, 25 N. E. 915, 19 Am. St. Rep. 523).

#### **As unsuitable.**

"Incompetency," as used in 2 Rev. St. N. Y. p. 152, § 14, providing that a guardian may be removed by the court for "incompetency," is a word of broad signification and comprehensiveness, like the word "unsuitableness" as applied to a trustee. It relates not only to the mental condition and moral status of a testamentary guardian, but imports that, in the interest of the ward, in respect to nurture, care, education, and safety, the court may take into consideration the relative social and pecuniary position of the guardian and infant, in removing the guardian. *Damarell v. Walker* (N. Y.) 2 Redf. Sur. 198, 205.

Incompetency includes a lack of moral qualities, as well as intellectual, and, in reference to an office, means a lack of fitness for the duties of the office. *Nehrling v. State*, 88 N. W. 610, 614, 112 Wis. 637.

#### **INCOMPETENT EVIDENCE.**

There is no material difference between "incompetent" and "not admissible," under the rules of evidence. *Texas Brewing Co. v. Dickey* (Tex.) 43 S. W. 577, 578.

An objection to evidence of a person concealing transactions with a deceased person, that it is incompetent evidence, is not sufficient to exclude it, for evidence of that character from a witness not under disability would not be incompetent. The evidence itself would be competent, but a witness under the disability would not be competent to give the evidence; and the objection should be put upon the grounds of disability of the witness, and not of the incompetence of the evidence offered. *Bell v. Bumstead*, 14 N. Y. Supp. 697, 699, 60 Hun, 580.

Where an objection was made to a question on the ground that it was a privileged communication, and other objections were made to similar questions which did not expressly state the ground of privilege, but did state, among other things, that the question was "not in cross-examination and incompetent," the word "incompetent" was sufficiently broad to include the ground of objection as being a privileged communication; such question being not only apart from the consideration of relevancy and materiality, but because prohibited by law. *People v. Mullings*, 23 Pac. 229, 231, 83 Cal. 138.

While the epithet of "incompetent," applied to a witness, indicates some legal defect in him, rather than in the matter which he is called to utter, and while, as applied to a writing sought to be introduced in evidence, it may indicate that of itself the writing is objectionable in its form or mode of authentication, rather than for what it contains, yet the common and different use of the phrase has worn off the sharpness of this meaning. Accordingly, where it was sought to introduce in evidence, as a statement against interest, the protest of the master of a vessel as to the vessel's sound condition, and the paper introduced was only a copy of the original, an objection "to the reading of the protest, as incompetent and immaterial," was doubtless understood to mean that a protest was not such a declaration against interest as permitted it to be read in evidence, rather than as an objection that the paper presented was a copy, for the loss of the original of which due proof had not been given. *Atkins v. Elwell*, 45 N. Y. 753, 757.

The word "incompetent," as regards evidence, indicates a defect in the person or document, yet its constant use has worn off its sharpness, and for this reason more significant words are necessary to indicate the objection to evidence. *Atkins v. Elwell*, 45 N. Y. 753, 756; *Bella v. New York, L. & W. Ry. Co.*, 6 N. Y. Supp. 552, 553.

The objection to evidence as incompetent is too vague to avail on appeal. *Noftsgier v. Smith*, 32 N. E. 1024, 6 Ind. App. 54; *McKarsie v. Citizens' Building & Loan Ass'n* (Tenn.) 53 S. W. 1107, 1110.

#### **INCOMPLETE TITLE.**

"Incomplete titles," in the sense that some French and Spanish titles required an act of confirmation by the government of the United States, were those which, while the terms of the granting act or concession sufficed to convey lands, or sufficed to evidence a present intention and purpose to convey lands, yet did not describe the particular land granted so as to identify and locate it, and no conveyance or act of loca-

tion having yet (prior to the cession) been made. In other words, an incomplete title was one where the grant or concession or order of conveyance had been made, but the actual identification or location had not taken place—where something had yet to be done to distinguish and segregate the land intended to be conveyed from the mass of other land, and thus perfect the title. *Teddle v. McNeely*, 29 South. 247, 249, 104 La. 606.

## INCONSISTENT—INCONSISTENCY.

Things are said to be inconsistent when they are contrary the one to the other, so that one infers the negation, destruction, or falsity of the other. *O'Malley v. Luzerne County (Pa.)* 3 Kulp, 41, 46.

"Inconsistency" implies opposition; antagonism; repugnance. One definition of "inconsistency" given by the lexicons is repugnance, and one definition given of "repugnance" is inconsistency. These words, though not exactly synonymous, may be, and often are, used interchangeably, and such are their use in regard to statutes, as being inconsistent. *Swan v. United States*, 9 Pac. 931, 933, 3 Wyo. 151.

Act April 2, 1860, amending the practice "relating to the laying out of roads," and repealing "all laws inconsistent herewith," is not equivalent to a law which enacted that all previous legislation relative to roads was "repealed and made void." The latter provision is general, and the other is special. The one is abrogatory, and the other derogatory. The act amending the practice does not necessarily destroy a proceeding founded upon it, since it merely remedies; but, where the law takes away the subject of jurisdiction, as by repeal, the proceeding founded upon it must fall. *In re Hickory Tree Road*, 43 Pa. (7 Wright) 139, 142.

### Validity distinguished.

The terms "inconsistency" and "validity" involve distinct ideas. Whether a former law is inconsistent with the provisions of the latter act is one question. Whether the provisions of the latter act are valid or invalid is another and different question. *Mesheimer v. State*, 11 Ind. 482, 489.

## INCONSISTENT CONDUCT.

"Inconsistent conduct," within Laws 1894, c. 716, providing for removal from office for incompetency and conduct inconsistent with the position held, is not synonymous with "incompetency." The clear intention was to treat these phrases disjunctively. Incompetency is one thing. Conduct inconsistent with the relator's position is another. A man may be perfectly competent, and yet be guilty of some heinous conduct

for which he should be removed. *People v. Wright*, 7 N. Y. App. Div. 185, 40 N. Y. Supp. 285, 291.

## INCONSISTENT DEFENSES.

Defenses are inconsistent only when one in fact contradicts the other. Where there is only a seeming and logical inconsistency, which arises merely from a denial of the plea in confession and avoidance, such defenses are not held to be inconsistent. So, in an action against a trustee for the balance remaining after the execution of a trust to sell realty and pay debts, a plea that plaintiff had had notice of defendant's sales to third persons for more than the period of limitations is held not to be inconsistent with a denial of the trust, and a claim of absolute ownership as plaintiff's vendee. *Irwin v. Holbrook*, 73 Pac. 860, 861, 32 Wash. 349.

## INCONTESTABLE.

The term "incontestable," as used in a life insurance policy providing that the policy shall be incontestable, means indisputable, and amounts to a guaranty that no objection shall be taken to defeat the policy on the death of the person whose life is insured. *Simpson v. Life Ins. Co. of Virginia*, 20 S. E. 517, 115 N. C. 393.

Where the constitution of a fraternal insurance society provides that a certificate issued to a member shall be incontestable after a certain date, the term "incontestable" applies to a provision declaring that a certificate is rendered void by the suicide of the member, and estops the society from contesting the certificate on the ground of suicide. *Royal Circle v. Achterath*, 68 N. E. 492, 204 Ill. 549, 63 L. R. A. 452.

## INCONTINENT—INCONTINENCY.

"Incontinency" means want of restraint in regard to sexual indulgence, and, according to our statute, definite, illicit sexual intercourse. *Lucas v. Nichols*, 52 N. C. 32, 35.

The term "incontinent" when generally applied to a female, cannot be understood to mean anything else than that she is unchaste. *Watts v. Greenlee*, 13 N. C. 115, 118, 119.

"Incontinency" is actual, illicit sexual intercourse; and a remark that a certain woman "had had sexual intercourse with a male dog" charges such woman with being incontinent, within Code, § 1113, making the slander of a woman by charge of incontinency a misdemeanor. *State v. Hewlin*, 37 S. E. 952, 128 N. C. 571.



As used in a statute declaring that "any words written or spoken of a woman which may amount to a charge of incontinency shall be actionable," the word "incontinency" means illicit intercourse with the other sex; and the offense is not shown by proof that defendant said, "She promised to let me have criminal intercourse with her, and I intend to have it." *State v. Moody*, 98 N. O. 671, 672, 4 S. E. 119.

"Incontinency," as used in Rev. St. c. 110, giving to a woman an action for another's using words in reference to her which amount to a charge of incontinency, imports not merely the imputation of impure desires or a lascivious disposition, but the criminal fact of adultery or fornication. To say of a woman that she is kept by a man not her husband is a charge of incontinency, for the word "kept," when used in reference to connections between the sexes, denotes habitual and criminal carnal conversation, amounting to cohabitation. *McBrayer v. Hill*, 26 N. C. 136, 138.

## INCONTROVERTIBLE.

"Webster defines 'incontrovertible' to mean too clear and certain to admit of dispute," so that an instruction that fraud must be proved by circumstances from which the inference of fraud is natural and incontrovertible is erroneous, as requiring too high a grade of proof. *McCreary v. Skinner*, 39 N. W. 674, 675, 75 Iowa, 411.

## INCORPORATE.

Corporation distinguished, see "Corporation."

"Incorporated" means united in one body, and it is not necessary to incorporate—that is, bodily insert—a plat introduced in evidence into the original bill of exceptions before signing thereof by the judge, but it is sufficient to refer to such plat, where the appropriate place therefor was designated by the words "Here insert." *Toledo, St. L. & K. O. R. Co. v. Cupp*, 35 N. E. 703, 8 Ind. App. 388.

The word "incorporated," as used in Sp. Laws 1878, c. 19, § 1, enacting that certain described territory "be, and the same is hereby," incorporated as the village of Pine Island, pursuant to Gen. Laws 1875, c. 139, is equivalent to the phrase "set apart by act of the Legislature for incorporation," as used in section 1 of the latter act. *State v. Cornwall*, 28 N. W. 144, 35 Minn. 176.

## INCORPORATED ACADEMY.

A school, the only restrictions upon which are that no religious tenets shall be required of any trustee or student, and that

no sectarianism shall be tolerated in the institution, and that persons of both sexes shall be admitted to its advantages, though under its charter no one can claim the absolute right to receive instruction in the institution on any terms, and no provision is made for gratuitous instruction, is an "incorporated academy or select school," within the meaning of Rev. St. §§ 3237, 3239, making such institutions exempt from interference from the supervision of the Attorney General. *Attorney General v. Albion Academy & Normal Institute*, 9 N. W. 391, 395, 52 Wis. 469.

## INCORPORATED BANK.

"Generally, when the words 'incorporated bank' are used in the statutes without words of qualification, a bank of issue is meant, and this is the meaning ordinarily given to the word in the community." *Commonwealth v. Pratt*, 137 Mass. 98, 104.

The words "incorporated bank" are broad and comprehensive. They apply to national banks incorporated under the statutes of the United States. *Commonwealth v. Barry*, 116 Mass. 1; *Commonwealth v. Tenney*, 97 Mass. 50. They apply to savings banks as well as to other banks, and so one embezzling from such a bank may be indicted under Pub. St. c. 203, § 41, which treats as guilty of larceny any officer of an incorporate bank who fraudulently converts to his own use, etc. *Commonwealth v. Warner*, 54 N. E. 353, 355, 173 Mass. 541.

Gen. St. c. 161, § 39, declaring that, if any officer of any incorporated bank convert to his own use anything on deposit therein, he shall be guilty of larceny, applies to banks chartered since the passage of the statute, as well as those incorporated at that time. *Commonwealth v. Tenney*, 97 Mass. 50, 57.

The expression "incorporated banking company," as used in Rev. St. c. 127, § 4, relating to the offense of uttering and publishing forged and counterfeit bank bills issued by an incorporated banking company in the state, is not identical with the term "banking company established in the state." The former necessarily implies a bank organized under a legal charter or authority in the form of a special act, or some general law authorizing and giving a corporate character to such association. The term "established" may imply nothing more than a voluntary association organized by its own independent agreement, and not in pursuance of any statute incorporation. *Commonwealth v. Simonds*, 77 Mass. (11 Gray) 306, 307.

## INCORPORATED CITY.

When an act of legislation speaks of "incorporated cities," the most obvious, if not

necessary, subjects of the application of such a law are localities that are cities by legislative designation. *New York, L. E. & W. R. Co. v. Drummond*, 46 N. J. Law (17 Vroom) 644, 646.

Under Code Proc. § 1407, providing that no bond shall be required when an appeal is taken by an incorporated city, a municipal corporation of the fourth class, called a "town," is exempt from giving bond on appeal; the term "incorporated city" being interpreted to mean a municipal corporation. *Town of Elma v. Carney*, 80 Pac. 782, 783, 4 Wash. 418.

### INCORPORATED COMPANY.

The term "incorporated companies," as used in a statute relating to taxation, did not include incorporations for religious, literary, or charitable purposes. The words would be quite inapt to describe an incorporated college, or an incorporated church or hospital, or eleemosynary society. *Catlin v. Domestic & Foreign Missionary Soc.*, 20 N. E. 867, 118 N. Y. 625.

"Incorporated company," as used in Rev. St. c. 18, tit. 1, § 1, exempting from taxation personal property of every incorporated company not made liable to taxation by title 4 of said chapter, which provides for the taxation of all moneyed corporations deriving an income from their capital or otherwise, was intended to designate only business and stock companies, and not to include corporations for religious, literary, or charitable purposes. In *re Vanderbilt's Estate*, 10 N. Y. Supp. 289, 343, 2 Con. Sur. 319.

### Bank.

"Incorporated company," as used in 1 Rev. St. p. 608, § 4, which provides that it shall not be lawful for any incorporated company to make any transfer or assignment in contemplation of the insolvency of such company, etc., includes banks provided for under the general banking law (Laws 1838), but does not include those banks which existed under prior laws. *Robinson v. Bank of Attica*, 21 N. Y. 406, 409.

### City or town.

The term "incorporated company" is defined as a corporation formed for the purpose of carrying on a business for profit; and, while it is true that an incorporated city or town is a corporation, yet it is not a company in any sense, so that a municipal corporation is not an incorporated company, within Const. art. 12, § 4, providing that the right of trial by jury shall be held inviolate in all trials for claims for compensation when, in the exercise of the right of eminent domain, any incorporated company shall be interested either for or against such right.

*Kansas City v. Vineyard*, 80 S. W. 326, 327, 128 Mo. 75.

The term "incorporated company," as used in Act Ky. March 17, 1870, providing that it shall be unlawful for any county judge or other county officer, or any incorporated company, to submit more than one proposition for taxes to the voters at any election, does not include a municipal corporation. *Wetzell v. City of Paducah* (U. S.) 117 Fed. 647, 653.

### Superintendent of poor.

In 2 Rev. St. p. 678, § 59, defining the crime of embezzlement, the term "incorporated company" includes those only which are composed of individuals associated together for private purposes, and does not include the superintendent of the poor, who, by Rev. St. p. 617, § 16, is declared to be a corporation. *Coats v. People*, 22 N. Y. 245, 246.

### INCORPORATED TOWN.

An incorporated town is not a village city, or township, within the meaning of a statute authorizing villages, cities, and townships to issue bonds in aid of a railroad. *Welch v. Post*, 99 Ill. 471, 473.

The word "town" is sometimes employed to designate a township; but the term "incorporated town" is seldom, if ever, employed to embrace such a body. *Harris v. Schryock*, 82 Ill. 119, 121.

An "incorporated town," within the meaning of the statute regulating the organization of cities and villages, was said in *People v. Village of Harvey*, 142 Ill. 573, 82 N. E. 295, to be a village or a small collection of residences, which has become incorporated for the better regulation of their internal police. In *People v. Martin*, 53 N. E. 809, 178 Ill. 611, we said: "A town organized under the township organization laws of the state is, as before said, a political or civil subdivision of a county. It is created as a subordinate agency to aid in the administration of the general state and local government. The distinction between such a town and other chartered municipal corporations proper, sometimes denominated 'towns,' is that a chartered town or village is given corporate existence, at the request or by the consent of the inhabitants thereof, for the interest, advantage, or convenience of the locality and its people; and a town under township organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization, and as an agency of the state and county, to aid in the civil administration of affairs pertaining to the general administration of the state and county government, and is imposed upon the territory included with-

in it without consulting the wishes of the inhabitants thereof." *Phillips v. Town of Scales Mound*, 63 N. E. 180, 182, 195 Ill. 353.

### INCORPORATION.

It is now the settled doctrine both of the English and American courts that an act of incorporation is a bargain between a company of adventurers, and the public; that the rights of the corporation are such as the very terms of the enactment confer, and any ambiguity in them must operate against the adventurers and in favor of the public. *Dugan v. Bridge Co.*, 27 Pa. (3 Casey) 303, 309, 67 Am. Dec. 464.

The word "incorporation," as used in the act of March 27, 1890, entitled "An act providing for the organization, classification, incorporation, and government of municipal corporations," is broad enough to include sections relating to the enlargement and consolidation of municipal corporations; such proceedings being analogous to the supplemental articles of a private corporation, including its capital stock. *King County Com'rs v. Davies*, 24 Pac. 540, 542, 1 Wash. St. 290.

Where a town was incorporated as a district under St. 1785, and as a town in 1806, the distinction being made that places were incorporated as districts where they contained less than 150 ratable polls, and as towns where they contained more, the word "incorporation," in an act authorizing any town to appropriate money for the purpose of celebrating any centennial anniversary of incorporation, refers to its incorporation as a district. *Hill v. Selectmen of Easthampton*, 4 N. E. 811, 813, 140 Mass. 381.

### INCORPOREAL.

Without body; not of a material nature; the opposite of corporeal. *Black, Law Dict.*

### INCORPOREAL CHATTEL.

An "incorporeal chattel" means an interest arising out of personal property, as an incorporeal hereditament is an interest or right issuing out of land. Where a municipal corporation granted land upon the shore or under the water of a river or harbor, and the wharf built thereon was to be a public wharf, but the grantees should enjoy the wharfage and all the advantages of the wharves erected, the wharfage is not an incorporeal chattel, as it arises out of land. *Boreel v. City of New York*, 4 N. Y. Super. Ct. (2 Sandf.) 552, 559.

### INCORPOREAL HEREDITAMENT.

Incorporeal hereditaments are not the object of sensation, can neither be seen nor

handled, are creatures of the mind, and exist only in contemplation. A species of incorporeal hereditaments is that of ways, or the right of going over another man's ground. *Hegan v. Pendennis Club (Ky.)* 64 S. W. 464, 465 (citing 2 Blackstone, 17).

"Kent says that incorporeal hereditaments comprise certain inheritable rights, which are not, strictly speaking, of a corporeal nature or land, although they are, by their own nature or use, annexed to corporeal inheritances, and are rights issuing out of them or concerning them. 3 Kent, Comm. 402. Their existence is merely in idea and abstract contemplation, though their effects and profits may be frequently objects of our bodily senses." *Whitlock v. Greacen*, 21 Atl. 944, 48 N. J. Eq. 859 (citing 2 Bl. Comm. 19).

An incorporeal hereditament is distinct from land, and is not a thing corporeal itself, but something collateral thereto. In order to form a clear notion of an incorporeal hereditament, we must be careful not to confound the profits produced and the thing or hereditament which produced them. Under this distinction, a statute declaring that no bargain, sale, etc., of houses or lands shall be good, unless properly acknowledged, does not extend to a right of way, which is an incorporeal hereditament. *Stone v. Stone*, 1 R. I. 425, 428.

The term "incorporeal hereditament" includes an easement in a right of way over the lands of another. Such an easement embraces the idea of a dominant and servient tenant; that is, there appertains in the former a right in the estate of the latter which is inheritable, but not tangible—is not a part of the adjacent land, but a right to use it for a particular purpose useful to the land of the owner of the dominant estate. Such a right passes by deed, and is classified as real estate. *Sangerland v. International Contracting Co.*, 4 N. Y. Supp. 12, 22, 43 App. Div. 215. See, also, *Johnson v. Lewis*, 14 S. W. 466, 467, 47 Ark. 66; *McMillian v. Lauer*, 24 N. Y. Supp. 951, 953.

The right which a party has to the use of water flowing over his own land is identified with the realty, and is a real or corporeal hereditament, and not an easement. But the right of a party to have the water of a stream or water course flow to or from his lands or mill over the land of another, is an incorporeal hereditament and an easement. *Cary v. Daniels*, 46 Mass. (5 Metc.) 236, 238.

The claim to land under a certificate of location is not a chattel, but is an incorporeal hereditament, fulfilling Blackstone's definition thereof as "a right issuing out of a thing corporate, whether real or personal." The claim to land, until perfected by loca-

tion and patent, was simply a right granted by the United States to receive so many acres of land—a mere equity. *Walker v. Daly*, 49 N. W. 812, 813, 80 Wis. 222.

#### As land or property.

As included in term "land," see "Land."  
As real property, see "Real Property."

#### Particular hereditaments.

Easement as, see "Easement."  
Ferry franchise as, see "Ferry Franchise."  
Franchise as, see "Franchise."  
Office as, see "Office."  
Way as, see "Way."

### INCORPOREAL REAL PROPERTY.

Incorporeal real property is defined to be the right issuing out of or annexed to a thing corporeal, and consists of the right to have some part only of the produce or benefit of the corporeal property, or to exercise a right or have an easement or privilege or advantage over or out of it. *Nellis v. Munson*, 15 N. E. 739, 740, 108 N. Y. 453; *Nellis v. Munson*, 13 N. Y. St. Rep. 825, 827.

### INCORPOREAL THING.

Incorporeal things, in the Spanish civil law, are those things which can neither be seen nor touched, and of this kind are all species of rights which the Spanish jurisprudence taught. *Sullivan v. Richardson*, 14 South. 692, 708, 33 Fla. 1.

Incorporeal things are such as are not manifest to the senses, and which are conceived only by the understanding—such as the rights of inheritance, servitudes, and obligations. *Civ. Code La. 1900*, art. 460.

### INCORRIGIBLE.

Incorrigibility as an offense, see "Offense."

Whenever any person shall have been twice convicted and imprisoned in a state prison or penitentiary for terms of not less than one year, and shall thereafter be convicted and imprisoned in the state prison of the state for a term of not less than one year, such person shall be deemed and taken to be an incorrigible. *Gen. St. Conn. 1902*, § 1530.

An opinion charging a girl with being incorrigible sufficiently charges growing up in crime, within the meaning of *Const. art. 8, § 12*, providing that the Legislature may provide for the safe-keeping, education, and employment of all children who, for want of care or other cause, are growing up in mendicancy or crime. *Scott v. Flowers*, 84 N. W. 81, 82, 60 Neb. 675.

### INCREASE.

See "Future Increase"; "Natural Increase."

"Increased," as used in *Const. Cal. art. 12, § 11*, providing that the stock and bonded indebtedness of corporations shall not be increased without the consent of the person holding the larger amount of the stock, does not include or apply to the first creation of bonded indebtedness. To give it such meaning would be to inject into the provision the word "create." *Union Loan & Trust Co. v. Southern California Motor Road Co. (U. S.)* 51 Fed. 840, 850.

#### Of animals.

"Increase," as used in referring to an increase of the wife's separate estate constituting community property liable to execution against her husband, means the offspring of animals, and not the enhancement of the value of specific animals owned by a wife at her marriage, by reason of their natural growth, their care by the husband, and sustenance from the community estate. *Stringfellow v. Sorrells*, 18 S. W. 689, 82 Tex. 277.

Webster defines the word "increase" as that which is added to the original stock by augmentation or growth; produce; profit; interest; progeny; issue; offspring. The *Century Dictionary* defines it as the amount or number added to the original stock, or by which the original stock is augmented; increment; profit; interest; produce; issue; offspring. The *Standard Dictionary* defines it as (1) produce, as of crops; (2) increment by generation; progeny; (3) commercial or financial increment; profit; interest. A chattel mortgage of sheep and the increase thereof therefore covers the wool thereafter shorn from such sheep. *Alferitz v. Ingalls (U. S.)* 83 Fed. 964, 974.

The word "increase," from "cresco," to grow, originally meant growth. It has acquired other meanings by use, but some are figurative, and others, which at first seem not to be growth, upon examination will be seen to be strictly so. When we speak of the earth's increase, meaning the annual crops, it is evident that the word is used figuratively. If we speak of interest on money as "increase," we refer to the sum of money at interest which is thereby increased. This is growth. Similarly, when we refer to rents, profits, and other gains as increase, it is the fortune of the owner which thereby is made to grow. When we speak of the increase of a herd of cattle or a flock of sheep, we refer to the growth of the herd or flock by the addition of new members. The natural increase can only mean the addition of new members by birth. As used in a mortgage upon "5,500 sheep and the

increase thereof," the term means additions in number to such sheep, and not the wool grown upon and clipped from such sheep. *Alferitz v. Borgwardt*, 58 Pac. 460, 461, 128 Cal. 201.

#### Of estate property.

The increase of estate property, within the meaning of a statute requiring executors to account for the increase, means the increase to the inventory for any cause, whether direct or indirect—whether it be the increase of the flock or the increase from interest; the increase from selling at a higher price than the appraised value in the inventory, or the increase from any property not embraced in the inventory. In *re Jones* (N. Y.) 1 Redf. Sur. 263, 266.

#### Of funds.

The term "increase" in a will directing that the rents, dividends, increase, and income in a fund composed of corporation stock and other property shall be paid to testator's children, does not include, when considered in connection with the corporation stock, anything more than dividends; and therefore a profit on the sale of a right to subscribe for additional stock goes to the trustees, and not to the beneficiaries. *Brinley v. Grou*, 50 Conn. 66-77, 47 Am. Rep. 618.

"Increase," as used in a will devising the interest, increase, profits, and income of a fund for life, is synonymous with "profits," but will not be held to include increase in value of the securities in which the funds are invested. *Linsly v. Bogert*, 33 N. Y. Supp. 975, 980, 87 Hun, 137.

Under a wife's conveyance of her separate estate to her husband, reciting that she appointed him trustee therein for her children, and that he agreed to use and invest the money according to his best ability, and that the increase or profits arising from any investment shall belong to the children, and that he shall reinvest such increase or profits for their benefit, the term "increase" would seem to mean something more than, and different from, the rents or hire of the property, or its mere increase in value, and that it showed that it was contemplated that there might be some profit resulting from handling the fund, other than rents—such, for example, as an increment arising from a purchase of property and a sale for reinvestment. *Scottish-American Mortg. Co. v. Massie*, 60 S. W. 544, 545, 94 Tex. 339.

#### Of hazard or risk.

In determining as to whether or not there has been an increase of risk, it is essential to ascertain what the parties must be presumed to have contemplated when the insurance was made; and this involves a consideration of the usages and incidents of

the risk, because, if the change was one warranted by the usage or usual incidents of the risk, although it in fact increased the risk, it does not come within the prohibition, because it is presumed to have been contemplated by the parties. *Smith v. German Ins. Co.*, 107 Mich. 270, 282, 65 N. W. 236, 241, 30 L. R. A. 368 (citing *Wood, Fire Ins.* [2d Ed.] § 253).

"Increase of hazard," as used in an insurance policy, denotes an alteration or change in the situation or condition of the property insured which tends to increase the risk, and implies something of duration, so that a casual change, of a temporary character, would not ordinarily render the policy void. *Angier v. Western Assur. Co.*, 71 N. W. 761, 763, 10 S. D. 82, 66 Am. St. Rep. 685.

A fire insurance policy providing that, if the premises should be occupied or used so as to "increase the risk" without the consent of the insurer, the policy should be void, means an essential increase of the risk. *Crane v. City Ins. Co.* (U. S.) 3 Fed. 558, 560.

#### Of land.

The term "increase of land," in *Sayles' Civ. St. art. 2851*, providing that the increase of all land which is the separate property of either of the spouses shall remain the separate property of that spouse, includes profits arising from the act of the husband in taking funds arising from the sale of his wife's land and investing it in other lands, and in continuing, as her agent, to buy and sell land. *Evans v. Purinton*, 34 S. W. 350, 353, 12 Tex. Civ. App. 158. And it includes the profits accruing from the sale of land purchased by a wife with her separate money. *Cabell v. Menzies* (Tex.) 35 S. W. 206, 208. But it does not include rents accruing from the real property of the wife. *Hayden v. McMillan*, 23 S. W. 430, 431, 4 Tex. Civ. App. 479.

#### Of person as word of succession.

A bequest of slaves and other property to A. and her increase, without any allusion to a particular estate in her, and without any terms to qualify or control the meaning of "increase," confers upon A., the mother, the absolute property. *Holderby v. Holderby*, 57 N. C. 241, 243.

#### Of salary.

The constitutional restriction imposed by Const. art. 15, § 9, and article 4, § 33, providing that no increase of such compensation shall take effect during the term of which the members of either house shall have been elected, etc., is doubtless intended only to prevent the increase of salary or compensation of officers as such officers, or for duties naturally belonging to their positions, and cannot, consequently, be extended

to prevent the allowance of compensation to officers upon whom duties or responsibilities in no wise connected with their offices are imposed. *Crosman v. Nightingill*, 1 Nev. 323, 325.

Laws 1893, c. 104, fixing the compensation of judges of the Supreme Court for services as justices of the General Term in the First Judicial Department, is not an increase of salary, within the meaning of Const. art. 6, § 12, prohibiting the increase of judges' and justices' salaries during their official terms; such act providing, rather, for reimbursing the expenses and disbursements of such justices in rendering such services. *People v. Fitch*, 39 N. E. 972, 974, 145 N. Y. 261.

#### Of slaves.

"The ordinary sense of 'increase,' in respect to a woman, is her children, grandchildren, etc., and issue of her body—descendants." Thus, in a will giving a female slave and her child to A., and then giving the woman and her increase over after the death of A. to another, does not show that the word "increase" was not used in its ordinary sense, so as to include the particular child designated, as well as all other children and grandchildren of the slave. *Moye v. Moye*, 58 N. C. 359, 360.

In construing a will bequeathing a negro woman to A. for life, and then to B. and her heirs forever, and providing that the increase of the woman, if she had any, shall go to the daughters of B. after her death, it was said that "the suggestion that 'increase' has a broader meaning than 'children,' and includes descendants to any indefinite future period, and so the limitation over is void, to prevent a perpetuity, is not well founded. What increase the daughters of B. are to take will be determined at her death, or, at all events, at the death of the negro woman. So the limitation must take effect within a life or lives in being." *Carroll v. Hancock*, 48 N. C. 471, 473.

In a marriage settlement of property, including slaves, providing that the mesne profits and labor of the property, when divided, both of land and negroes, together with the increase of said negroes, should be used by the husband for the joint benefit of himself and wife, if they lived together, the term "increase" means natural increase, and does not pass the increase themselves of the slaves, but only their labor, which increase would go to increase the corpus of the estate. *Carswell v. Schley*, 56 Ga. 101, 111.

#### Same—After-born children.

In *Selbels v. Whatley*, 2 Hill, Eq. 607, the bequest was of Nance and her increase; and the Court of Appeals say that, when the term "increase of slaves" is used, it is the common understanding of men that it refers

to increase thereafter to be produced, and they could not in any way construe them to children born before the making of the will. It is not, perhaps, so important what the rule is, as that it should be fixed. Since the case of *Selbels v. Whatley*, the term "increase," when used in a will in reference to slaves, must, as a general rule, be construed to include after-born children only. It is supposed that the term "all her increase" may make a difference. But supposing "increase" to have the established meaning of "after-born children," "all" is merely an expletive, and includes all her after-born children. *Donald v. Dendy* (S. C.) 2 McMul. 123, 130.

The word "increase," as used in a will devising negroes and their increase, "is not unequivocal. Generally speaking, indeed, it carries only issue born after the death of the testator, yet sometimes it has carried that born after the date of the will, and it may even take that born before the date of the will, upon the apparent intent." *Hurdle v. Elliott*, 23 N. C. 174, 177; *Reno's Ex'rs v. Davis* (Va.) 4 Hen. & M. 283, 290; *Puller's Ex'rs v. Puller* (Va.) 3 Rand. 83, 85.

A will providing that, after the death of the daughter of the testator, the negro woman P. and all her increase were to be equally divided among such daughter's children, means only the issue born after the testator's death. Such term means in such case no more than "increase" per se. *Hurdle v. Reddick*, 29 N. C. 87, 89. See, also, *Cole v. Cole*, 23 N. C. 460, 462.

#### Of wife's separate property.

The term "increase," as used in Const. art. 12, § 14, providing that the rights of married women to their separate property, real and personal, and the increase of the same, shall be protected, cannot be construed to include the profit, interest, or revenue arising from the use of the wife's property, though, in an etymological sense, the word "increase," as applied to land, means that which grows out of it, or that which is produced by its cultivation. *Carr v. Tucker*, 42 Tex. 330, 336.

"Increase," as used in St. 1848, providing that all property, both real and personal, of the wife, owned and claimed by her before marriage, and that acquired afterward by gift, devise, or descent, as also the increase of all lands or slaves thus acquired, shall be the separate property of the wife, in an etymological sense, as applied to lands or to the soil, means that which grows out of it, or that which is produced by the cultivation of it; but such is not the meaning to be attached to it as used in the statute, for, if the increase of land means a product of the soil itself, it would follow that a crop grown on the land of her husband by the labor of the slaves of the wife would be the separate prop-

erty of the husband, because it was the increase of his land. *De Blane v. Lynch*, 23 Tex. 25, 28.

#### INCREASE IN THE FAMILY.

The expression "increase in the family," in common parlance, means the addition of a child, and, in a will, indicates that the word "family" was used in the sense of "children." *White v. Briggs*, 15 Sim. 17, 30.

#### INCREASED STOCK.

Between such stock as may be authorized and required by the charter of a corporation—that is, original stock or foundation stock—and increased stock there is a substantial difference. In case of the issue of increased stock there is no implied understanding that the whole of the authorized issue shall be subscribed for. A subscriber's contract for such stock is that he will pay the price agreed upon for the stock, and, if it is not delivered in accordance with such contract, he is liable at any time to be called upon to pay whatever balance he may owe. *Gettysburg Nat. Bank v. Brown*, 52 Atl. 975, 976, 95 Md. 367, 93 Am. St. Rep. 339.

#### INCREASED VALUE.

"Increased value," as used in Act Cong. June 30, 1864, § 96, which exempts from the tax laid on sundry articles of dress by section 95 clothes manufactured of materials on which a duty has been paid, unless the increased value exceeds 5 per cent. ad valorem, means the difference between the market value of the materials at the time the first tax was paid and the market value of the manufactured goods at the time of the assessment of the second tax. *Boylan v. United States*, 77 U. S. (10 Wall.) 58, 62, 19 L. Ed. 859.

#### INCRIMINATING CIRCUMSTANCES.

"'Incriminate' means to charge with a crime, and an incriminating circumstance is one which tends to show that a crime has been committed, or that some particular person committed it." *Davis v. State*, 70 N. W. 984, 987, 51 Neb. 301.

#### INCULCATE.

"To inculcate" means to impress by frequent admonitions; to teach and enforce by frequent admonitions; to urge on the mind; and, as used in the charter of a corporation, stating that one of the objects and purposes of the corporation is to inculcate just and equitable principles of trade, it becomes the duty of the corporation to do some act to fulfill such purpose; and, where it has failed to

do so, it cannot try a member for a proceeding inconsistent with the just and equitable principles of trade. *People v. New York Produce Exchange*, 29 N. Y. Supp. 307, 308, 8 Misc. Rep. 552.

#### INCULPATING.

In an instruction stating that if the jury believed from the evidence in the case, and found that defendant, without any information from any one else, "pointed out the places where the tools were found, and they were the tools that were used in wrecking the train, that would be an inculpatory circumstance that might be considered in the case, with reference to defendant's guilt, in connection with other evidence," the use of "inculpatory" served only to characterize the purpose for which the testimony was admitted, and did not amount to an expression of an opinion as to its probative value in determining the guilt or innocence of the accused. *Shaw v. State*, 29 S. E. 477, 479, 102 Ga. 660.

#### INCUMBENT.

An incumbent of an office is one who is legally authorized to discharge the duties of that office. *State v. Blakemore*, 15 S. W. 960 961, 104 Mo. 340.

The term "incumbent," as used in Act Feb. 14, 1840, providing that no citizen of the state shall hold by appointment at the same time, or for the same period of time, more than one of certain offices mentioned, but providing that nothing contained in the act should be applicable to present incumbents of two or more official stations, until their term of office should expire, means one who is legally authorized to discharge the duties of that official station or office. For instance, a man who is elected county treasurer is required to give bonds and take an oath of office. These things must be done before he can discharge the duties of the office, and, if not done in due time, the office itself is vacant, and there is no incumbent. So, where a man is elected judge, he does not by the election become a judge. He must receive a commission, as evidence of his authority to act; must take an oath of office, and have it indorsed on his commission. When this is done, and not before, he is an incumbent of the office. A person appointed or elected to an office does not thereby become an incumbent of that office. *State v. McCollister*, 11 Ohio, 46, 50.

The term "incumbent," in the title relating to elections, means the person whom the canvassers declare elected. *Pol. Code Idaho 1901*, § 927.

#### As one elected merely.

*Pol. Code*, § 966, providing that an office becomes vacant on the refusal or neglect of

the incumbent to file his official oath or bond within the time prescribed, includes a person elected to an office, though he does not qualify at all. The statute regards the person duly elected to an office as the incumbent from the time of the commencement of the term for which he was elected until the expiration thereof, whether he qualifies or not. *People v. Taylor*, 57 Cal. 620, 622. But contra, see *People v. Ward*, 40 Pac. 538, 539, 107 Cal. 236.

The term "incumbent," as used in Gen. St. 1878, c. 9, § 2, subd. 1, providing that an office shall become vacant on the death of the incumbent, means a person in possession of an office, and hence does not include a person elected to the office, but who has not qualified or entered on the duties thereof. *State v. Benedict*, 15 Minn. 198, 201 (Gil. 153, 156). But in subdivision 6 of the same chapter, providing that an office shall become vacant on the refusal or neglect of the incumbent to take the oath of office, and file it, etc., it was held to refer not merely to one already administering the duties of an office, but as well to one elected or appointed to an office, but not yet qualified. *Board of Com'rs of Scott County v. Ring*, 13 N. W. 181, 183, 29 Minn. 398.

## INCUMBER—INCUMBRANCE.

"Incumber" means to load with debts, as an estate is incumbered with mortgages or with a wife's dower. *Newhall v. Union Mut. Fire Ins. Co.*, 52 Me. 180, 181 (citing *Webst. Dict.*).

Webster defines an incumbrance as a burdensome and troublesome load; anything that impedes motion or action, or renders it difficult or laborious; a clog; a hindrance; a check. *Cream City Mirror Plate Co. v. Swedish Bldg. & Loan Ass'n*, 74 Ill. App. 362.

The word "incumber," as used in an act incorporating a street railway company, which provides that such corporation shall not incumber any portion of the streets or highways not occupied by such tracks, means "to obstruct or hinder travel by putting things in the way of it." "To incumber, according to Webster, is to impede the motion or action of, as with a burden; to weigh down; to obstruct; to embarrass or perplex." *Taggart v. Newport St. Ry. Co.*, 19 Atl. 326, 327, 16 R. I. 668, 7 L. R. A. 205.

In construing a building contract providing that the contractor should sustain all damages resulting from incumbrances in the line of the work, it was said that the word "incumbrance" must necessarily be construed as intending anything which, being discovered, would prevent or delay the contractor in the performance of his contract. It necessarily includes everything in the line of the work which has that effect, and therefore

an obstruction falls within the meaning of such term, although it was not foreseen at the time of making the contract. *Mairs v. City of New York*, 65 N. Y. Supp. 160, 162, 52 App. Div. 348.

"An object is not an incumbrance in a highway unless it obstructs the use of the way, while an encroachment is an unlawful gaining upon the rights or possessions of another, as where a man sets a fence beyond his line. *Bouv. Law Dict.* This is the meaning of the term in Gen. St. p. 151, c. 70, entitled 'Incumbrances and Encroachments upon Highways.' The Legislature, in passing such statutes, understood encroachments and incumbrances to be different evils, requiring different remedies. Thus the title furnishes evidence that the object of the statute was to preserve the limitations of the public right in the prevention of obstructions to travel." *State v. Kean*, 45 Atl. 256-257, 69 N. H. 122, 48 L. R. A. 102.

"Incumbrances and erections," as used in Greater New York Charter, § 610, providing that the board of park commissioners may enact ordinances for the government and protection of all parks, and shall at all times be subject to all ordinances in respect to any erection or incumbrance thereon, does not include a portion of a house erected by the owner of contiguous property, a part of which encroaches on the park. *Ackerman v. True*, 66 N. Y. Supp. 140, 143, 31 Misc. Rep. 597.

"Incumbrances," as used in a city charter authorizing the common council to prevent the incumbrance of streets with carriages, wagons, lumber, or any other material, is synonymous with "obstruction," and authorizes the council not only to remove or cause to be removed anything actually obstructing a street, but also to take measures to prevent anything from becoming an obstruction. *Fox v. City of Winona*, 23 Minn. 10, 11.

Where a sewer contract provided that incumbrances and obstructions should be removed by the contractor at his own expense, a subsequent filling in the line of the sewer on a change of grade to a considerable degree was not an incumbrance or obstruction, within the meaning of the contract. *Thleemann v. City of New York*, 81 N. Y. Supp. 773, 777, 82 App. Div. 136.

## INCUMBRANCE (On Title).

See "Covenant against Incumbrances"; "Free from Incumbrance."

An incumbrance is any right to or interest in land which may subsist in third persons to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee. *Prescott v. Trueman*, 4 Mass. 627, 629, 3 Am. Dec. 249 (citing 2 Greenl. Ev. § 242); *Fuller v. Wright*, 35 Mass.



(18 Pick.) 408, 405; *Fitch v. Seymour*, 50 Mass. (9 Metc.) 462, 467; *Jones v. Gardner* (N. Y.) 10 Johns. 263, 269; *Huyck v. Andrews*, 20 N. E. 581, 582, 113 N. Y. 81, 3 L. R. A. 789, 10 Am. St. Rep. 432; *Koezly v. Koezly*, 65 N. Y. Supp. 613, 615, 31 Misc. Rep. 397; *Mitchell v. Warner*, 5 Conn. 497, 527; *Kelsey v. Remer*, 43 Conn. 129, 133, 21 Am. Rep. 638; *Alling v. Burlock*, 46 Conn. 504, 510 (citing Rawle, Cov. [4th Ed.] p. 94); *Carter v. Denman's Ex'rs*, 23 N. J. Law (3 Zab.) 260, 272; *Demars v. Koehler*, 41 Atl. 720, 721, 62 N. J. Law, 203, 72 Am. St. Rep. 642; *Laferty v. Milligan*, 30 Atl. 1030, 1031, 165 Pa. 534; *Batley v. Foerderer*, 29 Atl. 868, 870, 162 Pa. 460; *Stambaugh v. Smith*, 23 Ohio St. 584, 591; *Barlow v. McKinley*, 24 Iowa, 69, 70; *Harrison v. Des Moines & Ft. D. Ry. Co.*, 58 N. W. 1081, 1082, 91 Iowa, 114; *Stokes v. Maxson*, 84 N. W. 949, 950, 113 Iowa, 122, 86 Am. St. Rep. 367; *Chapman v. Kimball*, 7 Neb. 399, 403; *Post v. Campau*, 3 N. W. 272, 274, 42 Mich. 90; *Fritz v. Pusey*, 18 N. W. 94, 95, 31 Minn. 368; *Mackey v. Harmon*, 24 N. W. 702, 704, 34 Minn. 168; *Clark v. Fisher*, 38 Pac. 493, 495, 54 Kan. 403; *Farrington v. Tourtelott* (U. S.) 39 Fed. 738, 740; *In re Gerry* (U. S.) 112 Fed. 958, 959; *Campbell v. Hamilton Mut. Ins. Co.*, 51 Me. 69, 72.

An incumbrance is whatever is a lien on an estate. *Campbell v. Hamilton Mut. Ins. Co.*, 51 Me. 69, 72.

An incumbrance is a weight on the land which must lessen the value of it. *Prescott v. Trueman*, 4 Mass. 627, 629, 3 Am. Dec. 249 (quoted in *Harrison v. Des Moines & Ft. D. Ry. Co.*, 58 N. W. 1081, 1082, 91 Iowa, 114); *Mitchell v. Warner*, 5 Conn. 497, 527.

In *Forster v. Scott*, 32 N. E. 976, 136 N. Y. 577, 18 L. R. A. 543, the same definition as in *Prescott v. Trueman*, 4 Mass. 630, is given, in substance; and it is also added that any right existing in another to use the land, or whereby the use by the owner is restricted, is an "incumbrance," within the legal meaning of the term. *Koezly v. Koezly*, 65 N. Y. Supp. 613, 615, 31 Misc. Rep. 397.

An incumbrance is defined to be "a burden on land, depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee." *Harrison v. Des Moines & Ft. D. R. Co.*, 58 N. W. 1080, 1082, 91 Iowa, 100; *Batley v. Foerderer*, 29 Atl. 868, 870, 162 Pa. 460; *In re Gerry* (U. S.) 112 Fed. 958, 959.

Every burden on the estate or clog on the title, such as a term for years or grant by copy of court roll, is an incumbrance. *Seitzinger v. Weaver* (Pa.) 1 Rawle, 377, 382.

Anything is an incumbrance which constitutes a burden on the title, as a right of

way. *Clark v. Swift*, 44 Mass. (3 Metc.) 390, 393.

An "incumbrance," as defined by Webster, is a burden or charge on property; a claim or lien on an estate which may diminish its value. Incumbrances are of two classes: (1) Such as affect the title to the property; and (2) such only as affect the property's physical condition. A mortgage or other lien is a fair illustration of the former, while a public road or right of way is an illustration of the latter. *Memmert v. McKeen*, 4 Atl. 542, 544, 112 Pa. 315; *Gilham v. Real Estate Title Ins. & Trust Co.*, 52 Atl. 85, 86, 208 Pa. 24.

Incumbrances on lands are liens which, proprio vigore, bind the reality; which fasten upon and follow it into the hands of all purchasers, who take it with notice of their existence; and which may be enforced by a sale of the property. They are called "incumbrances" because they rest as a burden on the title until they are removed by payment or release. *Gordon v. McCulloch*, 7 Atl. 457, 458, 66 Md. 245.

The word "incumbrance," as used in a contract to convey lands free from all incumbrances, means any claim which charges, burdens, obstructs, or impairs the use of the land, or prevents its transfer. *Anonymous* (N. Y.) 2 Abb. N. C. 56, 62.

*Anderson*, in his Law Dictionary, defines "incumbrance" to be a burden; an obstruction or impediment; anything that impairs the use or transfer of property. Webster defines an incumbrance to be a burdensome and troublesome load, and, again, a burden or charge on property; a legal claim or lien on an estate. *Willis v. Rapid Valley Horse Ranch Co.*, 63 N. W. 546, 548, 7 S. D. 114.

Where several grantors join in a deed and in a covenant against incumbrances, the covenant must be construed as extending to several as well as joint incumbrances. *Duvall v. Craig*, 15 U. S. (2 Wheat.) 45, 54, 4 L. Ed. 180.

A condition which may work a forfeiture of the estate is an incumbrance. *Jenks v. Ward*, 45 Mass. (4 Metc.) 404, 413.

The term "incumbrances" includes taxes, assessments, and all liens upon real property. *Civ. Code Mont.* 1895, § 1520; *Civ. Code Idaho* 1901, § 2417; *Rev. Codes N. D.* 1899, § 3549; *Civ. Code Cal.* 1903, § 1114.

#### As claim.

See "Claim."

#### Conveyance distinguished.

Code 1857, p. 336, art. 23, providing that no conveyance or incumbrance for the separate debts of the husband shall be binding on the wife beyond the amount of her income, means that the wife shall not make

her property security for her husband's debts by any form of instrument by which, under the law, a lien or hypothecation can be created. The words "conveyance or incumbrance," as so used, are not used to convey the same idea. "Conveyance" is a general word, comprehending the several modes of passing title to real estate. Strictly speaking, the words include mortgages and deeds of trust, and also the ordinary deed of bargain and sale. *Klein v. McNamara*, 54 Miss. 90, 105.

#### **Extent of diminution.**

The existence of an incumbrance does not depend upon the extent or amount of the diminution of value. If the right or interest of the third person is such that the owner of the servient estate has not so complete and absolute an ownership in his land or property as he would have if the right spoken of did not exist, his land is, in law, diminished in value and incumbered. *Mackey v. Harmon*, 24 N. W. 702, 704, 84 Minn. 168.

The diminution of value which is made the test of an incumbrance is not, however, limited to cases where the thing granted is, by reason of some outstanding right or interest in a third person, of less pecuniary worth, but also extends to cases where the grantee, by reason of such outstanding interest, does not acquire complete dominion, which the grant apparently gives. Therefore an action may be maintained for a breach of the covenant against incumbrances by a grantee, where there was an outstanding term, though the land may not have been diminished in value thereby. Evidence as to such a term might be admissible on the question whether his damages should be substantial or only nominal, but would be entirely inadmissible to defeat recovery. *Demars v. Koehler*, 41 Atl. 720, 721, 62 N. J. Law, 203, 72 Am. St. Rep. 642.

#### **Knowledge of incumbrance.**

Where a deed conveyed an undivided part of a pew in a meeting house free from all incumbrances, the covenant was not broken because the pew was liable for a portion of the expense which had been incurred in building the meeting house, since the facts must have been known to both parties. *Spring v. Tongue*, 9 Mass. 28, 6 Am. Dec. 21.

Where the incumbrance affects the physical condition of the premises—e. g., an open, notorious easement—the purchaser must be presumed to have seen it, and to have fixed his price for the land with reference to the actual condition of the land, and such incumbrance is not a breach of the covenant. *Memmert v. McKeen*, 4 Atl. 542, 544, 112 Pa. 315. See, also, *Kutz v. McCune*, 22 Wis. 623.

Knowledge by the grantee of the existence of the easement at the time of the conveyance does not affect his right of action. *Huyck v. Andrews*, 20 N. E. 581, 582, 113 N. Y. 81, 10 Am. St. Rep. 432.

#### **Absolute conveyance.**

Within Comp. Laws 1879, art. 27, c. 80, providing that the lien of a mechanic or materialman has preference to all other liens and incumbrances, an absolute conveyance is an incumbrance, in the fullest sense of that term. *Warden v. Sabins*, 12 Pac. 520, 522, 36 Kan. 165.

#### **Attachment lien.**

An attachment levied upon lands is an incumbrance. *Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638.

A lien or charge upon land which binds it for the payment of a debt is an incumbrance. The incumbrance may be created by contract, or it may be acquired in pursuance of some statute. The lien of an attaching creditor is an incumbrance, equally with a mortgage. *Spangler v. Sanborn*, 43 Pac. 905, 907, 7 Colo. App. 102.

The lien of an attachment is an incumbrance, within the meaning of 1 Mills' Ann. St. § 446, providing that a recorded deed or agreement as to real estate shall take effect as to bona fide purchasers and incumbrancers not having notice thereof, and shall take precedence of an unrecorded title or interest of which the attaching creditor had no notice before attachment. *Teller v. Hill* (Colo.) 72 Pac. 811, 813 (citing *Perkins v. Adams*, 63 Pac. 792, 16 Colo. App. 96).

#### **Bond to convey.**

A bond for the conveyance of land upon the payment of a sum of money at a specified time is not an incumbrance on premises insured, if the time has expired, and the money has not been paid, even if the obligor has verbally waived the time. *Newhall v. Union Mut. Fire Ins. Co.*, 52 Me. 180, 181.

#### **Building restrictions.**

Where the owners of adjoining lots covenant that all buildings erected on them shall be set back a specified distance from the line of the street, such a covenant constitutes an incumbrance upon the lot to which it applies, and, if the covenantor subsequently conveys by a deed containing the usual covenant against incumbrances, a breach of the latter covenant arises the instant the deed is executed. *Roberts v. Levy* (N. Y.) 3 Abb. Prac. (N. S.) 311, 316.

Where a deed of lands contained conditions that the grantee should not build, except under certain restrictions, there was a valid condition subsequent, a breach of which divested the estate, and such restrictions

were incumbrances. *Anonymous* (N. Y.) 2 Abb. N. C. 56, 62.

As a general rule, party-wall contracts and real estate improvements, either required or forbidden, are incumbrances. Thus a title conditioned that no mill, factory, brewery, or distillery shall be erected on the premises, is not a title free of all incumbrances. *Batley v. Foerderer*, 29 Atl. 868-870, 162 Pa. 460.

#### Cloud on title.

In a popular sense, the word "incumbrance" might include an illegal claim set up to land under such a state of facts as would apparently give title when in fact no title existed. Thus used, it would be equivalent to the words "cloud upon title." In a legal sense, the word "incumbrance" means an estate, interest, or right in lands, diminishing their value to the general owner; a paramount right in, or weight upon, land, which may lessen its value; and hence a suit for the recovery of land is not a suit to remove incumbrances upon the title to land. *Thomson v. Locke*, 1 S. W. 112, 114, 66 Tex. 383.

#### Dower.

A dower interest in land is not an incumbrance, but an interest in the land itself. *Johnson v. Elmen*, 59 S. W. 253, 255, 94 Tex. 168, 52 L. R. A. 162, 86 Am. St. Rep. 845.

In some cases the inchoate right of dower is spoken of as incumbrance, but as thus used the term "incumbrance" is not used in the sense of a lien, but rather in the sense of an outstanding paramount title, which operates as a breach of the covenant of seisin. *Shell v. Duncan*, 10 S. E. 330, 335, 31 S. C. 547, 5 L. R. A. 821.

A right of dower, whether assigned or unassigned, is an incumbrance. *Runnells v. Webber*, 59 Me. 488, 490.

"Incumbrance," as used in insurance applications, applies to and includes an unassigned dower interest of another than the applicant. *Ohio Farmers' Ins. Co. v. Britton*, 31 Ohio St. 488, 490.

An inchoate or contingent right of dower constitutes an incumbrance, within the meaning of a covenant against incumbrances. *Durrett v. Piper*, 58 Mo. 551, 554; *Fuller v. Wright*, 35 Mass. (18 Pick.) 403, 405; *Jones v. Gardner* (N. Y.) 10 Johns. 266, 269.

An agreement to sell certain lands, and furnish a "fee-simple title, free from incumbrances," is violated by the grantor's wife refusing to sign the deed, thereby preventing him from being able to fulfill such contract. *Drake v. Baker*, 34 N. J. Law (5 Vroom) 358, 359.

"Incumbrances," as used in a covenant to make a deed clear of all incumbrances,

means a settled, fixed incumbrance. A possibility of dower is not an incumbrance within the meaning of such a covenant. *Powell v. Monson* (U. S.) 19 Fed. Cas. 1218, 1221; *Bostwick v. Williams*, 36 Ill. 65, 70, 85 Am. Dec. 385.

#### Easement.

It cannot be denied that an easement is a restriction and incumbrance, within the possible meaning of the words as used in St. 1889, c. 442, § 1, providing that when the title to land appears of record to be affected by a restriction, etc., a petition may be filed to determine the validity or nature and extent of such incumbrance; and this is so whether the easement is created by covenant or by grant. *Crocker v. Cotting*, 53 N. E. 158, 160, 173 Mass. 68.

If land which is subject to an easement is devised "subject to all incumbrances thereon," the fact that the testator had been in the habit of using the land in connection with his adjoining land does not make such mode of use an incumbrance; nor is such construction aided by the fact that the testator devised his remaining land to two persons in severalty, and imposed an easement on each part for the benefit of the other. *Sullivan v. Ryan*, 130 Mass. 116, 118.

A right to an easement of any kind is an incumbrance. Accordingly the right of a third party to the use of the water of a brook running through certain land granted by a deed, being an easement, was an incumbrance, and, had the deed contained a covenant against incumbrances, would have been a breach thereof. *Mitchell v. Warner*, 5 Conn. 497, 527.

The grant by a wife of a right to use the front stairway of a building so long as the party wants it is not an incumbrance, within the provision of section 2974 of the Code, providing that no conveyance or incumbrance of the homestead is valid unless the husband and wife join in the execution of some joint instrument. *Stokes v. Maxson*, 84 N. W. 949, 950, 113 Iowa, 122, 86 Am. St. Rep. 367.

An easement is an incumbrance, within the meaning of the covenant against incumbrances. *Kuhnen v. Parker*, 38 Atl. 641, 642, 56 N. J. Eq. 286 (citing Rawle, Cov. [1st Ed.] p. 115); *Mackey v. Harmon*, 24 N. W. 702, 703, 84 Minn. 168.

A covenant against incumbrances is broken by the existence of an easement over a portion of the land for the purpose of maintaining a dam. *Huyck v. Andrews*, 20 N. E. 581, 582, 113 N. Y. 81, 3 L. R. A. 789, 10 Am. St. Rep. 432.

An easement of light is an incumbrance. *Denman v. Mentz*, 52 Atl. 1117, 1119, 63 N. J. Eq. 613.

**Eminent domain.**

An incumbrance is said to import every right to or interest in the land, which may subsist in another, to the diminution of the value of the land, but consistent with the power to pass the fee by a conveyance. Any right existing in another to use the land, or whereby the use by the owner is restricted, is an incumbrance, within the legal meaning of the term. Thus the filing of a map, by the department of parks, of a proposed street, under section 677, of the consolidation act, providing that on the final opening and condemnation of a street, a map of which has been filed by the department, no compensation shall be allowed for any building erected thereon after the filing of the map, would constitute an incumbrance on the land through which the street would run if open, if such act were valid. *Forster v. Scott*, 32 N. E. 976, 977, 136 N. Y. 577, 18 L. R. A. 543.

The term "incumbrance," within the meaning of a covenant by a vendor of city property that it was clear of all incumbrances, was construed to include the right of a city to open the street without paying any damages for buildings erected in the bed thereof after the street was laid out and platted on the city plan. *Evans v. Taylor*, 35 Atl. 635, 177 Pa. 286.

**Exemption.**

An incumbrance is a legal claim in favor of one person on the estate of another. An exemption of property from execution sale is a favor to the owner of the property, and to no other person, although designed for the benefit of his family as well as for himself. One cannot have an incumbrance upon land to which he has a complete title, including the possession, as the latter comprehends and merges the former. So a representation by the owner of property, for the purpose of obtaining credit, that his house and lot were unincumbered, when at the same time he knew it was exempt from sale on execution, was not a false or fraudulent representation. The exemption constituted an impeachment or bar to the right of the creditor to resort to the land to obtain satisfaction of his judgment, but in no sense of the term was an incumbrance on the land. *Robinson v. Wiley*, 15 N. Y. 489, 492.

**Gas and water rent.**

The covenants implied by the words "grant, bargain, and sell," in a fee-simple deed, have been defined by the Legislature to be that the grantor was seised of an indivisible estate in fee simple, free from incumbrances done or suffered from him, and for quiet enjoyment. Where a grantor or his tenant defaulted in the payment of gas bills, by reason of which the gas was cut off from the building, such act created a direct incumbrance on the property, within the

meaning of such implied covenant, and was a breach thereof. *In re Wood's Estate* (Pa.) 41 Leg. Int. 225.

All claims of water rents are incumbrances, within the meaning of an order of sale of real estate of a bankrupt under and subject to incumbrances. *In re Gerry* (U. S.) 112 Fed. 958, 959.

The necessity of paying for water pipes laid in a street in front of property, only in case of use of the water flowing through it, is not in any legal sense a lien against the land, nor is it an incumbrance which affects the physical condition of the property, so that a vendor agreeing to pay all incumbrances against the property is not compelled to pay such sum. *Gilham v. Real Estate Title Ins. & Trust Co.*, 52 Atl. 85, 86, 203 Pa. 24.

**Highway.**

The term "incumbrances," as used in a deed containing a covenant against incumbrances, should be construed to include a highway, for the right of the public to an easement for land is utterly inconsistent with that exclusive dominion which the tenant in fee exercises in ordinary circumstances. It is true that the advantages derived from a highway may be more than equivalent to the loss sustained thereby, yet, so long as the others have a right which the owner of the soil can neither prohibit nor control, it seems clear that there is a subsisting legal incumbrance. *Hubbard v. Norton*, 10 Conn. 422, 431.

A public road upon lots of ground which the owner had covenanted to sell and convey is not such an incumbrance as will constitute breach of an agreement to convey clear of incumbrances. *Patterson v. Arthurs* (Pa.) 9 Watts, 152, 153.

A public town way over land conveyed is an incumbrance, within the meaning of a covenant that the premises are free of all incumbrances. *Kellogg v. Ingersoll*, 2 Mass. 97, 101.

**Judgment.**

Judgment duly rendered and docketed must be regarded as incumbrances, as used in popular speech. *Willis v. Rapid Valley Horse Ranch Co.*, 63 N. W. 546, 548, 7 S. D. 114 (citing *Redmon v. Phoenix Fire Ins. Co.*, 51 Wis. 292, 293, 8 N. W. 226, 37 Am. Rep. 830).

According to the well-understood meaning of the word "incumbrance," it has always been supposed to embrace judgment liens. Indeed, no incumbrance is more common than that created by the lien of judgments. *Bowman v. Franklin Ins. Co.*, 40 Md. 620, 631.

A judgment on a penal bond, with confession of judgment, conditioned upon the

restoration of certain personal property which had been levied upon by the sheriff, and upon which execution had been stayed, constituted an "incumbrance," within the meaning of a clause in a fire insurance policy providing that if the property should be incumbered by a judgment, mortgage, or otherwise, the policy should be void. And this is true though the property was subsequently forthcoming on the demand of the sheriff. *Seybert's Adm'rs v. Pennsylvania Mut. Fire Ins. Co.*, 103 Pa. 282, 285, 286.

Const. 1868, and homestead act, passed in accordance therewith, providing that the courts should have jurisdiction to enforce a judgment rendered upon a debt for money loaned to remove an incumbrance from the land claimed as a homestead, authorized the courts to take jurisdiction to enforce a mortgage given to secure payment of money to pay off a judgment upon the land. *Kelly v. Stephens*, 39 Ga. 466, 470.

#### **Lease.**

An outstanding lease is an incumbrance. *Clark v. Fisher*, 38 Pac. 493, 495, 54 Kan. 403; *Fritz v. Pusey*, 18 N. W. 94, 95, 81 Minn. 368.

In its ordinary significance, "incumber" is not expressive of the act of creating a tenancy for years in lands. It is appropriate to putting the property in pledge for the payment of money. *Sullivan v. Barry*, 46 N. J. Law (17 Vroom) 1, 5.

The word "incumbrances," as used in the charter of a fire insurance company, providing that no insurance shall be valid unless the insured has a good, unincumbered title to the insured property, or unless his true title and the incumbrances are fully disclosed and specified in the policy, construed to mean liens on the property and not to include ordinary leases thereof. *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553, 560.

Under Burns' Rev. St. 1894, § 6961, providing that a married woman cannot incumber or convey her lands, except by deed in which her husband shall join, a lease of lands by a married woman for the purpose of giving the lessee the right to prospect and operate for gas and oil was not an incumbrance or conveyance. *Heal v. Niagara Oil Co.*, 50 N. E. 482, 150 Ind. 483.

#### **Mechanic's lien.**

The term "incumbrance," as used in an application for fire insurance, relating to the incumbrance on the property, should be construed to include a subsisting lien of a mechanic or materialman for which a petition had been filed. Webster defines an "incumbrance" to be a burdensome and troublesome load, and, again, a burden or charge on property; a legal claim or lien on an estate.

Such is its popular signification, and it is not limited to mortgages only. Judgments duly rendered and docketed must be regarded as incumbrances, as used in popular speech, and the same is true with respect to a mechanic's lien. *Redmon v. Phoenix Fire Ins. Co.*, 8 N. W. 226, 229, 51 Wis. 293, 37 Am. Rep. 830.

#### **Mineral or timber privilege.**

A deed conveying all the iron ore and coal on certain lands, with the right of way and other privileges for their removal, is an incumbrance, within the meaning of the covenant against incumbrances. *Stambaugh v. Smith*, 23 Ohio St. 584, 591.

A reservation in a deed reserving to the grantor the right to prospect for coal and other mineral within and underlying the land granted, and to mine and remove the same if found, and reserving right of way for such purpose, is an incumbrance on the land. *Adams v. Reed*, 40 Pac. 720, 722, 11 Utah, 480.

A right to take of timber is an incumbrance. *Cathcart v. Bowman*, 5 Pa. (5 Barr) 317, 319.

#### **Mortgage.**

The word "incumbrances," when applied to incumbrances on real estate, includes mortgages, and the word will be so construed when used in a will without any language explanatory of its meaning. *Koezly v. Koezly*, 65 N. Y. Supp. 613, 615, 31 Misc. Rep. 397.

An insurance policy clause providing that if an incumbrance should fall or be executed upon the property insured, sufficient to reduce the real interest of the insured to a sum only equal to or below the amount insured, without the consent of the company, the policy should be void, does not include a mortgage on the property before the conditions are broken and before foreclosure, since before such event has happened it cannot be said that the interest of the insured in the property has been reduced. *Allen v. Hudson River Mut. Ins. Co. (N. Y.)* 19 Barb. 442, 446.

A mortgage, though there can be no recovery on it until a year after the last installment becomes due, is a present incumbrance on the inheritance from the moment it is given, and comes within the operation of the statutory covenant against incumbrances, expressed by the words "grant, bargain, and sell." *Funk v. Vonelda (Pa.)* 11 Serg. & R. 109, 112, 14 Am. Dec. 617.

"Incumbering," as used in Code, § 2410, prohibiting a husband from selling or incumbering the community property of himself and wife, includes the mortgaging of such property. *Hoover v. Chambers*, 13 Pac. 547, 548, 3 Wash. T. 26.

**Mortgage paid but not discharged.**

If a mortgage debt has been paid, the undischarged mortgage is not an incumbrance, and a mortgage unpaid, but which the mortgagee has released by voluntarily destroying the note without the knowledge of the mortgagor, is not an incumbrance, within the meaning of a statement in an insurance policy by the insured that there is no incumbrance on the property. *Smith v. Niagara Fire Insurance Co.*, 15 Atl. 353, 355, 60 Vt. 682, 1 L. R. A. 216, 6 Am. St. Rep. 144.

Gen. St. tit. 50, c. 1, § 4, provides that a settlement may be gained by an inhabitant of another town in this state, if he shall have been possessed in his own right, in fee, of real estate of the value of \$100, free from any incumbrance in the town, to which he may have removed for the term of one year, etc. Held, that the term "incumbrance" should be construed to exclude a satisfied mortgage not discharged of record. "It may be a cloud upon the title, but that is not necessarily an incumbrance. The statute does not contemplate a perfect record title, and an incumbrance which will operate to prevent the acquisition of a settlement must be an actual incumbrance, as distinguished from one on paper merely." *Town of Clinton v. Town of Westbrook*, 88 Conn. 9, 14.

**Ownership by lender.**

Where a father loaned a slave to his son, who kept the slave for a number of years, the interest of the father in the slave, as a lender, was not within the meaning of the term "incumbrance," as used in the first section of the act of 1828 (Aik. Dig. 207, § 4). *Norris v. Bradford*, 4 Ala. 203, 205.

**Paramount right.**

The term "incumbrance," in a contract to convey land free from incumbrances, includes a paramount right to the land, which may wholly defeat the grantee's title. *Fletcher v. Button* (4 Comst.) 4 N. Y. 396, 400 (citing *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 249).

**Parol agreement.**

The term, within the meaning of a covenant which covenants that premises are free from all incumbrances, would not include a parol agreement by a grantor that he would not claim damages for the flowing of his land, caused by the erection of a mill-dam. *Fitch v. Seymour*, 50 Mass. (9 Metc.) 462, 467.

**Party wall.**

A party wall erected on the line of a person's land constitutes an incumbrance, within the covenant against incumbrances. *Mackey v. Harmon*, 24 N. W. 702, 704, 34 Minn. 168; *Giles v. Dugro*, 8 N. Y. Super. Ct. (1 Duer) 331, 335.

An injunction establishing a paramount right of an adjoining owner to the maintenance of a wall, the half of which extended over the grantee's land, was a breach of grantee's covenant or warranty to the enjoyment of the land free from all incumbrances. *Ensign v. Colt*, 52 Atl. 829, 831, 75 Conn. 111.

Whatever charges or burdens real property, in favor of a person other than the owner, is in the nature of an incumbrance. A beam right or easement, to which premises are subject, in favor of adjoining premises, to continue until the wall of the servient premises is destroyed in any manner, or torn down for the purpose of rebuilding, is an incumbrance. *Schaeffer v. Miehl*, 34 N. Y. Supp. 693, 13 Misc. Rep. 520.

When a person purchases a vacant lot which supports a half of the wall of the building erected on the adjoining lot, and is, by the terms of a previous wall agreement entered into by his grantor, obliged to pay a part of the costs of the wall in order to use it, such agreement and the wall constitute an incumbrance. *Burr v. Lamaster*, 30 Neb. 688, 46 N. W. 1015, 1016, 5 L. R. A. 637, 27 Am. St. Rep. 428.

**Right of way.**

A right of way of a railroad over land constitutes an incumbrance. *Farrington v. Tourtloott* (U. S.) 39 Fed. 738, 740.

**Simple contracts.**

The term "incumbrance," as used in an agreement that the grantee should take such steps as he might deem necessary to discharge all incumbrances or claims against the lands granted, does not include simple contracts of the grantor to pay an attorney for professional services, since such contracts do not bind the grantor's realty, or constitute liens on the grantor's property, which follow it into the hands of all purchasers who take with notice of the existence of such contracts. *Gordon v. McCulloh*, 7 Atl. 457, 66 Md. 245.

**Special assessments.**

A contract to convey land free from incumbrances ordinarily has reference to incumbrances or liens actually existing when the contract is executed, or thereafter created or suffered by the act or default of the vendor, while assessments for street improvements constitute liens upon the lands aside from the time of their confirmation, and are, in the strict sense, incumbrances thereon, yet they are not incumbrances within the meaning of the contract, since they do not diminish the value of the subject of the contract. *Gotthelf v. Stranahan*, 34 N. E. 286, 288, 138 N. Y. 845, 20 L. R. A. 455.

Where a city awarded contracts for grading under an act afterwards held unconsti-

tutional, which was validated by curative acts, and the city authorized to collect the expense thereof, such expenses were held to constitute an incumbrance, within the covenant of the deed made after the passage of such curative act. *Lafferty v. Milligan*, 30 Atl. 1030, 1031, 165 Pa. 534.

An incumbrance is defined by Bouvier to be a lien upon an estate. A special assessment did not become an incumbrance until it was a lien on the premises. *De Peyster v. Murphy*, 39 N. Y. Super. Ct. (7 Jones & S.) 255, 264.

A covenant in a deed against incumbrances should not be construed to include the estimated value of the labor of constructing a ditch, awarded to the vendor of lands through which it passes by the commissioners of a county, where the sale was made after the ditch was established and such estimate made, and before such work was let by the commissioners. *Newcomb v. Fiedler*, 24 Ohio St. 463, 466.

#### Taxes.

An unpaid tax lawfully assessed upon a parcel of land is a lien upon the land from the date of the assessment, and constitutes an incumbrance, and hence is a breach of a covenant against incumbrances. *Maddocks v. Stevens*, 36 Atl. 398, 89 Me. 336 (citing *Cochran v. Guild*, 106 Mass. 29, 8 Am. Rep. 296). See, also, *In re Gerry* (U. S.) 112 Fed. 958, 959; *Blossom v. Van Court*, 34 Mo. 390, 394, 86 Am. Dec. 114.

The covenant against incumbrances is in the present tense—"that said premises are free from incumbrances." If there are taxes actually existing as a lien against the land at the time of the conveyance, the covenant is broken at that time, and a cause of action at once accrues in favor of the covenantee for his damages. *Chapman v. Kimball*, 7 Neb. 399, 403.

Although an unpaid tax is doubtless an incumbrance upon the land upon which it is laid, yet it is not such an incumbrance as was in the contemplation of the testator in a will requiring investments to be made in mortgages upon unincumbered real estate. There is comparatively but a short time in the course of a year when a tax upon real estate is not levied or impending over it, and to call a tax an incumbrance, within the meaning of this provision, would give it an unreasonable and impracticable construction. *Crabb v. Young*, 92 N. Y. 56, 69.

#### Tax deed.

The statute for a more equitable appraisal of real property under judicial sales provides that, for the purpose of appraisal, the officer and the freeholders therein named shall deduct from the real value of the lands and tenements levied on

the amount of all liens and incumbrances for taxes or otherwise prior to the lien of the judgment under which the execution is levied, and the sum thereafter remaining shall be the real value of the interest therein of the persons against whom the execution is levied. An incumbrance is defined to be any right to or interest in the land which may subsist in third persons, to the diminution in value of the estate of the tenant, but consistent with the passing of the fee. A lien is defined to be "a hold or claim which one person has upon the property of another as a security for some debt or charge." Tax deeds are not liens or incumbrances, within the meaning of the statute. A party claiming title under a tax deed holds adversely, and for the time being, at least, must rely upon his title. The statute provides that, in cases where there has been a valid assessment, if the tax title fails, the holder may have a lien upon the real estate; but this is a mere possibility, and cannot be considered by the appraisers, as the validity of a tax deed must be determined by the court, and not by appraisers. *Sessions v. Irwin*, 8 Neb. 5, 8, 9.

#### As voluntary incumbrances.

The word "incumbrance," as used in the condition of a deed that the grantee shall not incumber the same, has no reference to such liens as may be created by law, but has reference only to such incumbrances as the grantee should voluntarily place on the land. Should a grantee confess judgment or suffer a sale of the land on a lien for the purpose of evading the condition, a different question would be presented; but as the grantor did not make it a part of the condition that the land should not pass by operation of law, which might have been plainly expressed, we cannot say that the grantor intended anything more by the use of the word "incumber" than some voluntary act on the part of the grantee. *Fouts v. Millikan*, 65 N. E. 1050, 1051, 30 Ind. App. 298.

A warranty in a policy of fire insurance by the applicant against "incumbrances of all kinds" means only incumbrances created by the act or with the consent of the assured, and not those created by the law; and therefore the policy was not avoided by omission to disclose the fact that delinquent taxes on the premises for previous years were due and unpaid, though taxes are a lien on the real estate taxed. *Hosford v. Hartford Fire Ins. Co.*, 8 Sup. Ct. 1202, 127 U. S. 404, 32 L. Ed. 198.

The word "incumbered," as contained in a policy of insurance, to the effect that, should the property be sold or incumbered, written notice should be given to the company, and its assent indorsed thereon, or the insurance on such property should immediately terminate, relates to voluntary incum-

brances alone, and the policy was not forfeited by the recovery of a judgment in invitum. *Phenix Ins. Co. of Brooklyn v. Smith*, 61 Pac. 501, 502, 9 Kan. App. 828.

Judgment liens and other claims enforceable without the consent of the insurer are not "incumbrances without the consent of the company," avoiding a policy providing that it shall be inoperative if the property is incumbered without consent of the insurer. *Georgia Home Ins. Co. v. Schild*, 19 South. 94, 73 Miss. 128.

### INCUMBRANCER.

As owner, see "Owner."

One who has an incumbrance or legal claim on an estate. *Newhall v. Union Mut. Fire Ins. Co.*, 52 Me. 180, 181; *Warden v. Sabins*, 12 Pac. 520, 522, 36 Kan. 165.

The term "incumbrancer," within the rule that a junior incumbrancer may redeem from a mortgage foreclosure sale, does not include a general creditor, even though the mortgagor is dead; and Code, art. 16, § 188, provides that the land of a debtor is conditionally liable to be sold for the payment of his debts. *McNiece v. Ellason*, 27 Atl. 940, 941, 78 Md. 168.

A lien or charge upon land, which binds it for the payment of a debt, is an "incumbrance," and the holder of the lien is an "incumbrancer," as used in Sess. Laws 1895, p. 43, providing that the filing of a notice of assignment by an assignee for the benefit of creditors shall be a constructive notice to a purchaser or incumbrancer of the transfer of the property described in such notice. An attaching creditor is an incumbrancer. *Spangler v. Sanborn*, 43 Pac. 905, 907, 7 Colo. App. 102.

Rev. St. c. 65, § 24, providing that no creditor shall be allowed to enforce the lien created by the statute, to the prejudice of any other incumbrancer, unless, etc., means one who has a lien by mortgage, judgment, or otherwise, not created by the operation of the statute. *Shaeffer v. Weed*, 8 Ill. (3 Gilm.) 511, 514.

### INCUR.

The word "incur" is an inappropriate one, in connection with the word "obligation," if the latter word is limited to a case of contract. Men contract debts. They incur liabilities. In the one case they act affirmatively. In the other the liability is incurred or cast upon them by act or operation of law. *Orandall v. Bryan* (N. Y.) 5 Abb. Prac. 162, 169.

In St. 6 & 7 Vict. c. 18, § 55, requiring parish officers to repay to the town clerk

expenses incurred in the registration of parliamentary voters of the borough, the expression "expenses incurred" applies only to the moneys properly expended by the clerk, and not to remuneration for his labor. *Reg. v. Town of Kingston upon Hull*, 75 Eng. Com. Law, 182, 187.

Under Act Feb. 10, 1866, providing that, in addition to personal property exempt from execution, on liabilities incurred after June 1, 1866, there shall be exempt certain other additional property, where an action had been brought prior to the date fixed by such statute, and judgment was rendered for defendant, which was reversed on appeal and rendered for plaintiff, the judgment determined that the liability existed at the time suit was brought, and hence the liability of defendant was incurred prior to the 1st day of June, 1866. *Knight v. Whitman*, 69 Ky. (6 Bush) 51, 53, 99 Am. Dec. 652.

In *Agawam Bank v. Strever*, 18 N. Y. 502, the note sued on was left with the bank as collateral security for all liabilities incurred; and the court, in speaking of this writing, said: "It is true that upon a strict, grammatical construction of these terms, they would be held to embrace only liabilities which had been already incurred. The word 'incurred,' being in the past tense, when used without other words to modify its meaning, would in strictness relate exclusively to past transactions." It was held, however, that it was proper to resort to evidence of attending circumstances to assist in ascertaining the meaning and intention of the parties. *Beemer v. Packard*, 38 N. Y. Supp. 1045, 1046, 92 Hun, 546.

As become liable for.

"Incur," as used in a sheriff's indemnity bond, indemnifying him for all costs and expenses which he shall incur by reason of the replevy of property levied on, means to become liable for or subject to. *Scott v. Tyler* (N. Y.) 14 Barb. 202, 205.

The word "incurred," in an instruction as to liability for medical expenses paid out or incurred, means become liable for. Such an instruction is not erroneous. *Flanagan v. Baltimore & O. Ry. Co.*, 50 N. W. 60, 61, 83 Iowa, 639.

"Incurred" means to become liable for, so that, as used in a guaranty that "we hold ourselves responsible for any costs and damages which may be incurred by said D.," it means such costs and damages as he shall become liable for, and not necessarily that such liability has been paid. *Beekman v. Van Dolsen*, 24 N. Y. Supp. 414, 418, 70 Hun, 288.

As cause or bring on.

"The word 'incur' means brought on." *Deyo v. Stewart* (N. Y.) 4 Denio, 101, 108 (citing *Webst. Dict.*).



In Act Cong. July 20, 1868, § 22, as amended by Act 1872, providing that a distiller who has suspended work in his distillery, who shall, without giving notice in writing stating the time when he will resume work, carry on the business of a distiller on said premises, or shall have mash, wort, or beer, with intent to distill the same, on said premises, shall incur the forfeitures and be subject to the same punishment as provided for persons who carry on the business of a distiller without having given the bond required by law, "incur" means shall cause or bring on. *United States v. Distillery at Spring Valley* (U. S.) 25 Fed. Cas. 854, 858.

Under the statute which provides that "each party to a suit shall be liable for all costs incurred by him," the plaintiff, in an action brought against a minor, is liable for costs taxed as compensation to the guardian ad litem of such minor. The word "incurred," as here used, means brought on, occasioned, or caused. As the cause, without reference to whether there was a defense, could not legally have been tried without the appointment of a guardian ad litem, and the exercise by him of the duties imposed by the appointment, the acts of the plaintiff may well be said to have brought on, occasioned, or caused the costs taxed for such guardian's compensation. *Ashe v. Young*, 68 Tex. 123, 128, 3 S. W. 454, 455.

#### INCURRED FOR PURCHASE OF HOMESTEAD.

The words "incurred for the purchase of a homestead," used in Rev. St. 1874, c. 497, § 4, providing that a homestead shall not be exempt from sale for a debt or liability incurred for the purchase thereof, characterizes a debt secured by the note of the purchaser and a trust deed of the homestead, which are given in lieu of notes originally given by the purchaser in payment therefor, which have been assigned by the vendor of the homestead to the person securing the renewal notes. *Williams v. Jones*, 100 Ill. 362, 365.

#### INCURABLE.

An incurable infirmity, sufficient to vitiate the sale of a slave, means an infirmity incurable at the time of the sale, and does not necessarily require that the infirmity should have been incurable at its inception. *St. Romes v. Pore* (La.) 10 Mart. (O. S.) 203, 211.

#### IND.

The courts and juries of this state may well know, from their general information, that the abbreviation "Ind.," as applied to a place, means "Indiana," and a note payable at a certain place in "Ind." is payable at a

bank in that state. *Burroughs v. Wilson*, 59 Ind. 536, 539.

#### INDEBITATUS ASSUMPSIT.

See "Assumpsit."

"The action of indebitatus assumpsit is one founded on a contract, and can never be maintained unless a contract has been expressly made between the parties, or is implied in law." *Force v. Haines*, 17 N. J. Law (2 Har.) 385, 386.

Indebitatus assumpsit is a proper remedy to recover compensation for work and labor done. It is the only remedy, where the amount of compensation has not been ascertained by express agreement, for no special count in assumpsit can be framed on a promise arising by implication of law. *Thompson v. French*, 18 Tenn. (10 Yerg.) 452, 454.

#### INDEBTED—INDEBTEDNESS.

See, also, "Debt."

See "Certificate of Indebtedness"; "Evidence of Debt"; "Floating Debt or Indebtedness"; "Net Indebtedness."

Any indebtedness, see "Any."

Mutually indebted, see "Mutually."

Other indebtedness, see "Other."

A party becomes indebted when he enters into an obligation to pay. *Scott v. City of Davenport*, 34 Iowa, 208, 213 (citing Webster).

"Being indebted" is synonymous with "owing." *Van Winkle v. Ketcham* (N. Y.) 8 Caines, 323.

An indebtedness is the owing of a sum of money on a contract or agreement. *Roelofson v. Hatch*, 3 Mich. 277, 278, 279.

"Indebtedness" is defined by Anderson, in his Law Dictionary, as 'the condition of owing money; also the amount owed.' Indebtedness—the state of being in debt, without regard to the ability or inability of the party to pay the same." *Cheyenne County Com'rs v. Bent County Com'rs*, 25 Pac. 508, 509, 15 Colo. 320.

Ordinarily the term "indebtedness" imports a sum of money arising upon a contract, express or implied. In its more general sense, it is defined to be that which is due from one person to another, whether money, goods, or services; that which one person is bound to pay or perform to another. In re Board of Rapid Transit R. R. Com'rs, 49 N. Y. Supp. 60, 69, 23 App. Div. 472.

According to Worcester, "indebtedness" means the state of being indebted. As used in Const. art. 11, § 3, providing that the stockholders of all corporations and stock com-

panies shall be liable for the indebtedness of said corporations to the amount of their stock subscribed and unpaid, and no more, it means the sum of the corporate debts. *Powell v. Oregonian Ry. Co.* (U. S.) 36 Fed. 726, 730, 2 L. R. A. 270.

A statute authorizing the funding by a county of matured and maturing indebtedness of every kind and description includes indebtedness evidenced by county warrants. *Howard v. Klowa County* (U. S.) 73 Fed. 406, 407.

The term "indebted," in a statute authorizing a writ of attachment "if any person is indebted to another in a sum of \$50," is general in its meaning and in its application, and is certainly synonymous with "owing." The statute, being remedial, embraces all cases where upon any claim or demand one person is indebted to another in a sum exceeding \$50. *Jones v. Buzzard*, 2 Ark. (2 Pike) 415, 447.

The term "indebted," in Act 1795, authorizing the issuance of a writ of attachment, and directing that the creditor shall make oath that the debtor is bona fide indebted, etc., is not to be construed in a technical or strict sense; and an attachment may issue on any demand arising ex contractu, where the contract ascertains the amount of indebtedness, or fixes a standard so certain as to enable the plaintiff, by affidavit, to aver it, or the jury, by their verdict, to ascertain and find it. *Wilson v. Wilson* (Md.) 8 Gill, 192, 194, 50 Am. Dec. 685.

#### **Appropriation by legislature.**

Appropriations by the Legislature in anticipation of the receipt of revenue from taxation are not debts, within the meaning of Const. art. 13, § 2, limiting the indebtedness which the state may incur. In re State Warrants, 62 N. W. 101, 103, 6 S. D. 518, 55 Am. St. Rep. 852 (citing *State v. McCauley*, 15 Cal. 429, 430; *State v. Medbery*, 7 Ohio St. 522, 529; *State v. Parkinson*, 5 Nev. 15).

#### **Bonds and mortgages.**

A bond is not an indebtedness or liability. It is only an evidence or representation of the indebtedness. *Reynolds v. Lyon County*, 96 N. W. 1096, 1098, 121 Iowa, 733. So the issuance of a bond to fund an existing debt is not to incur an indebtedness or liability. *City of Los Angeles v. Teed*, 44 Pac. 580, 582, 112 Cal. 319.

The bonds and mortgages of a corporation are within the term "indebtedness" as used in Const. art. 16, § 7, and Act Assem. April 18, 1874, prescribing restrictions and regulations under which corporations may incur indebtedness. *Rothschile v. Rochester & P. R. Co.*, 1 Pa. Co. Ct. R. 620, 624.

#### **Contingent liability.**

A debt, in a general sense, arises out of an expressed or implied promise by one per-

son to another to pay a sum of money. And, Law Dict. p. 815. An indebtedness cannot arise unless there is either a legal, equitable, or moral obligation to pay a sum of money to another, who occupies the relation of creditor, and who has a legal or moral right to call upon or constrain the debtor to pay. *Quill v. City of Indianapolis*, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681. An absolute legal right to coerce payment is not always necessary in order to create an indebtedness. *City of Baltimore v. Gill*, 31 Md. 375. It is, however, essential that the obligation should have arisen out of a contract, the holder of which is entitled to receive from the promisor a sum of money which the latter is under a legal or moral duty to pay, without regard to future contingencies. *Wilcoxon v. City of Bluffton*, 54 N. E. 110, 115, 153 Ind. 267.

A debt is a sum of money due by contract, expressed or implied. The sum of money may be payable at a fixed time or upon a contingency. When payable upon a contingency, it becomes a debt when the contingency has happened. Under such definition, where a city gives a railroad the right to construct its railway on condition that, in lieu of a per cent. of its net profits, and for a bonus for the contract, certain shares of its stock should be transferred to the city as fully paid up, a provision in the contract that in the event that, the company should allow itself to be incumbered with debt, the city should have a lien on the company's franchise and property, did not make the interest of the city in its stock a debt, as against the corporation. *Guaranty Trust Co. v. Galveston City R. Co.* (U. S.) 107 Fed. 311, 317, 46 C. C. A. 305.

#### **Corporate stock subscriptions.**

"The term 'indebtedness' is a very general and comprehensive one, and undoubtedly, under proper circumstances, may be held to embrace unpaid subscriptions of stock, as it has been frequently held to include debts not due, as well as those that are due." As used in a by-law of a bank declaring that no transfer of stock shall be allowed or valid as long as the holder is in arrears to the bank, or in any form indebted to it, it means any indebtedness outside of the stock subscription. *Kahn v. Bank of St. Joseph*, 70 Mo. 262, 268.

As used in Act March 21, 1814, providing that no stockholder of a bank, indebted to the institution, shall be authorized to make a transfer or receive a dividend until such debt shall have been paid, the words "indebted to the institution" meant all debts; their significance not being limited to debts on account of the original subscription to the capital of the bank. *Rogers v. Huntingdon Bank* (Pa.) 12 Serg. & R. 77, 78.

Acts 1874, § 7, makes certificates of stock in corporations formed under the act trans-

ferable at the pleasure of the holder, subject to all payments due or to become due thereon, but provides that "no certificate shall be so transferred so long as the holder thereof is indebted to the corporation unless the board of directors shall consent thereto." Held, that the word "indebted" is not restricted to an indebtedness growing out of the original stock subscription and subsequent calls and assessments, but includes any indebtedness of the stockholder to the corporation. *National Bank of the Republic of New York v. Rochester Tumbler Co.*, 83 Atl. 748, 749, 172 Pa. 614.

#### Debt due or to become due.

"Indebted," as used in a complaint alleging that defendant was indebted to plaintiff in a certain manner, is a legal term, having a legal meaning, and implies a debt presently payable. *Slutts v. Chafee*, 4 N. W. 763, 764, 48 Wis. 617.

"A party, either in legal or common acceptance, can only be said to be indebted to another when he withholds from him that which is his due, which he is then bound to pay, and the other has a right to demand. When only under an obligation to pay at a future time, he becomes indebted by a failure to pay at the time stipulated, but he cannot be said to be indebted until the day of payment, because until then he does not withhold that which is another's due, and which he has a right to demand." *Lum v. The Buckeye*, 24 Miss. (2 Cushm.) 564, 568.

The word "indebted," as used in the charter of a company providing that no stockholder indebted to the company shall be authorized to make a transfer until such debt shall have been discharged, has not acquired a technical signification, and, in common understanding, means a sum of money which one has contracted to pay to another, whether the day of payment has come or not. *Grant v. Mechanics' Bank of Philadelphia* (Pa.) 15 Serg. & R. 140, 143; *Sewall v. Lancaster Bank* (Pa.) 17 Serg. & R. 284, 285; *Pittsburgh & O. R. Co. v. Clarke*, 29 Pa. (5 Casey) 146, 151; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149, 154. It should not be construed to apply only to debts for stock or for notes which had actually fallen due and were unpaid. *Sewall v. Lancaster Bank* (Pa.) 17 Serg. & R. 284, 285. It includes the amount owing on a subscription. *Pittsburgh & O. R. Co. v. Clarke*, 29 Pa. (5 Casey) 146, 151.

The word "indebtedness" is not to be construed to mean a fixed sum due, but any liability that may have been incurred, either by contract, express or implied, that renders a party a debtor, within the meaning of the law. *Mattingly v. Wulke*, 2 Ill. App. (2 Bradw.) 169, 172. See, also, *Commercial Bank v. Weinberg*, 25 N. Y. Supp. 235, 236,

70 Hun, 597; *French v. City of Burlington*, 42 Iowa, 614, 617; *Spilman v. City of Parkersburg* (W. Va.) 14 S. E. 279, 282.

B. and S., manufacturers, were the sole stockholders and officers of the B. Company. B., the chief owner of the property used by B. & S., transferred this property to the B. Co. by a deed which contained the following provision: "In further consideration for the premises hereby conveyed, the said B. Company are to pay and discharge all the indebtedness now existing against said B. and S., now due or to grow due." Held, that the word "indebtedness," as used in the deed, should be construed to include the outstanding notes and those renewals of the same, the outstanding accommodation indorsements of B. and S., whether due or to become due, and for the renewals of such indorsements. "Indebtedness" is a word of large meaning. It is used to denote almost every kind of pecuniary obligation originating in contract. We see no reason for limiting its significance in the case at bar. *Merriman v. Social Mfg. Co.*, 12 R. I. 175, 176.

The indebtedness of a depositor to a bank within the meaning of the exception in Rev. St. 1894, § 2031, which makes it embezzlement for a bank to receive a deposit, when insolvent, from any one not indebted to the bank, must be such that the bank has a legal right to apply the deposit as a payment thereon, such as a matured obligation, so that the depositor has no right to have the deposit repaid on demand, and it is not lost to him by the bank's insolvency. *State v. Beach* (Ind.) 43 N. E. 949, 954.

#### As enforceable debts or demands.

"Indebtedness," as used in Comp. St. c. 72, art. 4, providing that on sale of railroads in certain cases the purchase shall be subject to all indebtedness existing against the company, etc., means and embraces all debts and demands against the selling company upon which suit could be maintained, either in law or in equity. The word "indebtedness" is here used in its large and general sense, and not in a technical one. *Chicago, St. P., M. & O. R. Co. v. Lundstrum*, 20 N. W. 198, 199, 16 Neb. 254, 49 Am. Rep. 718.

The word "debt," as used in law, means something owed; money due or to become due upon express or implied agreement. It denotes not only an obligation of the debtor to pay, but the right of the creditor to receive and enforce payment. Thus, where a city purchased a park under a contract by which the purchase price was not to constitute a liability against the city, and the title was not to vest until the whole amount of the purchase price had been paid, the city not being under obligation to pay such price, it did not constitute a debt. *Burnham v. City of Milwaukee*, 73 N. W. 1018, 1019, 98 Wis. 128.

A debt is money due upon a contract, without reference to the question of the remedy for its collection. It is not essential to the creation of a debt that the borrower shall be liable to be sued therefor. A debt, within the meaning of Const. art. 9, § 8, providing that the debt of a city shall never exceed a certain limit, is created by a contract by which A. is to construct a system of waterworks for the city, to be delivered to and operated by it when completed; the city to pay A. a certain sum annually for a certain number of years, and to deposit a certain sum annually for that time, to be given to him, with accrued interest, at the end of that period, when the transfer of the title to the waterworks is to be made to it. And this is true though the contract provides that payments and deposits are to be made from the current revenues, and not otherwise. *Brown v. City of Corry*, 34 Atl. 854, 856, 175 Pa. 528.

While an indebtedness may exist without a present liability to pay, yet an allegation that one is indebted to another will be held a sufficient allegation of a legal liability under the statutory requirement of liberality in the construction of pleadings, and in view of the verdict of the jury finding a legal liability. *Yocum v. Allen*, 50 N. E. 906, 910, 58 Ohio St. 280.

#### **Equitable or moral obligation.**

A will providing that the indebtedness of testatrix's brother to the estate of her husband be paid for him out of the estate, so that he might be wholly released from the same, should not be construed as meaning only a legal obligation on his part to pay something due, but implies, as well, a mere moral or equitable obligation to make such payment. *Scott v. Neeves*, 45 N. W. 421, 422, 77 Wis. 305.

#### **Future indebtedness.**

As used in an act providing for the adjustment of indebtedness and government of boroughs, townships, and school districts affected by changes of limits, the word "indebtedness" cannot be taken in its strict, ordinary meaning, but must have a broader application, as including financial obligations of all kinds—not only those existing previously, but those necessarily growing out of the separation—and, when we consider that the adjustment is to be of indebtedness and government, the enlarged sense of the word becomes still more clear. "Government" is a very comprehensive term, and one of the most important subjects included in it is that of finances, including assets in property as well as in money. In *re Sugar Notch Borough*, 43 Atl. 985, 986, 192 Pa. 349.

Within the rule that a creditor has an insurable interest in the life of his debtor

only to the amount of the indebtedness to be secured, the word "indebtedness" is to be understood as implied in a liberal sense, and may embrace not only a debt or debts actually existing when the insurance is taken out by the debtor, or is thereafter assigned to the creditor, but also additional indebtedness to arise upon the making of future loans or advances by the creditor to the debtor—such, for instance, as cash for premiums to be paid in obtaining the policy or in keeping it alive. *Exchange Bank v. Loh*, 31 S. E. 459, 461, 104 Ga. 446, 44 L. R. A. 372.

#### **Interest to accrue.**

As used in Const. § 158, limiting the amount of indebtedness which may be contracted by any city, etc., the term does not include the interest to accrue, but the indebtedness created by an issue of bonds is the face of the bonds, and is valid, if within the limit, though, by adding the interest which would accrue to the maturity of the bonds, the limit would be exceeded. *City of Ashland v. Culbertson*, 44 S. W. 441, 442, 103 Ky. 161.

In an assignment "to pay and discharge in full the following described indebtedness [naming creditors and amounts], and then to pay and discharge in full, if the residue of the proceeds is sufficient, all the debts and liabilities now due or to grow due thereon," the word "indebtedness" is used obviously in the sense of debts—that is, all that is due to a man under any form of obligation or promise, or that of which payment is liable to be exacted—and, in this sense, includes the interest on the debts. In *re Fay*, 27 N. Y. Supp. 910, 911, 6 Misc. Rep. 462.

#### **Involuntary or voluntary debts.**

As used in Const. art. 10, § 8, providing that "no county, city, school district, or municipal corporation shall hereafter be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per cent. on the value of taxable property," the term "indebtedness" meant the state of being by voluntary obligation, express or implied, under legal liability to pay in the present or at some future time for something already received, or for something yet to be furnished or rendered. This includes every kind of indebtedness, no matter in what manner created or voluntarily brought about. *Spilman v. City of Parkersburg*, 14 S. E. 279, 282, 35 W. Va. 605.

The term "indebtedness," in a statute providing that, if the indebtedness of any manufacturing company shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of such com-

pany, clearly includes not only every debt voluntarily contracted by the company, but every debt of every nature, whether contracted by the company or arising. A judgment for costs is a debt within the meaning of the term in the statute. *Allen v. Clark*, 15 N. E. 387, 388, 108 N. Y. 269.

#### **Joint and several liabilities.**

"Indebtedness" is a word of large meaning, and is used to denote almost every kind of pecuniary obligation arising on contract. It must be held to cover the debtor's joint as well as several liabilities. *Bell v. Mendenhall*, 80 N. W. 843, 844, 78 Minn. 57.

#### **As justly indebted.**

According to the common legal acceptance of the term "indebted," it means justly indebted; legally indebted; indebted according to law. The omission of the word "justly" before the word "indebted" in an attachment affidavit, charging that defendant is indebted, etc., is immaterial, as the word, if added, would not strengthen the affidavit. *Livengood v. Shaw*, 10 Mo. 273, 276; *Kennedy v. Morrison*, 81 Tex. 207, 218.

#### **Legal or illegal debts.**

"Indebtedness," as used in Const. art. 11, § 6, as amended November 6, 1888, providing that any county may contract a debt by the issuance of bonds for the purpose of liquidating indebtedness incurred prior to a certain date, is used in a general sense, and is descriptive of county warrants and bonds outstanding on the date mentioned, regardless of their legality or illegality. In re *Funding of County Indebtedness*, 24 Pac. 877, 879, 15 Colo. 421.

#### **Liability as indorser or surety.**

The word "indebtedness" may be held to include liabilities of every sort, present and to accrue—liabilities contracted by indorsement, whether due or to grow due, and every debt of every character, however arising. Thus a mortgage conditioned to pay all indebtedness of every name or nature "now incurred or to be hereafter incurred, which is now due or may hereafter become due" from the mortgagor to the mortgagee, includes the mortgagor's liability as an indorser or surety for others, and is not restricted to his own debts. *Commercial Bank v. Weinberg*, 25 N. Y. Supp. 235, 236, 70 Hun. 597. See, also, *Bell v. Mendenhall*, 80 N. W. 843, 844, 78 Minn. 57.

"Indebted," as used in a charter or by-law restraining a stockholder from transferring his stock while indebted to the company, applies to those debts in which the stockholder is surety, as well as those in which he is principal. *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149, 154.

#### **Liability for tort.**

Used in its strict legal significance, the word "indebtedness" applies only to an obligation arising from a contract, expressed or implied. The term is defined by Bouvier as "the state of being in debt, without regard to the ability or inability to pay the same." The word "debt" has generally been confined to a contract obligation, and is defined in Blackstone as "a sum of money due by certain and expressed agreement." It has been expressly held that a debt does not include a liability in tort. But there is, however, a much broader meaning given to the term than the definition above. Thus in the Imperial Dictionary the word "debt" is defined as "that which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to or perform for another; that which one is obliged to do or suffer." It seems clear that in common parlance, as well as in law, the term "debt" is, in a larger sense, sometimes used to denote any kind of just demand. Citing *Carver v. Blaintree Mfg. Co.* (U. S.) 5 Fed. Cas. 235. As used in a mortgage given to secure a written agreement by the secretary of a bank that if, after further investigation, there should be found to exist an indebtedness from him to the bank, he would pay the same, the security covered the mortgagor's liability to the bank for the payment of money stolen by employees through his connivance or culpable negligence. *Latimer v. Veader*, 46 N. Y. Supp. 823, 829, 20 App. Div. 418.

The indebtedness for which a garnishee is made liable must be a demand for which an action of debt—*indebitatus assumpsit*—might be maintained by the principal defendant. *Drake, Judgments*, § 545. A garnishee cannot be held liable for the wrongful conversion of property belonging to the debtor. Under these principles, where property of the principal defendant was taken under a bona fide claim of ownership, and so used as to lose its identity, it would seem that the garnishee's only liability therefor, being in unliquidated damages for the conversion, would not be subject to garnishment. *Keyes v. Milwaukee & St. P. Ry. Co.*, 25 Wis. 691, 693.

A railroad corporation, after acquiring all the stock of another railroad corporation, accepted a transfer of all the latter's property, "subject to its bonded indebtedness and all other indebtedness, without affecting the rights of creditors therein," and it was held that the word "indebtedness" should, under the circumstances, be construed in this particular case as including claims for unliquidated damages, and not merely contractual liabilities, so that the purchaser became liable for the torts of the vendor. *Louisville & N. R. Co. v. Biddell*, 66 S. W. 84, 35, 112 Ky 494.

**Loans to insured.**

Within the provision of an insurance policy that, in case of lapse for nonpayment of premium, the company shall apply the net reserve, less any indebtedness of the assured, as a single premium in the purchase of extended insurance, the company may deduct loan certificates for 30 per cent. of annual premiums paid by insured which have been signed by assured, such certificates constituting an indebtedness to the company, though in one sense it is simply a credit of 30 per cent. of premium payment, but this construction can be implied, and no distinction can be made between a cash loan and a premium loan. *Omaha Nat. Bank v. Mutual Ben. Life Ins. Co. (U. S.)* 81 Fed. 935, 939.

A provision in an endowment policy, payable to the insured's wife, that "the balance of the year's premium if any, and all other indebtedness to the company," might be deducted from the proceeds of the policy, undoubtedly referred only to such indebtedness as arose from the premiums upon which the insurance was based, whether cash premiums which had become due, or premiums which had been paid by notes. For, since the wife has such an interest in an endowment policy payable to her as to preclude her husband from assigning it without her consent, the parties to the contract could not have contemplated any other loan from the company to the insured upon the faith and credit of the policy. To give the word "indebtedness" a construction expanding it to cover loans not connected with the policy, except as it operated as a security, would be to impair the wife's contingent right to indemnity, a thing which the parties could not accomplish by the direct assignment of the policy. *Union Central Life Ins. Co. v. Woods*, 37 N. E. 180, 182, 11 Ind. App. 335.

**Of municipality.**

The word "indebtedness," as used in Const. art. 11, § 3, providing that no city shall incur an indebtedness in excess of 5 per cent. of its assessed value, means an agreement of some kind by the city to pay money. *Swanson v. City of Ottumwa*, 91 N. W. 1048, 1049, 1051, 118 Iowa, 161, 59 L. R. A. 620.

The term "debt," as used in Const. art. 9, § 8, limiting the debts a city may contract to 7 per cent. of the assessed value of the taxable property, does not include a portion of the city loans which the city purchased for its sinking fund. *Brooke v. City of Philadelphia*, 29 Atl. 387, 389, 162 Pa. 123, 24 L. R. A. 781.

The word "indebtedness," in Const. § 157, limiting the tax rate and indebtedness of cities, refers to an indebtedness created by

contract. *O'Bryan v. City of Owensboro (Ky.)* 68 S. W. 858, 862.

While the word "debt" has a technical use of somewhat more limited significance than its common meaning, yet it is not naturally or usually a technical word. Pursuant to this it is held that a contract by a city for the building of a viaduct without expense to itself, and by which it assumes the damages to abutting property, is within Pa. Const. art. 9, § 8, providing that the city shall not incur any debt or increase its indebtedness to exceed 2 per cent. of the assessed value of the property therein, without the consent of the electors. *Keller v. City of Scranton*, 49 Atl. 781, 782, 200 Pa. 180, 86 Am. St. Rep. 708.

The word "indebtedness," as used in the title of an act providing for the adjustment of indebtedness and government of boroughs, townships, and school districts affected by changes of limit of any borough in the commonwealth, is not used in its strict ordinary meaning, but is used in a broader sense so as to include financial obligations of all kinds, not only those existing previously, but those necessarily growing out of the creation of a new borough out of a part of an old one. In re Sugar Notch Borough, 43 Atl. 985, 986, 192 Pa. 349.

Interest-bearing notes given by the trustees of a school city of a municipality to raise money for school purposes do not form a part of the "indebtedness" of the civil city, within the constitutional provision limiting the indebtedness cities may incur to a certain per cent. of their taxable value. *Heinl v. City of Terre Haute (Ind.)* 66 N. E. 450.

**Same—Bonded indebtedness.**

The term "indebtedness," as used in Const. art. 2, § 3, providing that no municipal corporation shall be allowed to become indebted, in any manner or for any purpose, to an amount in the aggregate exceeding 5 per cent. of the value of the taxable property within such corporation, to be ascertained by the last state and county tax lists previous to the incurring of such "indebtedness," is not to be confined to debts evidenced by bond or to those which are due simply, but is to be construed in its fair and legitimate meaning and general acceptance, and includes indebtedness for whatever purpose created. It matters not how or for what purpose the indebtedness is incurred. *French v. The City of Burlington*, 42 Iowa, 614, 617; *City of Council Bluffs v. Stewart*, 1 N. W. 628, 635, 51 Iowa, 385.

The term "indebtedness," as used in the charter of a company providing that, if the indebtedness of such company shall at any time exceed the capital stock paid in, the directors assenting thereto shall be individual-

ly liable to the creditors for said excess, includes all indebtedness of the corporation, thus including bonded indebtedness as well as floating indebtedness. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 32 S. W. 1097, 1101, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943.

Where an act annexed a portion of a township to a city and exempted the territory annexed from any tax for prior indebtedness incurred by the city, it is held that the word "indebtedness" is not limited to bonded indebtedness, but that improvement certificates issued for street work done before annexation are within the exemption, and bonds issued after the annexation, by authority of the act prior thereto, to pay judgments recovered on these certificates, are not chargeable by taxation on the lands annexed. *Hoboken Land & Imp. Co. v. City of Hoboken*, 43 N. J. Law (14 Vroom) 96, 100.

#### **Same—Contracts for future service.**

A contract for future services to be paid for as rendered is not the incurring of indebtedness within the limitation imposed upon the city as to the amount of its indebtedness. *Ludington Water-Supply Co. v. City of Ludington*, 78 N. W. 558, 562, 119 Mich. 480.

A clause of a city charter, prohibiting the city from contracting an indebtedness exceeding a certain amount within any one year, does not include the compensation due a contractor until the service is performed and the contractor is entitled to be paid, and hence the mere making of the contract, which calls for a sum in excess of such limit, when considered in connection with other debts, but which is not to be completed and payable by the performance of the work until the succeeding year, is not a violation of the charter. *Weston v. City of Syracuse*, 17 N. Y. 110, 113.

A contract by a city to pay a fixed price annually for a certain period for a water supply, such payment to be contingent on the supply furnished, does not create a "debt" or indebtedness on the part of the city within a constitutional provision fixing the lawful limit of municipal indebtedness. *Lamar Water & Electric Light Co. v. City of Lamar*, 39 S. W. 768, 770, 140 Mo. 145; *Saleno v. City of Neosho*, 30 S. W. 190, 192, 127 Mo. 627, 27 L. R. A. 769, 48 Am. St. Rep. 653; *Carlyle Water, Light & Power Co. v. City of Carlyle*, 31 Ill. App. 325, 339; *Cunningham v. City of Cleveland* (U. S.) 98 Fed. 657, 664, 39 C. C. A. 211. Contra, see *City Council v. Dawson Waterworks Co.*, 32 S. E. 907, 912, 106 Ga. 696.

A contract for rental of lights for the use of the city, payment therefor to be made

only upon the performance of the service provided for, and the annual rental thereof not exceeding the amount the city council was legally authorized to collect and appropriate for each year, did not create such a "debt" as comes within the constitutional provision which inhibits the creation of debt without at the same time making provision for its payment. *Dallas Electric Co. v. City of Dallas*, 58 S. W. 153, 155, 23 Tex. Civ. App. 323. See, also, *Seward v. Town of Liberty*, 42 N. E. 39, 40, 142 Ind. 551; *Smith v. Town of Dedham*, 10 N. E. 782, 786, 144 Mass. 177; *New Orleans Gaslight Co. v. City of New Orleans*, 7 South. 559, 42 La. Ann. 188; *Crowder v. Town of Sullivan*, 28 N. E. 94, 128 Ind. 486, 13 L. R. A. 647; *Foland v. Town of Frankton*, 41 N. E. 1031, 1032, 142 Ind. 546.

The act of 1883, amending the charter of the city of Helena, providing that the city should not be authorized to incur any "indebtedness" on behalf of said city, for any purpose whatever, to exceed the sum of \$20,000, should be construed to include a contract which binds the city to take water from a contractor, paying an annual rent of \$15,000, since such contract creates a liability to pay money on a contingency which is morally sure to take place irrespective of any action taken or option exercised by the city in future. "Webster defines 'indebtedness' as the state of being indebted or placed in debt, or under an obligation, or held for payment or requital." This remits us to the proper meaning of the term "debt," which Bouvier defines to be a sum of money due by a certain and express agreement. *Rap. & L. Law Dict.* says, in the strict sense of the word, a "debt" exists when a certain sum of money is owing from one person, the debtor, to another, the creditor. Hence "debt" is properly opposed, first, to unliquidated damages; second, to liability, when used in the sense of an inchoate or contingent debt; and, third, to certain obligations not enforceable by ordinary process. "Debts" denote not only the obligation of the debtor to pay, but also the rights of the creditor to receive and enforce payment. Blackstone, in his Commentaries, defines the word as follows: "The legal acceptance of 'debt' is a sum of money due by certain and express agreement, as by a bond for a determinate sum, bill, or note; a special bargain; or a rent reserved on a lease where the quantity is fixed and specific, and does not depend on any subsequent valuation to settle it." *Davenport v. Klenschmidt*, 13 Pac. 249, 257, 6 Mont. 502.

If a man, having no income except his salary, which is adequate to support his family, can, by contracting for a term of years, reduce his house rent, the rent being payable monthly or annually, he would not by making such a contract create an "indebted-

ness" for the whole term of years; or, if he should contract the board of his family for 10 years at \$1,000 per year, he would not thereby become "indebted" in the sum of \$10,000. Under the same principle, a contract by a municipal corporation, pertaining to its ordinary expenses, and, taken together with other like expenses, within the limit of its current revenue, and such special taxes as it may lawfully and in good faith intend to levy therefor, does not create an "indebtedness." Within the meaning of Const. art. 11, § 3, providing that no municipal corporation shall become indebted in any manner to an amount exceeding a certain per cent. of the value of its taxable property, a city would become indebted, in the meaning of such provision, by employing individuals or a corporation to construct waterworks for it in consideration of a certain sum to be paid in bonds or other evidences of debt, and the necessity for the waterworks would constitute no excuse for the violation of the Constitution. But if others construct and maintain such works for the city's use and benefit, and it contracts to pay a just and fair rent out of its current revenues, and can also out of such revenues pay its other ordinary expenses, such an agreement to pay the rent does not create an "indebtedness" against the city, though the contract may run for a number of years. *Grant v. City of Davenport*, 36 Iowa, 396, 403.

The liability created by a contract for the disposition of the sewage of a city for a period of five years, the sum to be paid yearly, is not a "debt" within the provision of the charter providing that the trustees shall not create or permit to accrue any debt in excess of the available money in the treasury that may be legally apportioned and appropriated, since a sum payable on a contingency is not a debt, or does not become a debt until the contingency happens. *McBean v. City of Fresno*, 44 Pac. 358, 360, 112 Cal. 159, 31 L. R. A. 794, 53 Am. St. Rep. 191.

There is a distinction between a debt and a contract of a future indebtedness to be entered upon provided the contracting parties perform the agreement out of which the debt may arise. Thus, an ordinance granting a franchise to a water company by which the city is to pay for all water supplied at so much per year for a number of years, the total amount of such payment does not constitute a debt against the city. *City of Walla Walla v. Walla Walla Water Co.*, 19 Sup. Ct. 77, 85, 172 U. S. 1, 43 L. Ed. 341.

Where contracts of a city for street lighting did not fix the amount of liability for its debts, they did not create an indebtedness within the Constitution of 1870, art. 9, § 12, prohibiting any city from becoming indebted in any manner or for any purpose to an amount exceeding 5 per cent. of the taxable

property therein. *City of Chicago v. Galpin*, 55 N. E. 731, 733, 183 Ill. 399.

Where a city contracts to pay a certain sum per year for a given number of years for water and electric light, it incurs an "indebtedness" within the meaning of the Constitution providing that a city shall not incur an indebtedness exceeding 5 per cent. of the value of its taxable property, for the total amount which the contract provides shall be paid during all the years it is to continue. *Beard v. City of Hopkinsville*, 24 S. W. 872, 874, 95 Ky. 239, 23 L. R. A. 402, 44 Am. St. Rep. 222.

#### Same—Current expenses.

The word "debt," as used in a constitutional provision providing that no debt for any purpose shall be incurred in any manner by a city or county unless provision is made for its payment at the time of its creation, means any pecuniary obligation imposed by contract, except such as were at the date of the contract, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year, or out of some fund then within the immediate control of the corporation. *McNeill v. City of Waco (Tex.)* 33 S. W. 324. A contract entered into for the construction or erection of any public improvement authorized by law, such as a bridge, would be the creation or incurring of a debt within the meaning of the Constitution. *Wade v. Travis County (U. S.)* 72 Fed. 985, 988.

"Indebtedness," within a constitutional provision limiting the power of municipal corporations to contract debts, means the contracting of an indebtedness or a debt after the constitutional limit has already been passed by other prior debts; but where a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the incurring of an indebtedness within the meaning of the statute. *City of Valparaiso v. Gardner*, 97 Ind. 1, 11, 49 Am. Rep. 416.

The words "any indebtedness," within the meaning of Const. 1870, art. 9, § 12, providing that no municipal corporation shall become indebted for any purpose above a certain amount, and that any such corporation incurring "any indebtedness as aforesaid" must provide for the collection of a tax to pay the interest and the debt, apply only to the discharge of that character of indebtedness which does not fall due until a future time and which bears interest. The constitutional intent is plain. It is to control towns with reference to that species or character of indebtedness, the payment whereof has been deferred to a fixed time



in the future and which bears interest. These requirements have no application to current indebtedness or application to towns, the payment of which had not been deferred to some fixed period and were not interest-bearing. The true construction of the sentence, therefore, is that the words "any indebtedness" mean any indebtedness of the character affected by the provisions of the sentence. *Town of Kankakee v. McGrew*, 52 N. E. 898, 894, 178 Ill. 74.

An "indebtedness" for current expenses payable out of current revenues, such as for the supplying of city with water, is an indebtedness within the constitutional provision against incurring indebtedness beyond a certain amount. *State v. City of Helena*, 63 Pac. 99, 103, 24 Mont. 521, 55 L. R. A. 336, 81 Am. St. Rep. 453.

**Same—Deduction of demands against others.**

Within the meaning of Const. art. 13, § 6, forbidding the contracting of municipal debts to an amount, including existing indebtedness, in the aggregate exceeding 3 per cent. of the value of the taxable property, the term "indebtedness" meant what the city owed, irrespective of demands which it might hold against others. *Jordan v. Andrus*, 69 Pac. 118, 27 Mont. 22.

**Same—Existence of fund for payment.**

Within the constitutional provision (article 11, § 3), "provided that no municipal corporation shall become indebted in any manner or for any purpose to an amount exceeding a certain per cent. of its taxable property," indebtedness evidenced by warrants will not be included in such term where there are funds in the treasury of the municipality with which to pay them. *German Ins. Co. v. City of Manning* (U. S.) 95 Fed. 597, 610.

A "debt," within the meaning of the constitutional prohibition against the creation of a debt, by a municipal corporation without at the same time providing for the assessment and collection annually of a sufficient sum to pay the interest thereof and create a sinking fund of at least 2 per cent. thereof, is said not to be created when the current liabilities do not exceed the current revenue to be derived from taxes. Thus, where a debt was incurred for the sinking of an artesian well, which was a permanent improvement, and the work was to be paid for when completed, and the money was already in the treasury for the purpose, it does not constitute a "debt" within the meaning of the Constitution. *Sandmeyer v. Harris*, 27 S. W. 284, 285, 7 Tex. Civ. App. 515.

"The word 'debt' has no fixed legal signification, as has the word 'contract,' but is used in different statutes and constitutions in

senses varying from a very strict to a very general one. Its meaning, therefore, in any particular statute or constitution, is to be determined by construction, and decisions upon one statute or constitution often tend to confuse rather than aid in ascertaining its signification in another relating to an entirely different subject." The term "debt," in Const. art. 11, declaring that no debt shall be created by any city unless at the same time provision may be made for its payment, does not include that class of pecuniary obligations in good faith intended to be and lawfully payable out of either the current revenues for the year of the contract, or any other fund within the immediate control of the corporation. The term means any pecuniary obligation imposed by the contract except such as were, at the date of the contract, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year, or out of some fund within the immediate control of the corporation. *McNeal v. City of Waco*, 33 S. W. 322, 323, 89 Tex. 83.

**Same—Option to purchase waterworks.**

A stipulation in a contract giving a city an option to purchase waterworks is not a "debt" binding on the city, within the constitutional provision limiting the amount of indebtedness which it can incur. *Stedman v. City of Berlin*, 73 N. W. 57, 60, 97 Wis. 505.

**Same—Provision for payment.**

By "indebtedness," in the constitutional provision limiting the indebtedness which a city may contract, is meant an agreement of some kind by the city to pay money where no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement. *Brashear v. City of Madison*, 36 N. E. 252, 142 Ind. 685, 33 L. R. A. 474; *Quill v. City of Indianapolis*, 23 N. E. 788, 791, 124 Ind. 292, 7 L. R. A. 681; *Sackett v. City of New Albany*, 88 Ind. 473, 479, 45 Am. Rep. 467.

**Of partnership.**

The term "indebtedness," in an agreement of a partnership to pay an indebtedness, may be construed to include the liability of the partners, who, as partners, guaranteed nonnegotiable notes to which they were strangers, indorsing one in blank and another for value received. *Woody v. Hawthorn*, 57 N. E. 272, 273, 24 Ind. App. 634.

## INDECENCY.

See "Public Indecency."

"Indecency is defined by Webster to mean that which is unbecoming in language or manners; any action or behavior which is deemed a violation of modesty or an offense

to delicacy, as rude or wanton actions, obscene language, and whatever tends to incite a blush in the spectator." It is defined by Bouvier to be "an act against good behavior and a just delicacy, as, for instance, an exhibition of the naked person or an exhibition of bad pictures." *McJunkins v. State*, 10 Ind. 140, 144.

The exposure in a public place, to divers persons there assembled, by a person of his or her private parts, is public indecency. Immediately after the fall of Adam, there seems to have sprung up in his mind an idea that there was such a thing as decency and such a thing as indecency; that there was a distinction between them; and since that time the ideas of decency and indecency have been instinctive in, and, indeed, parts of, humanity. And it historically appears that the first most palpable piece of indecency of his or her as now commonly called privates, and the first exercise of mechanical ingenuity, was in the manufacture of fig-leaf aprons by Adam and Eve by which to conceal from the public gaze of each other their now, but not then, called privates. This example of covering their privates has been imitated by all mankind since that time, except, perhaps, by some of the lowest grades of savages. *Arderly v. State*, 56 Ind. 328, 329, 330.

"Indecency is an act against good behavior and just delicacy." It is not necessary, in an indictment for the violation of Rev. St. 3893, as amended by 24 Stat. 496, making it criminal to mail any obscene, lewd, or lascivious book or pamphlet, etc., or other publication of an indecent character, to allege that the letter complained of was indecent, if the indictment charges that it was obscene, lewd, and lascivious, as the term "indecent" adds nothing to the language used. *Timmons v. United States* (U. S.) 85 Fed. 204, 205, 30 C. C. A. 74.

#### INDECENT.

The term "indecent" "is said to signify more than 'indelicate' and less than 'immodest'; to mean something unfit for the eye or ear. Worcester's Dict. And I think it is obscene also." *United States v. Loftis* (U. S.) 12 Fed. 671, 672.

Entering a courthouse and urinating against the door facing therein is using the building "for an indecent purpose," within the meaning of Pen. Code, § 725. *Smith v. State*, 35 S. E. 168, 110 Ga. 292.

#### INDECENT ASSAULT.

A verdict finding a defendant guilty of "indecent assault" on the person of a female 10 years of age is equivalent to and synonymous with "indecent liberties" as used in Pen. Code, § 245, providing that the taking

of indecent liberties with or on the person of any female child under the age of 10 years, whether she consents or not, is a felony. They are convertible terms. The crime as defined by the statute is, in its legal tenor and import, an "indecent assault." The term "indecent assault" is but the statutory definition of the crime epitomized. Hence the verdict found defendant guilty of the offense defined in the statute. *State v. West*, 40 N. W. 249, 39 Minn. 321.

#### INDECENT EXPOSURE.

The phrase "indecent exposure of the person," in its well-settled and accepted signification, means the exhibition of such parts of the person as modesty or a sense of self-respect requires to be kept usually covered; so that under Code 1873, § 4012, defining "lewdness" as a designedly open and obscene exposure of the person, an indictment charging defendant with willfully, unlawfully, and designedly making an open, indecent, and obscene exposure of his person in a public place sufficiently describes the offense. *State v. Bauguess*, 78 N. W. 508, 509, 106 Iowa, 107.

#### INDECENT LIBERTIES.

Indecent assault synonymous, see "Indecent Assault."

Under 3 How. Ann. St. § 9314b, providing that if any male person, etc., shall assault a female child and take indecent and improper liberties with the person of such child, without committing or intending to commit the crime of rape upon such child, he shall be deemed a felonious assaulter, etc., "indecent and improper liberties with the person of such child" means such liberties as the common sense of society would regard as indecent and improper, and to constitute the offense the liberties taken with the person of the child need not have been with her private parts. *People v. Hicks*, 98 Mich. 86, 90, 56 N. W. 1102, 1104.

#### INDECENT PUBLICATIONS.

"Indecent" is defined as "not decent; unfit to be seen or heard." The word is used in such sense in Rev. St. § 3893, prohibiting the transmission in the mails of any obscene, lewd, or lascivious book, pamphlet, etc., or other publication of an indecent character. *United States v. Bebout* (U. S.) 28 Fed. 522, 524.

The word "indecent" as used in Rev. St. § 3893, prohibiting the deposit of lewd, obscene, lascivious, or indecent publications in the mails, is to be construed as having the same meaning as given to it at common law in prosecutions for obscene libel. *United States v. Clark* (U. S.) 38 Fed. 500, 501.

The words "obscene," "lewd," "lascivious," or of an "indecent character," in the federal statute prohibiting the sending of such matter through the mail, does not necessarily mean that the separate words are of such a character, but the character of the letter is to be determined by treating it as a whole. *United States v. Hanover* (U. S.) 17 Fed. 444.

The term "indecent or obscene publication," within the meaning of Rev. St. § 3893, includes an illustrated pamphlet purporting to be a work on medical subjects, but of an indecent character and intended for general circulation, even though the work consists partially of extracts from standard medical works. *United States v. Chesman* (U. S.) 19 Fed. 497.

In Supp. Rev. St. p. 229, prohibiting the carriage in the mails of any obscene, lewd, lascivious book, pamphlet, writing, print, or other publication of an indecent character, "indecent" means immodest, impure; and language which is coarse or unbecoming, or even profane, is not within the inhibition of this act. *United States v. Smith* (U. S.), 11 Fed. 663, 665.

#### As immoral.

"Indecent" means that which is offensive to modesty and delicacy, and, in the postal laws making indecent matter unmailable, was intended to exclude such matter as would disseminate immorality in any form. *United States v. Britton* (U. S.) 17 Fed. 731, 733.

The terms "obscene" and "indecent," as used in section 317 of the Penal Code, declaring it to be a misdemeanor for any person "to sell, lend, give away or offer to give away, or show, or advertise, or otherwise offer for loan, gift, sale or distribution, an obscene or indecent book, writings, paper, picture, drawing or photograph," include all pictures, drawings, or photographs of an indecent and immoral tendency, embracing such as are offensive to chastity, and demoralizing and sensual in their character, by exposing what purity and decency forbid to be shown, and which are productive of libidinous and lewd thoughts or emotions. *People v. Muller* (N. Y.) 82 Hun, 209, 211.

The test of the "indecency" or "obscenity" of a picture, within the meaning of Pen. Code, § 317, prohibiting the selling of any obscene or indecent pictures or publications, etc., is their capability of suggesting impure thoughts. It is evident that mere nudity in painting or sculpture is not obscenity. Some of the great works in painting and sculpture, as all know, represent nude human forms. *People v. Muller*, 96 N. Y. 408-411, 48 Am. Rep. 635.

The word "indecent," in the federal statute prohibiting the mailing of indecent, etc.,

books, etc., means tending to obscenity; having the form of indecency which is calculated to promote the general corruption of morals. *United States v. Bennett* (U. S.) 24 Fed. Cas. 1093, 1099; *United States v. Wightman* (U. S.) 29 Fed. 636. See, also, *Dunlop v. United States*, 17 Sup. Ct. 375, 380, 165 U. S. 486, 41 L. Ed. 618.

#### INDECENTLY.

The word "indecently" has no definite legal meaning, and its meaning depends upon the connection in which it is used. *Reg. v. Webb*, 2 Car. & K. 933, 938.

#### INDECENTLY ACTING.

Pen. Code, § 418, providing that any person who shall by cursing or using profane or obscene language, or by being intoxicated or otherwise "indecently acting," interrupt or in any manner disturb a congregation of persons lawfully assembled for divine service, and until they are dispersed from such place of worship, shall be guilty of a misdemeanor, means any conduct which, being contrary to the uses of the particular class of worshipers, interferes with their services, or is annoying to the congregation in whole or in part. Divine services are probably more often disturbed by the talking and loud whispering of rude and ill-mannered persons, especially during prayer, than by any other means, and such disturbance will be deemed "indecently acting" and warrant a prosecution. *Nichols v. State*, 29 S. E. 431, 432, 103 Ga. 61.

"Indecently acting," as used in an indictment charging a person with making a disturbance by talking, by loud talking, by using profane language and obscene language, and being intoxicated, and by otherwise "indecently acting," includes indecent and vulgar noises. *Taffe v. State*, 16 S. E. 204, 90 Ga. 459.

#### INDECENTLY DRUNK.

A charge in a complaint against a defendant for "being indecently drunk," contrary to the provisions of the statute, was similar in its import to the words of the statute, making it an offense for being intoxicated under such circumstances as to amount to a violation of decency. The words in their natural sense would convey to the common mind in each case substantially the same impression. *Alexander v. Card*, 3 R. I. 145, 146.

#### INDECOROUS.

"Indecorous" means impolite, or a violation of good manners or improper breeding. It is broad enough to cover the slightest departure from the most polished politeness to conduct which is vulgar and insult-

ing. It does not necessarily, nor indeed generally, involve an insult. The latter assumes superiority and offends the self-respect of the person to whom it is offered, while the former excites pity for the one guilty of it. The word or act may be both indecorous and insulting, but yet it often lacks the essential elements of an insult. And though it may have been "indecorous" in a conductor not to stop a train at the platform for a woman passenger, or not to carry her valise when she was leaving the train, or to let her get off between stations rather than suffer inconvenience by being carried to the next station, yet none of these things amounted to insult, indignity, oppression, or inhumanity. *Louisville & N. R. Co. v. Ballard*, 85 Ky. 307, 812, 8 S. W. 580, 581, 7 Am. St. Rep. 600.

## INDEFEASIBLE ESTATE IN FEE SIMPLE.

The covenant that the grantor is seised of an indefeasible estate in fee simple is a covenant of perfect title. *Douglass v. Lewis*, 9 Sup. Ct. 634, 637, 131 U. S. 75, 38 L. Ed. 58.

A bond to make an "indefeasible title in fee simple, such as the state makes," is to be construed as requiring a deed with a general warranty. *Kelly's Heirs v. Bradford*, 6 Ky. (3 Bibb) 317, 6 Am. Dec. 656.

## INDEFINITE FAILURE OF ISSUE.

"An 'indefinite failure of issue' means an extinction of issue at any period." *Chetwood v. Winston*, 40 N. J. Law (11 Vroom) 337, 338.

An "indefinite failure of issue" is the period when the issue or descendants of the first taker shall become extinct, and when there is no longer any issue of the issue of the grantee, without reference to any particular time or any particular event. *Huxford v. Milligan*, 50 Ind. 542, 546; *Cain v. Robertson*, 61 N. E. 26, 27, 27 Ind. App. 198; *Downing v. Wherrin*, 19 N. H. 9, 84, 49 Am. Dec. 139; *Anderson v. Jackson* (N. Y.) 16 Johns. 382, 399, 8 Am. Dec. 330; *Downing v. Wherrin*, 19 N. H. 9, 84, 49 Am. Dec. 139; *Moody v. Walker*, 8 Ark. (3 Pike) 147, 198.

An "indefinite failure of issue" means a failure of issue whenever it may happen, sooner or latter, without any fixed, certain, definite period within which it must happen. *Anderson v. Jackson* (N. Y.) 16 Johns. 382, 399, 8 Am. Dec. 330; *Downing v. Wherrin*, 19 N. H. 9, 84, 49 Am. Dec. 139; *Moody v. Walker*, 8 Ark. (3 Pike) 147, 198.

## INDEFINITE IMPRISONMENT.

A sentence to pay a fine, and "that the sheriff do keep you in custody until the

judgment of the court is complied with," is not in itself a violation of section 8 of the Bill of Rights, forbidding "indefinite imprisonment." The sentence, with award of process, does not necessarily create any imprisonment, the custody adjudged under such sentence being a mode of executing the sentence; that is, enforcing the payment of the fine. *Ex parte Bryant*, 4 South. 854, 24 Fla. 278, 12 Am. St. Rep. 200.

## INDEMNIFY.

"'Indemnify' is defined by Webster to mean: '(1) To save harmless; to secure against future loss or damage. (2) To make up for what is past; to make good; to reimburse.' By Worcester it is defined to be: '(1) To secure against damage, loss, injury, or penalty; to save harmless. (2) To compensate for loss or injury; to reimburse; to remunerate.' The word, then, appears to be used in two general senses: First, in the sense of giving security; and, second, in the sense of compensation for actual damage; and it is used in this second sense in a bond to indemnify one delivering goods to the obligor against legal liability by reason thereof." *Weller v. Eames*, 15 Minn. 461, 467 (Gil. 376, 383), 2 Am. Rep. 150.

The word "indemnify," as used in an award of arbitrators directing that the defendant should indemnify the plaintiff against demands that should thereafter come against a firm, has reference only to a personal responsibility. *Peck v. Wakely* (S. C.) 2 McCord, 279, 283.

The use of the word "indemnify," in a policy securing a gas company from loss on account of injuries to its employes, means to reimburse or make whole the assured against loss on account of such liability, and it was not a contract of insurance against liability, but of indemnity against loss, by reason of such liability. *Frye v. Bath Gas & Electric Co.*, 54 Atl. 395, 396, 97 Me. 241, 59 L. R. A. 444, 94 Am. St. Rep. 500.

## INDEMNITY.

The term "indemnity," in the statement that insurance is a contract of indemnity, excludes all idea of profit to the insured. *Davis v. Phoenix Ins. Co.*, 43 Pac. 1115, 1117, 111 Cal. 409.

"Indemnity," as used in an award of arbitrators that the plaintiff should give the defendant sufficient indemnity against four certain notes, has reference only to personal responsibility. *Peck v. Wakely* (S. C.) 2 McCord, 279, 283.

A contract of indemnity is given to a person against his sustaining loss or damage, and cannot properly be called one that insures the thing, it not being possible so to

do. *Cummings v. Cheshire County Mut. Fire Ins. Co.*, 55 N. H. 457, 459.

Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties or of some other person. Civ. Code Cal. 1903, § 2772; Civ. Code S. D. 1903, § 1959; Civ. Code Mont. 1895, § 8580.

#### Contribution distinguished.

The doctrine of "contribution" is not founded on contract, but on the principle that equality of burden as to a common right is equity; that wherever there is a common right the burden is also common. "Indemnity," on the contrary, springs from contract, express or implied, and in a general way may be defined as the obligation or duty resting on one person to make good any loss or damage which another has incurred while acting at his request or for his benefit. *Vandiver v. Pollak*, 19 South. 180, 181, 107 Ala. 547, 54 Am. St. Rep. 118.

#### Guaranty of payment distinguished.

There is a well-understood difference between a guaranty of payment and a contract of indemnity against loss as the result of the nonpayment of a debt. In the first case the liability of the guarantor is fixed by the failure of the principal debtor to pay at maturity or at the time when payment was guaranteed; in the second the contract partakes of the nature of a guaranty of collection, no liability being incurred until after, by the use of due and reasonable diligence, the guarantee has become unable to collect the debt from the principal debtor. *Pierce v. Merrill*, 61 Pac. 64, 66, 128 Cal. 464 (citing *Burton v. Dewey*, 46 Pac. 325, 4 Kan. App. 589).

There is an essential difference, in legal effect, between "covenants of indemnity" strictly—that is, of indemnity against loss—and "covenants to pay" or assume or stand for the debt, or a surety's liability thereon. A right of action accrues on those of the latter class as soon as the debt matures and is unpaid, because the liability then becomes absolute, and the failure to pay is a breach of the express terms of the covenant; while those of the former class are not broken, and no right of action accrues, until the indemnitee has suffered a loss against which the covenant runs. This distinction grows out of the express terms of the contract, and is well established by authority. It is expressed by Mr. Justice Swayne in *Wicker v. Hoppock*, 73 U. S. (6 Wall.) 94, 99, 18 L. Ed. 752, 753, as follows: "In that class of cases [contracts of indemnity] the obligee cannot recover until he is actually damaged, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well-settled distinction between

an agreement to indemnify and an agreement to pay. In the latter case a recovery may be had as soon as there is a breach of the contract, and the measure of damages is the full amount agreed to be paid." *Henderson-Achert Lithographic Co. v. John Shillito Co.*, 60 N. E. 295, 298, 64 Ohio St. 236, 83 Am. St. Rep. 745.

#### Losses distinguished.

Where defendants give plaintiff a bond to indemnify them against losses by sales in their business, the word "indemnity," as distinguished from the words "losses," means the amount for which the defendant may be liable under the bond, while the word "losses" refers to the loss by the plaintiffs sustained in their dealings with their customers. *Rice v. National Credit Ins. Co.*, 41 N. E. 276, 277, 164 Mass. 285.

#### INDEMNITY BELT.

The "indemnity belt" is the belt of land extending on either side of a railroad from which the railroad is entitled to make a selection of lands in case the land which has been specifically granted to it has been previously appropriated by other parties. *Eiling v. Thexton*, 16 Pac. 931, 933, 7 Mont. 330.

#### INDEMNITY BOND.

Under Act 1799 (Rev. Laws, p. 426), providing that every prisoner in every civil action, giving bond to the sheriff with sufficient securities that he will keep within the prison bounds, shall have liberty to walk therein, and if he walk out of said bounds the bond shall be forfeited, such a bond is not a bond of indemnity, strictly speaking, and there is no necessity of showing an actual damnification. *Smith v. Allen*, 1 N. J. Eq. (Sart.) 43, 50, 21 Am. Dec. 33.

#### INDEMNITY LANDS.

"Indemnity lands" are lands granted in aid of railroads, to be selected in lieu of parcels previously granted which have been lost by previous disposition or reservation for other purposes, the title to which accrues from the time of their selection. No title to indemnity lands becomes vested in any company until the selections are made, and they are not considered as made until they have been approved, as provided by statute, by the Secretary of the Interior. *Wisconsin Cent. R. Co. v. Price County*, 10 Sup. Ct. 341, 347, 133 U. S. 496, 83 L. Ed. 687; *Jackson v. La Moure County*, 46 N. W. 449, 1 N. D. 238.

#### Granted or place lands distinguished.

In the construction of land grants in aid of railroads, there is a well-established dis-

inction observed between "granted lands" and "indemnity lands." The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by and approved and accepted survey of the line of the road filed in the Land Department as of the date of the act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection. *Barney v. Winona & St. P. R. Co.*, 117 U. S. 228, 232, 6 Sup. Ct. 654, 656, 29 L. Ed. 858, 860; *Altschul v. Clark*, 65 Pac. 991, 994, 39 Or. 315; *State of Tennessee v. Whitworth*, 6 Sup. Ct. 649, 653, 117 U. S. 139, 29 L. Ed. 833.

There is a well-defined difference between "indemnity lands" and "place lands," place lands becoming instantly fixed by the adoption of the line of road. *Jackson v. La Moure County*, 46 N. W. 449, 1 N. D. 238.

## INDENT.

The term "indent," as used by English lexicographers, signifies any contract or obligation in writing; but as used in Act Cong. March 3, 1825, § 17 (4 Stat. 119), which enumerates as the subject of forgery an "indent," certificate of public stock or debt, or treasury note, or other public security of the United States, or any letters patent, etc., it means a certificate of indebtedness issued by the federal government at the close of the Revolutionary war to the public creditors. *United States v. Irwin* (U. S.) 26 Fed. Cas. 544, 546.

Act Feb. 14, 1729-30, supplementing an act prohibiting clergymen and others from joining in marriage indented servants without consent of their masters or mistresses, is not to be construed as including apprentices, as the "term 'servant' in common parlance does not apply to apprentices." *Altamus v. Ely* (Pa.) 3 Rawle, 305, 306.

## INDENTURE.

An indenture is a deed between parties by which they each assume obligations to the other and become actually bound by the terms of the instrument. *Scott v. Mills*, 10 N. Y. St. Rep. 357, 358.

The word "indenture," applied to a written instrument, imports in its broadest sense a conveyance. *Whitney v. Richardson*, 18 N. Y. Supp. 861, 862, 59 Hun, 601.

The calling of an instrument an "indenture," in the body of it, will not be considered as expressing the intention that the maker intended it as a deed. *Walker v. Kelle*, 8 Mo. 301, 302.

## As mutual deed.

A deed executed only by the grantor provided that the grantees assumed and agreed to pay a certain mortgage on the premises conveyed. In answer to a claim by the grantees that they were not liable on this agreement, the court said: "The conveyance purports to be an 'indenture,' which, according to its proper signification, is a deed inter partes or a mutual deed. An 'indenture' is a writing containing a conveyance, bargain, contract, covenants, or agreements between two or more; that which is the mutual deed of both." The deed in this case was accepted by the grantees as an indenture, and it does not seem to be contrary to principle to hold that for the purposes of the remedy it shall be regarded as an instrument of the character expressed and as a deed of both parties." *Bowen v. Beck*, 94 N. Y. 86, 89, 46 Am. Rep. 124.

## Seal imported.

An indenture is a deed that is in writing, sealed and delivered. It makes its name from being "indented," or cut by a waving line or a line of indenture, so as to fit or aptly join its counterpart from which it is supposed to have been separated. Aside from the general principle of the law, that an indenture must be sealed, the act respecting apprentices and servants provided that the indenture of an apprenticeship or service should be sealed. When the act for the settlement of the poor, therefore, speaks of gaining a settlement by serving an apprenticeship under indenture, it necessarily means an indenture sealed. *Overseers of Poor of Hopewell Tp. v. Overseers of Poor of Amwell Tp.*, 6 N. J. Law (1 Halst.) 169, 175. See, also, *Commonwealth v. Wilbank* (Pa.) 10 Serg. & R. 416, 417.

The word "indenture," when used in statutes, does not necessarily imply a seal. *Code Iowa 1897*, § 48, subd. 20; *Gen. St. Kan. 1901*, § 7342, subd. 20.

## INDEPENDENCE.

What is meant by the "independence of the judicial department" is that it may exercise its functions of expounding and enforcing law in the administration of justice, and that no part of its functions can be exercised, either directly or indirectly, by either the legislative or the executive; indeed, that those in authority in the other departments cannot even so much as cross the line dividing the domain of the judicial and other departments to make a suggestion as to how the judicial department shall perform its functions, or what kind of judgments or decrees it ought to render, and what exposition it shall give to the laws. *White County Com'rs v. Gwin*, 36 N. E. 237, 245, 136 Ind. 562, 22 L. R. A. 402.

**INDEPENDENT.**

In an action involving the relations between the general and local organizations of a church, it was said that the word "independent" in ordinary usage is very indefinite. "The tenant of a poorhouse likes to call himself an independent citizen, and no one need object seriously to this so long as he conforms to the laws of the place. Others have a better right to claim this distinction, and yet all must submit to the laws of the land. No man or body of men can be entirely independent of society or its laws, and yet there is a measure of independence in all associations, and its extent can be ascertained only by the observation of the facts that define it." *Winebrenner v. Colder*, 43 Pa. (7 Wright) 244, 252.

**INDEPENDENT ADVICE.**

"The words 'independent advice,' used in speaking of one who has acted without any independent advice, is shown by examination of the cases to be a synonym of 'impartial.' One of the definitions of the word is 'not subject to bias or influence.' It certainly does not mean that, when a person has the advice of one or more impartial friends, he must seek, or the friend must suggest, application to another; nor do we think, when the friend is a near relative who is familiar with the condition of the party as to mental capacity and estate, that it is necessary to call in a stranger to make his advice valid." *Neal v. Black*, 35 Atl. 561, 566, 177 Pa. 83, 34 L. R. A. 707.

**INDEPENDENT CAUSE.**

An "independent cause of an injury" is a cause which is not subject to any control or could not have been contemplated by the parties. *Jones v. George*, 61 Tex. 345, 349, 48 Am. Rep. 280.

**INDEPENDENT CONTRACT.**

Independent contracts are those in which the mutual acts or promises have no relation to each other, either as equivalents or as considerations. Civ. Code La. 1900, art. 1769.

**INDEPENDENT CONTRACTOR.**

An independent contractor is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. *Gayle v. Missouff Car & Foundry Co. (Mo.)* 76 S. W. 987-992; *Crenshaw v. Ullman*, 20 S. W. 1077, 1078, 118 Mo. 633 (citing *Thompson on Negligence*).

An independent contractor is one who, exercising an independent employment, con-

tracts to do a piece of work according to his own methods, and without being subject to the control of his employer except as to the result of the work. *Waters v. Pioneer Fuel Co.*, 52 Minn. 474, 55 N. W. 52, 38 Am. St. Rep. 564; *Indiana Iron Co. v. Cray*, 48 N. E. 803, 807, 19 Ind. App. 565.

An independent contractor is one who contracts to perform the work at his own risk and cost, the workmen being his servants, and he, and not the person with whom he contracts, being liable for their misconduct. *People v. Orange County Road Const. Co.*, 67 N. E. 129, 130, 131, 175 N. Y. 84.

An independent contractor is said to be one who undertakes to do specific pieces of work for other persons without submitting himself to their control in the details of the work, or one who renders the service in the course of an independent employment, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. *Waters v. Pioneer Fuel Co.*, 55 N. W. 52, 52 Minn. 474, 38 Am. St. Rep. 564; *Norfolk & W. Ry. Co. v. Stevens' Adm'r*, 34 S. E. 525, 528, 97 Va. 631, 46 L. R. A. 367.

An independent contractor is one who contracts to perform service for another independent of the employer in all that pertains to the execution of the work, and who is subordinate to the employer only in effecting a result in accordance with the employer's design. *Smith v. Simmons*, 103 Pa. 32, 36, 49 Am. Rep. 113.

An independent contractor is one who prosecutes an occupation having some independence. While performing his contract and complying with its terms, he is not subject to the rule and control of the employer, who cannot interfere save to require the performance as agreed. The relation is one of contract, under which the contractor retains some degree of independence, while the laboring man follows the employer's direction, and is not independent in the sense of an independent contractor's independence. *Holmes v. Tennessee Coal, Iron & R. Co.*, 22 South. 403, 405, 49 La. Ann. 1465.

"To draw the distinction between independent contractors and servants is often difficult, and the rules which courts have undertaken to lay down on this subject are not always simple of application. A rule, as often quoted as any, is stated in the syllabus of the case of *Bibb's Adm'r v. Norfolk & W. R. Co.*, 14 S. E. 163, 87 Va. 711, after an able review of the authorities, as follows: 'Independent contractor is one who renders service in the course of an occupation, and represents the will of his employer only as to the result of his work, and not as to the means whereby it is accomplished, and is usually paid by the job.' *Thomp. Neg.* § 39, says: 'Perhaps the most usual test by which

to determine whether the person doing the injury was a servant or an independent contractor is to consider whether he was working by the job or at stated wages—so much per day, week, or month. *Schular v. Hudson River R. Co.* (N. Y.) 38 Barb. 653. A person who works for wages, whose labor is directed and controlled by the employer, either in person or by an intermediate agent, is a servant, and the master must answer for the wrongs done by him in the course of his employment. A person who, for a stated sum, engages to perform a stated piece of labor in which he is skilled, the proprietor of the work leaving him to his own methods, is an independent contractor. The proprietor does not stand in relation of superior to him, and is not answerable for the wrongs done by him or his servants in the prosecution of the work, unless special circumstances exist making him so. The fact the employé was hired, not for a definite time, but to perform a particular job, does not, however, of itself negative the relation of master and servant, for under such a contract the employer may well retain full control over him; and it must be constantly borne in mind that the power to control, on the part of the employer, is the essential fact establishing the relation. A person employed by the agent of the owner of a street railway, at a stipulated sum per month, to run a car and furnish a driver, the car and the road being controlled and the work directed by the agent, is not an independent contractor, but is a servant." *Jensen v. Barbour*, 39 Pac. 906, 908, 15 Mont. 582. The definition in *Bibb's Adm'r v. Norfolk & W. R. Co.*, 14 S. E. 163, 87 Va. 711, quoted and approved in *Fink v. Missouri Furnace Co.*, 82 Mo. 276, 283, 52 Am. Rep. 376; *Norfolk & W. Ry. Co. v. Stevens' Adm'r*, 34 S. E. 525, 526, 97 Va. 631, 46 L. R. A. 367.

The essential element of the definition of an "independent contractor" is that he has control of the work under the contract, and this may be the case though working on premises still in the possession of the owner. Where a stairway in a public building was in process of construction by a stair builder under a contract made with the agent of the owner, under which the contractor was given full control of the stairway for that purpose, and the cleats nailed onto the stairs which caused plaintiff to fall were placed there by the contractor's servants, over whom the agent and owner had no control, and the work was not completed and turned over to the owner until a month after the accident, the negligence, if any, was that of the independent contractor, exempting the owner from liability. *Louthan v. Hewes*, 70 Pac. 1065, 1066, 138 Cal. 116.

A construction company engaged in building a railroad made a subcontract for the construction of the road from a given

point, as far as the company's chief engineer might determine, the company to furnish a locomotive and train, with engineer, fireman, and brakeman, for the use of the subcontractors in such work. Held that, while engaged in such work, the subcontractors were independent contractors, for whose negligence in the management of the train the company was not liable. *Powell v. Virginia Const. Co.*, 13 S. W. 691, 694, 88 Tenn. 692, 17 Am. St. Rep. 925.

A laborer engaged for 50 cents to drive an animal to defendant's shop from another part of the city is held to be a servant, and not an independent contractor. *O'Neill v. Blase*, 68 S. W. 764, 766, 94 Mo. App. 648.

#### INDEPENDENT COVENANT.

An "independent covenant" is where either party may recover damages from the other for the injury he may have received for a breach of the covenants in his favor, and it is no excuse for the defendant to allege a breach of the covenant on the part of the plaintiff. *Bailey v. White*, 8 Ala. 330, 331.

#### INDEPENDENT EMPLOYMENT.

Stevedores bringing passengers' baggage on board a steamship from the wharf and placing it in the compartments where passengers may request to have it placed, so as to be convenient for their use during the voyage, are not exercising an independent employment, but are performing a duty which rests on the ship. *The Dresden (U. S.)* 62 Fed. 438, 439.

#### INDEPENDENT EXECUTOR.

Though not so designated by statute, an executor, under a will made in accordance with Rev. St. art. 1995, providing that any person may provide in his will that no action shall be taken towards the settlement of his estate beyond the probating of the will and the return of an inventory, is, in legal phraseology, an "independent executor." *Ellis v. Mabry*, 60 S. W. 571, 572, 25 Tex. Civ. App. 164.

#### INDEPENDENT RECLAMATION.

"Independent reclamation," as used in Pol. Code, § 3481, relating to the independent reclamation of swamp lands, means separate and distinct reclamation. *People v. Parvin (Cal.)* 14 Pac. 783, 785.

#### INDEPENDENTLY.

A bequest to a wife, stipulating that the property shall be held by her "independently," has the effect of excluding her husband from any rights in the property. *Margetts v. Barringer*, 7 Sim. 482.



## INDEX.

"Webster defines 'index' to be that which points out; that which indicates or manifests. One great object of an index is to render the contents of a book readily accessible." *Metz v. State Bank of Brownsville*, 7 Neb. 165, 172.

The proper office of the index is what its name imports—to point to the record. *Chase v. Bennett*, 58 N. H. 428, 429.

An "index," according to the dictionary, is that which points out; that which shows, indicates, or manifests. In ordinary use it is a table of references pointing out the page of a book where a certain article or subject may be found. When the article or subject to be pointed out is a record, it cannot be done until the record has an existence and has found a place on a certain page or pages of some book. *Perkins v. Strong*, 36 N. W. 292, 295, 22 Neb. 725.

The "index" mentioned in the statute requiring a plain and accurate index of all judgments, etc., docketed to be kept, and making the clerk liable for failure to docket any judgment or to preserve the index, is a guide to the docket. It saves labor and trouble in examining the docket, but is not the docket itself, nor a part of it. Thus "docketing" the judgment is one thing, and "indexing" it is a different thing. *Calwell's Ex'r v. Prindle's Adm'r*, 19 W. Va. 604, 669.

## INDIA.

The word "India," in a marine policy for a voyage to India, may be shown, according to the mercantile acceptance, to include Mauritius. *Robertson v. Clark*, 1 Bing. 445.

## INDIA RUBBER.

"India rubber" is a generic name for gums having the qualities of caoutchouc. *Goodyear v. Mullee* (U. S.) 10 Fed. Cas. 707.

"India rubber," as used in Act March 3, 1883, § 2502, Schedule N, providing that "articles composed wholly of India rubber," not specially enumerated or provided for in this act, should be subject to a certain duty, should be construed to include dental rubber, though composed of a mixture of rubber with sulphur and coloring matter, for it has not lost its identity by a chemical change and become a new and different species. It is not crude rubber, nor milk of rubber, nor is it a fabric of rubber; but it is rubber rendered elastic and more attractive by coloring. Sulphur and coloring matter make the resulting rubber, while still remaining rubber, an article of rubber, as contradistinguished from rubber crude, or rubber merely cleansed of impurities. *Junge v. Hedden*, 13 Sup. Ct. 88, 89, 146 U. S. 233, 36 L. Ed. 963.

## INDIAN.

See "Pueblo Indians."

As citizen, see "Citizen."

As foreign citizen, see "Foreign Citizen."

As slave, see "Slave."

As white person, see "White Person."

Chief Justice Marshall, in *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515, 8 L. Ed. 483, says that the Indian natives had always been considered as distinct, independent political communities, retaining their original natural rights as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves as well as on the Indians. *Langford v. Monteith*, 1 Idaho, 612, 616.

The term "Indians," as ordinarily used when referring to persons in the United States, is understood to refer to the members of that race of men who inhabited North America when it was found by Caucasian people. And it does not logically follow that a member of that race who has become a citizen may no longer be properly called an "Indian," with more force than it would also follow that a member of the African or Negro race, commonly called in this country the "colored race," and who is also a citizen, may not be properly and technically described by his racial designation. And the term "Indian," when used in the statute without any other limitation, should be held to include members of the aboriginal race, whether now sustaining tribal relations or otherwise. *Frazee v. Spokane County*, 69 Pac. 779, 782, 29 Wash. 278.

Act April 16, 1850, § 14, providing that no black or mulatto person or Indian shall be allowed to give evidence in favor of or against a white man, construed to include all nationalities other than the Caucasian. *People v. Hall*, 4 Cal. 399.

Rev. St. § 2139, provides that every person who disposes of spirituous liquors to any "Indian under the charge of any superintendent or agent" shall be punished, etc. Held, that an Indian of the Nez Percés tribe, a soldier in the United States army, was under the charge of a superintendent or agent within the meaning of the statute. "When an Indian enlists in the military service, the officers of Indian affairs are only partially relieved of their charge concerning him, and but temporarily deprived of power to control his person. While he is in the army such officers continue to be charged with the duty of caring for his family and property and interests as a member of his tribe, and on his

discharge from the army their right to control him will be fully restored." *United States v. Hurshman* (U. S.) 53 Fed. 543, 544.

#### Adopted white man.

"Indian," as used in Act Cong. June 30, 1884, § 35, which relates to the punishment of offenses committed within the jurisdiction of the United States, and provides that the provisions of that section shall not extend to crimes committed by one Indian against the person or property of another Indian, does not include a white man who at a mature age is adopted into an Indian tribe. It refers to those who, by the usages and customs of the Indians, are regarded as belonging to their race. *United States v. Rogers*, 45 U. S. (4 How.) 567, 572, 11 L. Ed. 1105; *United States v. Rogers* (U. S.) 27 Fed. Cas. 886, 889. See, also, *Ex parte Morgan* (U. S.) 20 Fed. 298, 308.

#### Husband of squaw.

"Indian," as used in Rev. St. § 2146, defining crimes and providing for punishments, and also providing that the provisions of the act do not extend to offenses committed by one Indian upon the person or property of another Indian, does not include one who has married an Indian squaw, the status of a person, whether an Indian or not, within the meaning of this act, being determined by the status of the father. *Ex parte Reynolds* (U. S.) 20 Fed. Cas. 582, 585.

#### Mixed blood.

"Indians by descent," as used in a treaty reserving certain lands to certain persons and describing them as "Indians by descent," is descriptive of persons of mixed Indian blood, and includes those of mixed white and Indian blood as well as those of full Indian blood, and the terms are applicable to both classes, though more strictly to only those of the whole blood. *Campau v. Dewey*, 9 Mich. 381, 484.

Within the meaning of Indiana Statutes relating to Indians, the term "Indian" includes a person recognized as an Indian by the community, by the Indians themselves, by the state and federal authorities, and who is stamped as such by birth, education, and language, and has three-eighths Indian blood. *Lafontaine v. Avaline*, 8 Ind. 6, 13.

The son of a negro father by an Indian mother is not an "Indian," within the meaning of the federal statute providing for the punishment of Indians doing certain offenses, as the child follows the condition of the father. *United States v. Ward* (U. S.) 42 Fed. 320.

A child that was born from a marriage between a white father adopted into an Indian tribe and a half-breed Indian woman is

not an Indian within the meaning of the act of Congress of February 8, 1887, granting lands to Indians not residing upon a reservation. *Keith v. United States*, 58 Pac. 507, 8 Okl. 446.

A child partakes of the condition of the mother, and if the mother is an Indian the child will be so considered, within the provisions of Act 1834, § 25, declaring that the laws of the United States for the punishment of crime in the Indian Territory shall not extend to the crimes committed by one Indian against the person or property of another. The child of a white woman by an Indian father would, for the purposes of that act, be deemed of the white race, the condition of the mother, and not the quantum of Indian blood in the veins, determining the condition of the offspring; this standard following the common-law rule, which was borrowed from the civil law. *United States v. Sanders* (U. S.) 27 Fed. Cas. 950, 951.

A person of half white and half Indian blood is not a "white person," within the meaning of this phrase as used in the naturalization laws, but an Indian. *In re Camille* (U. S.) 6 Fed. 256.

Every person, not a colored person, having one-fourth or more of Indian blood, shall be deemed an Indian. Code Va. 1877, § 49.

#### Mongolian.

"Indian," as used in Act April 16, 1850, § 14, providing that no Indian, etc., shall be allowed to give evidence in favor of or against a white man, and as used in Civil Practice Act, § 394, prohibiting any Indian, etc., from testifying as a witness in any action in which a white person is a party, is to be construed as a generic term distinguishing the great Mongolian race, and is not confined to the aboriginal inhabitants of North America. The name "Indian" was given to the inhabitants of North America by Columbus, under the supposition that the new continent was a part of India, and "from that time down to a very recent date the American Indian and Mongolian or Asiatic were regarded as the same type of the human species." *People v. Hall*, 4 Cal. 399.

#### INDIAN COUNTRY.

What is known as the "Indian country" or the "Indian Territory" was first defined and appointed by the act of June 30, 1834. That definition is as follows: "That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana or the territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purpose of this act is to be deemed to be the Indian country." The

expressions "Indian country" and "Indian Territory" are used interchangeably in the statutes. We speak of the "Indian Territory," but politically that is a mistake; there is no organization; it is more properly a territory, referring simply to geographical extension, and not to any political organization. In re Jackson (U. S.) 40 Fed. 372, 373.

"Indian country," as used in Indian Intercourse Act 1834, § 23 (4 Stat. 732), means that country in which the intercourse between the whites and Indians is regulated and restrained by special acts of Congress. In re Carr (U. S.) 5 Fed. Cas. 115, 116.

"Indian country," as used in Rev. St. § 2145, providing that the general laws of the United States governing the punishment of crime shall extend to the "Indian country," includes all that country within the limits of the United States to which the title of the Indians has not been extinguished, even when not within a reservation expressly set apart for the exclusive occupancy of the Indians, excluding, however, any territory embraced within the exterior geographical limits of a state, not excepted from its jurisdiction by treaty or by statute at the time of its admission into the Union. The term would also include any country, actually occupied by the Indians, over which Congress has jurisdiction, under its constitutional power, or in pursuance of treaties made thereunder, to regulate commerce with the Indian tribes, where the offense charged in any way interfered with such commerce. Ex parte Kan-gi-shun-ca, 3 Sup. Ct. 396, 399, 109 U. S. 556, 27 L. Ed. 1030.

"The 'Indian country,' within the meaning of the statute making it a crime to introduce spirituous liquors therein, is only that portion of the United States or its territories which has been declared to be such by an act of Congress. Because a country is inhabited or owned in whole or in part by Indians, it is not therefore an Indian country within the purview of the trade and commerce acts." United States v. Seveloff (U. S.) 27 Fed. Cas. 1021, 1022.

#### As country under Indian title.

The term "Indian country," within the meaning of Rev. St. §§ 2139, 2140, and 29 Stat. p. 506, c. 109, prohibiting the introduction of liquors into the Indian country, does not include mining claims located as authorized by an act of Congress in an Indian reservation. In the opinion of the Supreme Court by Mr. Justice Miller, in the case of Bates v. Clark, 95 U. S. 204, 208, 24 L. Ed. 471, the definition of "Indian country" is given as follows: "The simple criterion is that, as to all lands thus described, it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had

title to it, and no longer. As soon as they parted with the title it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case." And later, in the case of Ex parte Crow Dog, 109 U. S. 556, 572, 3 Sup. Ct. 396, 27 L. Ed. 1030, Mr. Justice Matthews said: "In our opinion that definition now applies to all the country to which the Indian title has not been extinguished, within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians." It is also settled by the decisions of the Supreme Court that the government of the United States is the primary and ultimate source of title to the public domain, and the Indians are not recognized as having any title, except the mere right of occupancy, which Congress has the right at any time to extinguish. United States v. Four Bottles Sour-Mash Whisky (U. S.) 90 Fed. 720, 722.

The "Indian country" embraces all land within the limits of the United States to which the Indian title has never been extinguished, except that which lies within the exterior geographical limits of a state, and which was not excepted from the jurisdiction of that state at the time of its admission into the Union. Ex parte Crow Dog, 3 Sup. Ct. 396, 399, 109 U. S. 556, 27 L. Ed. 1030.

"An 'Indian country' is a portion of territory subject to an Indian title and inhabited by Indians. A mere solitude, or a country without Indians, would hardly be considered an 'Indian country,' even if their title, which is merely possessory, would survive the absolute absence of its beneficiaries." United States v. Certain Property, 25 Pac. 517, 520, 1 Ariz. 31.

"Indian country" is the term used to designate the "territory occupied and set apart for Indian tribes and owned exclusively by them, and wholly within the exclusive jurisdiction of Congress." United States v. Cohn, 52 S. W. 38, 44, 2 Ind. T. 474.

Lands ceded to the United States by the Indians ceased from that time to be a part of the "Indian country" within the nonintercourse act. Clark v. Bates, 46 N. W. 510, 511, 1 Dak. 42.

The term "Indian country," defined in the act of Congress of 1834 to be territory the Indian title to which has not been extinguished, includes any portion of the public domain upon which an Indian tribe has been suffered long to remain, while other portions have been open to settlement or set aside specifically for occupation. Forty Three Cases Cognac Brandy (U. S.) 14 Fed. 539, 540.

**As territory set apart for Indians.**

"Indian country," as used in Act Cong. June 30, 1834, § 25, 3 Stat. 733, as modified by Rev. St. 2145, 2146, which enacts that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall be in force in the "Indian country," etc., is a technical expression, and only applies to such portions of the United States as are described in the first section of the act above referred to, or have since become such by and in pursuance of an act of Congress or a treaty of the United States. It does not extend to or apply to any country simply because it is owned or inhabited by Indians in whole or in part. *United States v. Bridelman* (U. S.) 7 Fed. 894, 895.

"Ever since the phrase the 'Indian country' found its way into the federal Constitution it has been used to signify not only a place or tract of country actually occupied by Indians, but also a tract so occupied by them, and set apart or designated as exclusively for their use, under and by the authority of the United States." *United States v. Martin* (U. S.) 14 Fed. 817, 822.

McCrary, C. J., in construing the provisions of Rev. St. § 2139, which prohibits the introduction of spirituous liquors or wines into the Indian country, said: "If necessity required the court to determine the meaning of the words 'Indian country,' in the absence of any statutory definition I should, in a criminal case, in obedience to the rule which requires that words in a penal statute shall be construed strongly in favor of the accused, hold that 'Indian country' is that portion of the public domain which is set apart as a reservation or as reservations for the use and occupancy of the Indians, and not the whole vast extent of the national domain to which the Indian title has not been extinguished. I do not say that I would in any criminal case undertake to define the words 'Indian country' as used in the statutes of the United States, but I do say that the meaning just suggested seems to me to be the more reasonable." *Forty-Three Gallons of Cognac Brandy* (U. S.) 11 Fed. 47, 50, 51.

The "Indian country" includes such portions of the public domain as are expressly reserved for the use and occupation of the several tribes and bands of Indians, and which are not included within the jurisdiction of any state or territorial government. *United States v. Knowlton*, 3 Dak. 58, 74, 13 N. W. 573.

The term "Indian country" is used to designate lands forming a part of the territory of the United States which have been set apart to the Indians, as contradistin-

guished from states and territories. *Ex parte Morgan* (U. S.) 20 Fed. 298, 304.

**Alaska.**

It may well be said that Alaska is not an "Indian country," in the ordinary sense of the words, but it is an Indian country so far as Congress may choose to make it such. True, the government has never treated with the Indians of Alaska, but in the third article of the treaty of March 3, 1867, there is express and specific reservation of power to the United States to make laws and regulations in relation to the aboriginal tribes, and Congress has the power to treat and consider it as Indian country, so far as to prohibit the sale of intoxicating liquors as a beverage within such territory. *United States v. Nelson* (U. S.) 29 Fed. 202, 203.

Act Cong. March 3, 1873, extending to Alaska two sections of Act June 30, 1834, know as the "Indian intercourse law," and relating principally to the interdiction of the liquor traffic among the Indians, makes said territory "Indian country" only to the extent of the prohibited commerce, and does not put the Alaska Indians on general footing with Indians of other parts of the United States. *In re Sah Quah* (U. S.) 31 Fed. 327; *Waters v. Campbell* (U. S.) 29 Fed. Cas. 411, 412.

The district of Alaska is not "Indian country," within the meaning of Act June 30, 1834, regulating the trade and intercourse with Indian tribes. *United States v. Stephens* (U. S.) 12 Fed. 52, 53 (citing *United States v. Seveloff* [U. S.] 27 Fed. Cas. 1022, 1023).

"Indian country," as used in Rev. St. § 2146, prohibiting the courts of the United States from taking cognizance of any crime committed by one Indian against the personal property of another in the Indian country, does not include all country "owned or inhabited in whole or in part by Indians or aborigines." It does not include Alaska. *Kie v. United States* (U. S.) 27 Fed. 851.

**Cherokee Outlet.**

That tract of the Indian Territory known as the "Cherokee Outlet," was not included within the boundaries of Oklahoma, and, though attached to Logan county, Okl., for judicial purposes, continued to be Indian country, and the United States District Court had jurisdiction over offenses committed in such Outlet, and of an indictment for horse stealing committed therein. *United States v. Pridgeon*, 14 Sup. Ct. 746-749, 153 U. S. 48, 38 L. Ed. 631.

**Crow Indian reservation.**

Prior to the admission of Montana as a state, the Crow Indian Reservation, situated therein, was part of the "Indian coun-

try," within the meaning of Rev. St. § 2145, extending the general criminal laws of the United States over the Indian country. *United States v. Partello* (U. S.) 48 Fed. 670, 676.

#### Montana.

All the country embraced within the limits of Montana Territory, for the purpose of Indian intercourse, must, under 4 Stat. 735, § 1, providing that all parts of the United States west of the Mississippi, and not within Missouri and Louisiana, or the territory of Arkansas, be taken and deemed Indian country. *United States v. 196 Buffalo Robes*, 1 Mont. 489-494.

#### Oregon.

The term "Indian country," as defined by Act Cong. June 30, 1834, does not include Oregon, as the act shows in terms that it was intended to apply to a country over which the general government had absolute and exclusive jurisdiction, and at that time the Oregon country was by treaty with Great Britain in the joint occupation of that country and the United States. *United States v. Tom*, 1 Or. 26, 27.

#### Reservations within states.

The term "Indian country" in Rev. St. U. S. § 2145, providing that the general laws of the United States governing the punishment of crimes shall extend to the Indian country, includes Indian reservations which are within the boundaries of the different States, unless there are some provisions in the act admitting the state prohibiting the United States from exercising jurisdiction over such reservations. *United States v. Partello* (U. S.) 48 Fed. 670, 676; *United States v. Monte*, 3 Pac. 45, 46, 8 N. M. (Gild.) 173.

All Indian reservations held under treaty stipulations with the government must be deemed and taken to be a part of the "Indian country," within the meaning of all laws on that subject; and where Indians of one tribe are found on a reservation assigned to another tribe, they being there without lawful authority, the Commissioner of Indian Affairs may cause their removal, if he deems their presence detrimental to the peace and welfare of the Indians occupying the reservation. *United States v. Crook* (U. S.) 25 Fed. Cas. 695, 700.

The term "Indian reservation," as used in the several acts of Congress in reference to public lands which are not subject to settlement or occupancy by white persons, but are set apart exclusively for the use of Indians, who still sustain their tribal relations and are under the charge and control of an Indian agent, is "Indian country," within the meaning of the federal statutes, giving the federal government jurisdiction over crimes committed in the Indian coun-

try. *Goodson v. United States*, 54 Pac. 423, 425, 7 Okl. 117.

"Indian country," as used in Rev. St. U. S. § 2133, making it a crime for any person other than an Indian to attempt to reside in the Indian country as a trader, or to introduce goods or trade therein, without a license from the government agent, is defined to be "all country to which the Indian title has not been extinguished, within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, except that within the boundaries of the state; and it embraces all territory within the boundaries of states actually occupied by Indians, and excluded by statute or treaty from state jurisdiction." *Ex parte Crow Dog*, 109 U. S. 556, 3 Sup. Ct. 396, 27 L. Ed. 1030. The Indian reservations in the state of New York are not included within this definition. *Benson v. United States* (U. S.) 44 Fed. 173, 182.

An Indian reservation is "Indian country," within Rev. St. § 2147, authorizing the removal of all persons found within the Indian country contrary to law. *United States v. Sturgeon* (U. S.) 27 Fed. Cas. 1357.

The Umatilla Indian reservation is a place within the geographical limits and general jurisdiction of the state of Oregon, but is also a tract of country to which the Indian title is not extinguished, and which has been permanently set apart by territory as a reservation for the use of the Indians, and is therefore "Indian country," within the meaning of that phrase as used in the Revised Statutes of the United States. *United States v. Barnhart* (U. S.) 22 Fed. 285, 288.

"Indian country," in Rev. St. U. S. § 2133, prescribing the penalty for unauthorized trading in the Indian country, does not include a tract of land existing as the Klamath Indian reservation prior to the act of the President in setting apart four tracts of land within the limits of the state of California not including such reservation, for Indian reservations, under Act April 8, 1868, authorizing the President at his discretion to set aside not exceeding four tracts of land, and that said tracts may be or may not include existing reservations. *United States v. 48 Pounds of Rising Star Tea* (U. S.) 38 Fed. 400, 401.

The Osage reservation, in Oklahoma, is "Indian country," within the meaning of St. U. S. § 2145, extending to the Indian country the general laws of the United States as to punishment of crimes, though such reservation has been withdrawn from the Indian Territory. *In re Ingram*, 69 Pac. 868, 869, 12 Okl. 54.

The Sioux Indian reservation, set apart under the treaty proclaimed February 24,

1869, is Indian country. *Uhlig v. Garrison*, 2 N. W. 253, 254, 2 Dak. 71.

The White Mountain Indian reservation, within the territory of Arizona, is a part of the Indian country, within the meaning of Rev. St. U. S. § 2145, which extends to the Indian country the general laws of the United States as to the punishment of crimes, etc. *Ex parte Wilson*, 11 Sup. Ct. 870, 871, 140 U. S. 575, 35 L. Ed. 513.

Act Cong. June 30, 1834, defining "Indian country" as all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any state, to which the Indian title has not been extinguished, though not re-enacted in the Revised Statutes of the United States, and therefore repealed by Rev. St. U. S. § 5596 [U. S. Comp. St. 1901, p. 3751], may be referred to for the purpose of ascertaining the meaning of the term "Indian country" found in any other sections of the Revised Statutes which were re-enactments of Act June 30, 1834. The Red Lake and Pembina Indian reservation was held to be Indian country. *United States v. Le Bris*, 7 Sup. Ct. 894, 121 U. S. 278, 30 L. Ed. 946.

#### INDIAN RESERVATION.

As Indian country, see "Indian Country."  
As public land, see "Public Land."

"An Indian reservation may be defined to be a certain limited portion of our national domain assigned by the federal government to a tribe or tribes of Indians, or some part or parts of the same, to be held by them according to the terms of the assignment." *United States v. Certain Property*, 25 Pac. 517, 520, 1 Ariz. 31.

An Indian reservation is a part of the public domain set apart by the public authorities for the use and occupation of a tribe or tribes of Indians. It may be set apart by an act of Congress, by treaty, or by executive order, but cannot be established by custom or prescription. The fact that a particular tribe or band of Indians have for a long time occupied a particular tract of country does not constitute such country an Indian reservation. *Forty-Three Cases of Cognac Brandy* (U. S.) 14 Fed. 539.

In order to create a reservation, it is not necessary that there should be a formal cession or a formal act setting apart a tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes. Where the Indian occupation was confined by a treaty to a certain specified tract, that in effect became an Indian reservation. *Minne-*

*sota v. Hitchcock*, 22 Sup. Ct. 650, 657, 185 U. S. 373, 46 L. Ed. 954.

#### INDIAN TERRITORY.

What is known as the "Indian country," or the Indian Territory, was first defined and appointed by Act June 30, 1834. That definition is as follows: "That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any state, to which the Indian title has not been extinguished, for the purpose of this act is to be deemed to be the Indian Territory." The expressions "Indian country" and "Indian Territory" are used interchangeably in the statutes. We speak of the Indian Territory, but politically that is a mistake. There is no organization. It is more properly a territory, referring simply to geographical extension, and not to any political organization. In *re Jackson* (U. S.) 40 Fed. 372, 373.

#### INDIAN TITLE.

The Indian title to land is the right to use, keep, and enjoy it *Brown v. Belmarde*, 3 Kan. 41, 52.

"An Indian title is one of mere occupancy, possession, or use, subject to the right of pre-emption in the United States." *United States v. Certain Property*, 25 Pac. 517, 520, 1 Ariz. 31.

"It is settled by the decisions of the Supreme Court that the government of the United States is the primary and ultimate source of title to the public domain, and the Indians are not recognized as having any title, except the mere right of occupancy which Congress has the right at any time to extinguish." *Johnson v. McIntosh*, 21 U. S. (8 Wheat.) 543, 604, 5 L. Ed. 681; *United States v. Cook*, 86 U. S. (19 Wall.) 591-594, 22 L. Ed. 210; *Spalding v. Chandler*, 160 U. S. 394-470, 16 Sup. Ct. 360, 40 L. Ed. 469; *United States v. Four Bottles Sour Mash Whisky* (U. S.) 90 Fed. 720-722.

#### INDIAN TRIBE.

As state, see "State."

Indian tribes are domestic independent nations, which are separate from the states of the Union, within whose limits they are located, and are exempt from the operation of state laws. They are subject to control of the United States, so far as is consistent with their character as separate political communities or states. They have the right to administer justice among themselves, even to the extent of inflicting the death pen-

alty. *State v. McKenney*, 2 Pac. 171, 177, 18 Nev. 182.

As used in Act March 3, 1891, c. 538, § 1, 26 Stat. 851 [U. S. Comp. St. 1901, p. 758], giving the Court of Claims jurisdiction of all claims for property taken and destroyed by Indians belonging to any tribe in amity with the United States, means a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined, territory. *Montoya v. United States*, 21 Sup. Ct. 358, 359, 180 U. S. 261, 45 L. Ed. 521.

"It is doubtful whether the term 'foreign nations' can with strict accuracy be applied to Indian tribes which are solely within the limits of the United States. They may more correctly be denominated 'domestic dependent nations.' They occupy territory to which the United States asserts a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection, rely upon its kindness and its power, and appeal to it for relief to their wants. They and their country are considered, by foreign nations as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands or to form a political connection with them would be regarded as an invasion of our territory and an act of hostility." *Cherokee Nation v. Georgia*, 30 U. S. (5 Pet.) 1, 17, 8 L. Ed. 25.

#### Indians in Maine and Massachusetts.

Indians resident within the state of Maine are not "Indian tribes," within the treaty-making powers of the federal government, whatever the status of the Indian tribes in the West may be. The Indian tribes there meant are those who have a tribal organization, so as to be able to make treaties law and punish crimes and administer civil justice among themselves. All the Indians, of whatever tribe, remaining in Massachusetts and Maine, have always been regarded by those states and by the United States as bound by the laws of the state in which they live. Their position is like that of those Cherokees who remained in North Carolina. *State v. Newell*, 24 Atl. 943, 84 Me. 465 (citing *Danzell v. Webquish*, 108 Mass. 133; *Murch v. Tomer*, 21 Me. [8 Shep.] 535; *The Cherokee Trust Funds*, 117 U. S. 288, 6 Sup. Ct. 718, 29 L. Ed. 880).

#### Pueblo Indians.

The term "Indian tribe," as used in Rev. St. U. S. § 2118, providing that every person

should be subject to a penalty who made a settlement on any land belonging, secured, or granted by a treaty with the United States to any Indian tribe, means those semi-independent tribes whom the government has always recognized as exempt from our laws, whether within or without the limits of an organized state or territory, and in regard to their domestic government left to their own rules and traditions, in whom we have recognized the capacity to make treaties, and with whom the government, state and national, deals, with a few exceptions, only in their national or tribal character, and not as individuals. The Pueblo Indians, of the village or pueblo of Taos, are not within the meaning of the words "Indian tribe," as used in the statute, though they may be designated by the word "tribe." They for centuries have been a pastoral and agricultural people, raising flocks and cultivating the soil, and since the introduction of the Spanish Catholic missionaries into the country have adopted mainly, not only the Spanish language, but the religion of a Christian church. They manufacture nearly all their blankets, clothing, and agricultural and culinary implements; integrity and virtue among them is fostered and encouraged; and they are as intelligent as most nations or people deprived of means or facilities of education. Their names, their customs, and their habits are similar to those of the people in whose midst they reside, or in the midst of whom their pueblos are situated. They are a peaceable, industrious, intelligent, honest, and virtuous people, and are Indians only in feature, complexion, and a few of their habits; in all respects superior to all but a few of the civilized Indians of the country, and the equal of the most civilized thereof. *United States v. Joseph*, 94 U. S. 614, 615, 24 L. Ed. 295.

#### INDICATE.

An instruction that a certain declaration, under the circumstances and in view of declarant's condition when made, indicates that she then realized that she was about to die, was held to be error on the ground that the word "indicates," as so used, is the same as "shows," and renders the instruction a charge on the effect of the evidence. *White v. State*, 111 Ala. 92, 97, 21 South. 330.

It is true, perhaps, that what is merely "indicated" by certain facts may not be shown by them. Although the words "show" and "indicate" are sometimes interchangeable in popular use, they are not always so. The present ordinary use of the words discloses a difference in signification, and that this is perhaps more recognizable when these terms are applied to the law or to

medical science. To show is to make apparent or clear by evidence, to prove, while an indication may be merely a symptom, that which points to or gives direction to the mind. In a prosecution for murder it was held that the commonwealth had the right to inquire in proper form from a competent expert whether any condition of facts assumed proved or indicated insanity. *Coyle v. Commonwealth*, 104 Pa. 117-123.

The word "indicating," as used in an instruction on a trial for grand larceny, that if the jury were satisfied beyond a reasonable doubt, that defendant killed or had the calf killed, and that she cut out the brand and cut off the ears of the calf, and burned up the ears and part of the hide so cut out, "this would be a circumstance to be considered by you indicating that the defendant was not the owner of the calf, and of her knowledge that she was not the owner," etc., would be understood by the jury as tending to show a certain result; and the language of the instruction is not in violation of the Constitutional provision prohibiting the court from charging the jury with respect to matters of fact. *State v. Loveless*, 17 Nev. 424, 426, 30 Pac. 1080.

## INDICAVIT.

A person who is sued in the spiritual court may purchase a writ which is called "indicavit," which writ is a prohibition. *State v. Commissioners of Roads for Christ Church Parish (S. C.)* 1 Mill, Const. 55, 63, 12 Am. Dec. 596.

## INDICT.

Rev. St. U. S. § 1032 [U. S. Comp. St. 1901, p. 722], which provides that when any person, indicted for any offense against the United States, upon his arraignment stands mute or refuses to answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, is so construed as to include both an indictment and an information. *United States v. Borger (U. S.)* 7 Fed. 198, 196.

## INDICTABLE OFFENSE.

Under Const. art. 1, §§ 18-24, providing that no person can for an indictable offense be proceeded against criminally by information, except in certain specific instances, misdemeanors were not intended to be embraced in the words "indictable offense." That phrase included felonies only. *State v. Berlin*, 42 Mo. 572, 574, 576; *State v. Cowan*, 29 Mo. 330, 334.

And even if an offense, which by the statute was punished in such a way or was of such a grade that the offender could not

be proceeded against except by indictment, is by a municipal ordinance made punishable in such manner or reduced to such grade as to render the offender liable to prosecution on information, the accused has no cause of complaint against such ordinance. *State v. Cowan*, 29 Mo. 330, 334.

## INDICTMENT.

See "Bill of Indictment."  
All indictments, see "All."

"Indictment" is a common-law term, and the courts have necessarily to look to the common law to ascertain its meaning. *Mott v. State*, 29 Ark. 147, 149.

The word "indictment" is said to be derived from the old French word "inditer," which signifies to indicate; to show; to point out. Its object is to indicate the offense charged against the accused. *Williams v. State*, 12 Tex. App. 395, 398 (citing *Bouv. Law Dict.*).

Indictment is a general remedy for the redress of public injuries, and may be filed in all cases where an offense is created and punishment imposed, authorizing in such cases penal actions or action in the nature of *qui tam*. *Louisville & N. R. Co. v. Commonwealth*, 66 S. W. 505, 506, 112 Ky. 635.

An indictment is a written accusation against the individual charged. It is in substance the declaration of the state, setting forth the offense of which she complains. *State v. Walker*, 32 N. C. 234, 236.

An indictment means just what it did at common law. The Legislature may change its form, but cannot change the substance of its material averments, without infringing upon constitutional guaranties. *State v. Terry*, 109 Mo. 601, 614, 19 S. W. 206, 209 (citing *State v. Meyers*, 99 Mo. Loc. Cit. 116, 12 S. W. 516).

The first pleading on the part of the people is the indictment. Cr. Code N. Y. 1903, § 274.

The object of an indictment is two-fold: First, to inform the defendant of the offense with which he is charged with such particularity as will enable him to prepare for his trial; second, so to define and identify the offense that the defendant may, if convicted or acquitted, be able to defend himself, in case he be indicted again for the same offense, by pleading the record of such conviction or acquittal. *United States v. Loring (U. S.)* 91 Fed. 881, 884. See, also, *Huntsman v. State*, 12 Tex. App. 620, 636.

## Accusation by grand jury.

An indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to and presented upon



oath by a grand jury. Board of County Com. v. Graham, 4 Col. 201, 202 (citing Burrill, Law Dict.; 4 Bl. Comm. 302); State v. Whitlock, 41 Ark. 403, 406; State v. Tomlinson, 25 N. C. 32, 33; In re Durant, 12 Atl. 650, 653, 60 Vt. 176; Lincoln v. Smith, 27 Vt. (1 Williams) 328, 360; State v. Hewlett, 27 South. 18, 19, 124 Ala. 471; Mose v. State, 35 Ala. 421, 425; Ex parte Hart, 63 Fed. 249, 259, 11 C. C. A. 165, 28 L. R. A. 801; Lougee v. State, 11 Ohio, 68, 72; State v. Schnelle, 24 W. Va. 767, 774; People v. Quigg, 59 N. Y. 83, 86; State v. Millain, 3 Nev. 409; Williams v. State, 12 Tex. App. 395, 398 (citing Bish. Cr. Proc.); Goddard v. State, 12 Conn. 448, 452 (citing 4 Bl. Comm. 302).

It is described by the Supreme Court of the United States as the presentation to the proper court under oath by a grand jury duly impaneled of a charge describing an offense against the law for which the party charged may be punished. Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849 (cited in Ex parte Hart [U. S.] 63 Fed. 249, 259, 11 C. C. A. 165, 28 L. R. A. 801).

"An indictment is a written accusation on oath, by at least 12 of the grand jury, against a person named therein, of a crime which it defines, to be carried into court and there made of record." 1 Bish. Cr. Proc. § 131. Williams v. State, 12 Tex. App. 395, 398; Vanvick v. State, 2 S. W. 642, 643, 22 Tex. App. 625; Finley v. State, 61 Ala. 201.

An indictment is an accusation at the suit of the state, by the oaths of 12 men at the least, and not more than 23, of the same county wherein the offense was committed, returned to inquire of all offenses in general in the county determinable by the court in which they are returned, and finding a bill brought before them to be true. Ex parte Slater, 72 Mo. 102, 106; Mack v. People, 82 N. Y. 235, 237.

"An indictment is an accusation in writing, presented by a grand jury to a competent court, charging a person with a public offense." Comp. Laws N. M. 1897, § 977; Rev. St. Utah 1898, § 4605; Comp. Laws Nev. 1900, § 4168; Pen. Code Idaho 1901, § 5303; Rev. Codes N. D. 1899, § 7882; Code Cr. Proc. S. D. 1903, § 185; Pen. Code Cal. 1903, § 917; Rev. St. Okl. 1903, § 5336.

An indictment is an accusation in writing, found and presented by the grand jury to the court in which they are paneled, charging the person with the commission of a public offense. Ind. T. Ann. St. 1899, § 1443.

"An indictment is the written statement of a grand jury, accusing a person therein named of some act or omission which by law

is declared to be an offense." Williams v. State, 12 Tex. App. 395, 398, 399 (quoting Code Cr. Proc. Tex. 1895, art. 419); State v. Edmondson, 43 Tex. 162, 165; Vanvick v. State, 2 S. W. 642, 643, 22 Tex. App. 625.

An indictment proceeds entirely from the grand jury. It is the result of their deliberations on the evidence produced before them. The court has no agency in causing the finding of an indictment, and can exercise properly no influence beyond charging the grand jury, when impaneled, as to the duties they are required to perform, or advising them on their request subsequently as to any matter of law. An accusation of a criminal offense not the finding and presentment of a grand jury is not an indictment, and confers on a court no jurisdiction to put the accused on trial before a petit jury. Finley v. State, 61 Ala. 201.

An indictment, under Code, § 2915, is an averment in writing, made by a grand jury legally convoked and sworn, that a person therein named or described has done some act or been guilty of some omission which by law is a public offense. Under the statute a grand jury must be composed of not less than 15 persons. An indictment found by a jury of less than 15 is therefore not good, and a party cannot be legally brought to trial on an indictment found by a grand jury not authorized by law. Norris' House v. State (Iowa) 3 G. Greene, 518, 517.

An indictment is a formal charge preferred by a legally organized grand jury, and is one of the only two authorized methods of procedure by which jurisdiction over the person of a defendant charged with crime can ordinarily be acquired; the other method being by information. Ex parte State, 71 Ala. 371, 375.

An indictment is an accusation from a body charged and sworn to investigate the crime upon the oath of witnesses, and it acts judicially. People v. Dorthy, 46 N. Y. Supp. 970, 977, 20 App. Div. 308.

Const. art. 2, § 12, provides that no person shall be proceeded against criminally otherwise than by indictment, save in certain cases. Held, that the word "indictment" means the instrument legally known by that name, and created and shaped in the manner required by law, to wit, a written accusation of an offense preferred to and presented on oath as true by a grand jury at the suit of the government. State v. Grady, 12 Mo. App. 361, 363.

The terms "indictment" and "presentment," in the sense of the Bill of Rights, necessarily presuppose and include the action of the grand jury in the common-law sense of these terms. Eason v. State, 11 Ark. 482, 500; State v. Cox, 8 Ark. 436, 442; Wolf v. State, 19 Ohio St. 248, 254.

"Indictment" is a technical word, peculiar to Anglo-Saxon jurisprudence, and implies the finding of a grand jury; and in a complaint for writ of habeas corpus, setting forth that criminal proceedings had been instituted in Russia and that relator had been indicted, the word "indicted" is used in the general sense of charged or accused by legal proceedings, and not in the technical sense of an indictment as here understood. *Grin v. Shine*, 23 Sup. Ct. 98, 103, 187 U. S. 181, 47 L. Ed. 130.

#### Essentials.

An indictment is a brief narrative of the offense charged, which must contain a certain description of the crime and the facts necessary to constitute it. *People v. White* (N. Y.) 24 Wend. 520, 570; *Lambert v. People* (N. Y.) 9 Cow. 578, 607 (citing 2 Hale, P. C. 169); *People v. Gates* (N. Y.) 13 Wend. 311, 317; *People v. Stark*, 12 N. Y. Supp. 688; *State v. Reddington*, 64 N. W. 170, 174, 7 S. D. 368.

An indictment is nothing more than a plain, brief notification of an offense committed by any person and the necessary circumstances that concur to sustain its facts and nature. *Richardson v. State*, 7 Atl. 43, 45, 66 Md. 205.

An indictment is a plain, brief, and certain narrative of any event, and it is a general rule of criminal law that every indictment must contain a certain description of the crime of which defendant is accused and a statement of the necessary facts by which it is constituted. *Alderman v. People*, 4 Mich. 414, 424, 9 Am. Dec. 321.

An indictment must state all the facts and circumstances comprised in the definition of the offense by the rule of common law or the statute on which the indictment is founded, and these must be stated with clearness and certainty, or the indictment will be bad. *State v. Hayward*, 83 Mo. 299, 309.

The indictment must contain, first, the title of the action, specifying the name of the court in which the indictment is presented and the names of the parties; second, a plain and concise statement of the act constituting the crime, without unnecessary repetition. *People v. Flaherty*, 29 N. Y. Supp. 641, 642, 79 Hun, 48 (citing Code Cr. Proc. N. Y. § 275). And in such manner as to enable a person of common understanding to know what was intended. *Rev. St. Idaho*, § 7632; *Territory v. Evans*, 17 Pac. 139, 140, 2 Idaho (Hasb.) 425.

The indictment must state the facts of the crime with as much certainty as the nature of the case will admit. There can be no latitude of intention to include more than what is charged. It must be explicit enough to support itself. Lord Mansfield says it

must relate an intelligible story. *People v. Gates* (N. Y.) 13 Wend. 311, 317.

An indictment must be framed with sufficient certainty. For this purpose the charge must contain a description of the crime or misdemeanor of which the defendant is accused and a statement of the facts by which it is constituted, so as to identify the accusation. *Williams v. State*, 12 Tex. App. 395, 398.

The meaning of the word "indictment" in the Bill of Rights requires that it should state the essential acts and omissions which constitute the offense with which the party is accused. It must charge explicitly all that is essential to constitute the offense, and cannot be aided by intendment. A statement of a legal result, a conclusion of law, will not be sufficient. *Williams v. State*, 12 Tex. App. 395, 400.

An indictment is something more than a mere accusation based upon probable cause. It is an accusation based upon legal testimony of a direct and positive character, and it is the concurring judgment of at least 12 of the grand jurors that upon the evidence presented to them the defendant is guilty. *People v. Tindler*, 19 Cal. 539, 81 Am. Dec. 77.

An indictment is an official presentation to the court that a person has been guilty of some designated felony based upon the testimony of witnesses before the grand jury. *Semon v. State*, 62 N. E. 625, 626, 158 Ind. 55.

An indictment must charge all acts or omissions essential to constitute the offense of which the defendant is accused; and, this being the requirement of the Constitution, the Legislature has not the power to dispense with it, nor to validate as an indictment a statement which, premitting the acts or omissions constituting an offense, charges the conclusion of law deducible therefrom. *Williams v. State*, 12 Tex. App. 395.

An indictment should be quashed when it clearly appears by affidavits that it was found by the grand jury without adequate evidence. *People v. Restenblatt* (N. Y.) 1 Abb. Prac. 268, 269.

#### Same—Name of defendant.

An indictment is an accusation of a person of crime. It is an accusation against a person, and not against a name, and therefore a person may be indicted without the mentioning of any name, but designating him as a person whose name is to the grand jurors unknown. *Lasure v. State*, 19 Ohio St. 43, 51.

#### Same—Allegation of presentment on oath.

At common law it was essential that the indictment should allege upon its face that it was presented upon the oaths or affirmations

of the grand jurors, and such is the usual and common form in this state, though not essential. *Vanvickle v. State*, 2 S. W. 642, 643, 22 Tex. App. 625.

#### Same—Time of offense.

An averment in an indictment of the time when the offense was committed is unnecessary, unless the time is a constituent part of the offense. Though such an averment is frequently made, where a statute makes an act criminal when committed after a certain specified day, or increases the punishment therefor, it would seem that this is not necessary, and it certainly is not necessary where the statute goes into effect immediately after its passage, or at the time at which statutes generally go into operation. *State v. Sam*, 13 N. C. 567.

"All that is necessary in regard to laying the time in an indictment is that the offense shall appear to have been committed before the finding of the bill, excepting in those cases where the time forms part of the offense, as in prosecutions which are limited to a certain period, and in murder, where the time of the death must be laid within a year and a day after the giving of the mortal stroke. But generally, where the time when an offense is committed is immaterial, and it is still indictable, whether done at one time or another, there it is not traversable if alleged under a scilicet, and its repugnancy to the premises will not vitiate, but the scilicet itself will be rejected as superfluous." *State v. Haney*, 8 N. C. 460, 461 (quoting 1 Saund. 170).

#### Same—Venue.

An indictment which omitted the essential allegation of venue, and was amended in that respect, was no longer an indictment of a grand jury, within the meaning of the Constitution, which prohibits the trial of any person, except on indictment of the grand jury. *State v. Chamberlain*, 6 Nev. 257.

#### Same—Verification.

An indictment is an accusation in writing, presented by a grand jury to a competent court, charging a person with a public offense. Pen. Code Mont. § 1371. Under such statute an indictment need not be verified. *State v. Brantley*, 50 Pac. 410, 411, 20 Mont. 173.

#### Bill of indictment distinguished.

Before the paper containing the criminal charge is handed out by the grand jury, it is called a "bill of indictment." After it is found, and all the blanks filled out, it is called an "indictment." *State v. Ray* (S. C.) *Rice, Law*, 1, 4, 83 Am. Dec. 90.

#### Cause distinguished.

See "Cause."

#### Charge or presentment.

See "Presentment."

Both the Constitution of the United States and that of Maryland use the terms "indictment," "presentment," and "charge" interchangeably, and as referring to the first step in the prosecution of a crime. *State v. Kiefer*, 44 Atl. 1043, 1044, 90 Md. 165.

#### Complaint.

Gen. St. c. 171, § 17, provides that an offense committed on the boundary of two counties, or within 100 rods of the dividing line between them, may be alleged in the indictment to have been committed, and may be prosecuted and punished, in either county. In a prosecution on a complaint of an offense of which a police court had jurisdiction, and which was alleged to have been committed within 100 rods of the dividing line between two counties, it was contended that, owing to the use of the word "indictment," jurisdiction to prosecute in either county existed only where the proceedings are by indictment, and that, inasmuch as the proceedings in the police court were by complaint, the police court could not entertain jurisdiction of the case. In answer to this contention the court said that, as the purpose of the enactment was to secure the full operation of the criminal laws and to avoid the embarrassing questions of the exact limits and boundaries of county lines, the term "indictment" ought not to be construed as restricting the effect of the statute to proceedings by indictment, but that it should be extended so as to include proceedings in a police court by complaint. *Commonwealth v. Gillon*, 84 Mass. (2 Allen) 502, 503.

The term "indictment," as used in Pub. St. p. 200, § 6, providing that no person shall be held to answer on a second indictment for an offense of which he has been acquitted by a jury on the merits, includes "complaint." *Commonwealth v. Goulet*, 35 N. E. 780, 160 Mass. 276.

#### Information.

An information cannot be considered as the equivalent of an indictment. *Ex parte Hart*, 63 Fed. 249, 259, 11 C. C. A. 165, 28 L. R. A. 801.

An indictment is an accusation by the grand jury, while an information is an accusation by a district attorney. The term "indictment," in a constitutional provision that all indictments must terminate with the formula against the peace and dignity of the state, is held not to include informations. *Nichols v. State*, 35 Wis. 308, 310.

Rev. St. 1889, § 4290, restricting the right of appeal by the state in criminal cases to those in which "an indictment is quashed, or adjudged insufficient on demurrer, or

where judgment thereon is arrested," does not give a right of appeal in a case where the information was quashed. "Indictment" is a technical word, and when used in the Constitution and in the statutes must be construed to have been used in the meaning attached to it at common law, to wit, an accusation preferred by a grand jury of the county wherein the offense was committed. *Ex parte Slater*, 72 Mo. 102. "An information by the prosecuting attorney also has a well-defined meaning at common law, but differs from an indictment in this: that, whereas the indictment is the accusation of a grand jury, an information is only the allegation of the officer who exhibits it." *State v. Cornelius*, 44 S. W. 717, 718, 143 Mo. 179 (citing 5 Bac. Abr. pp. 167, 170, 172; *State v. Kelm*, 79 Mo. 515); *State v. Carr*, 44 S. W. 776, 777, 142 Mo. 607. See, also, *State v. Whitlock*, 41 Ark. 403, 406; *Clepper v. State*, 4 Tex. 242, 246; *Territory v. Cutinola*, 14 Pac. 809, 810, 4 N. M. 160.

The word "indictment," in the statute relating to the right to try a prisoner for lesser offense, where either a conviction or acquittal occurs on an indictment, is a generic term embracing an information. *State v. Hatcher*, 38 S. W. 719, 136 Mo. 641.

#### As prosecution.

Rev. St. c. 34, § 75, making it an offense to trade with a slave, and which provides that no suit or indictment should be prosecuted for any violation of the act, unless such suit or indictment be commenced within 12 months, meant the finding of the grand jury, and was not used in the sense of "prosecution." *State v. Tomlinson*, 25 N. C. 32, 33.

The word "indictment," as used in Act March 31, 1860, providing that all indictments which shall hereafter be brought or exhibited for any crime, murder and voluntary manslaughter excepted, shall be brought and exhibited within the time and limitations expressed in the act and not after, is synonymous with the term "prosecution." *Commonwealth v. Haas*, 57 Pa. (7 P. F. Smith) 445.

"The term 'indictment' is used in ordinary conversation, and often in judicial opinions, to embrace any criminal prosecution," and hence, in an action for libel for charging that plaintiff was under an indictment for malfeasance in office, the defendant may show a prosecution and conviction of the plaintiff on such charge before a justice of the peace. *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251, 255.

#### Prosecution by warrant.

Under Code, § 4782, an indictment is an accusation in writing, presented by the grand jury of the county, charging a person with an indictable offense. Under this definition

section 4820 of the Code, which provides that when an indictment has been quashed for any cause, the period which elapses between the finding of such indictment and a subsequent indictment must be deducted from the time limited by law for the prosecution of the offense, does not authorize the deduction of the time between the commencement of a prosecution by warrant in a court which proved to have no jurisdiction and a subsequent finding of an indictment, since the first prosecution was not a prosecution under an indictment. *Bube v. State*, 76 Ala. 73, 74.

### INDIFFERENCE—INDIFFERENT.

"Indifferent," as used in respect to a person standing indifferent in a pending cause, means that the mind of such person is in a state of neutrality as respects the person and the matter to be tried; that there exists no bias for or against either party in the mind of the juror, calculated to operate upon him; that he comes to the trial with a mind uncommitted, and prepared to weigh the evidence in impartial scales. A person who stated that, if the evidence on a second trial should be the same as on the first, he should pronounce defendants guilty, is not standing indifferent. *People v. Vermilyea* (N. Y.) 7 Cow. 103, 122.

"Indifferent men," as used in Gen. St. c. 59, § 2, providing that for the due marking out of any highway the town council shall appoint three suitable and indifferent men, not interested or concerned in the land through which said highway is to pass, cannot be construed to include petitioners for the laying out of the highway. *Anthony v. Town Council of South Kingstown*, 13 R. I. 129, 130.

The term "indifferent freeholders," in a statute requiring real estate taken by execution to be appraised by indifferent freeholders, does not include a tenant of one of the parties to the suit. *Mitchell v. Kirtland*, 7 Conn. 229, 231.

#### As affected by relationship.

Under Rev. St. c. 1, § 4, rule 22, requiring disinterestedness and indifference on the part of those performing judicial acts, those are excluded who are related to the parties in the action within the fourth degree, as well as those who are peculiarly interested in the adjudication. *Lyon v. Hamor*, 73 Me. 56 (citing *Conant v. Norris*, 58 Me. 451).

"Indifferent," as used in a Connecticut statute requiring the appointment of an indifferent appraiser, means "impartial; free from bias." A nephew by marriage of one of the parties is not an indifferent appraiser of land under a levy within the meaning of the statute. *Fox v. Hills*, 1 Conn. 295, 307.

Under a statute providing that appraisers are to be indifferent freeholders, an ap-

praiser who is uncle to the wife of one of the parties is not indifferent within the meaning of the law. *Tweedy v. Picket* (Conn.) 1 Day, 109, 111.

## INDIGENT.

"Indigent, pious young men," as used in a bequest providing that any surplus income from the testator's estate should be expended for the support of indigent, pious young men preparing for the ministry in New Haven, Conn., is too uncertain in its terms to render the bequest enforceable. *White v. Fisk*, 22 Conn. 81, 51.

A charitable gift, providing that the interest of a certain fund should be applied by the selectmen of a certain town to aid indigent young men in fitting themselves for the evangelical ministry, is not void for uncertainty, since neither "indigent" nor "evangelical" is of rare use or hidden meaning, but both are quite within ordinary intelligence, and point with a sufficient degree of certainty to the individual to enable the statute of charitable uses to distinguish him from all others, and are sufficiently accurate to describe a man who is without sufficient means of his own, and whom no person is bound and able to supply, to enable him to prepare himself for preaching the gospel. *Storrs Agricultural School v. Whitney*, 8 Atl. 141, 146, 54 Conn. 342.

A person is indigent who is destitute of property or means of comfortable subsistence; one who is needy or poor. *Juneau County v. Wood County*, 85 N. W. 387, 388, 109 Wis. 330.

"Indigent insane," as used in Code, § 2278, providing that in admission to an asylum preference shall be given to the indigent insane, means those who have no income over and above what is sufficient to support and maintain those who may be legally dependent on them. In *re Hybrat*, 25 S. E. 963, 965, 119 N. C. 359.

The word "indigent" means "needy," or "poor," and applies to those who are destitute of property and the means of comfortable subsistence. *City of Lynchburg v. Slaughter*, 75 Va. 57, 62.

The law of indigence, as distinct from pauperism, was first introduced into our lunacy statutes in 1842. It was designed for the benefit of that laboring population which is only self-supporting while employed. Hence such persons are accorded a temporary support from the county for a specified time. This support, being a county charge, cannot, as in the case of paupers, be cast upon any particular town in which such "indigent" lunatic may have a residence. *People v. Board of Sup'rs of Schoharie County*, 121 N. Y. 345, 350, 24 N. E. 830, 831.

The term "indigent insane," when applied to a person without a family, means one whose estate, after payment of his debts, and excluding from the estimate such part of his estate as is exempt from execution, is worth less in cash than \$300; and when applied to a person having a family means one whose estate, estimated as aforesaid, is worth less in cash, after payment of his debts and the support of his family for one year, than \$1,000; provided that, when applied to a married woman, her estate and that of her husband shall be estimated as aforesaid, and the amount shall determine the question aforesaid, whether she be a poor person, or not, within the meaning of the chapter relating to asylums. Rev. St. Mo. 1899, § 4894.

## INDIGNITY.

"Indignity" is defined by Mr. Webster to be "unmerited contemptuous conduct toward another; any action toward another which manifests contempt for him; contumely, incivility, or injury, accompanied with insult." *Coble v. Coble*, 55 N. C. 392, 395.

Indignities, such as authorize a divorce, are those which render the condition of the wife intolerable, or her life burdensome, and are to be distinguished from such cruelties as endanger her life. *Erwin v. Erwin*, 57 N. C. 82, 84.

The term "indignities," in Act March 12, 1849, amendatory of the Act of 1845 concerning divorces, and declaring that it shall be a cause of divorce for either party to offer such indignities to the other as shall render his or her condition intolerable, does not necessarily require that such indignities be to the person, as expressly required by the act of 1845, which requirement is omitted in the amendatory act. "In determining what is such an indignity, it is impossible to lay down any rules that will apply to all cases, because the habits and feelings of different persons differ so much that treatment which will produce the deepest distress with one will make but a slight impression upon the feelings of the other." The mere writing of a letter by a husband to his wife, which he did not publish to the world, was held not such an indignity. *Hooper v. Hooper*, 19 Mo. 355, 357.

Such indignities as will authorize the granting of a divorce must amount to a species of cruelty, not to the body, but to the mind, and have been defined to be "unmerited contemptuous conduct toward another; any action toward another which manifests contempt for it; contumely, incivility, or injury accompanied with insult." *Goodman v. Goodman*, 80 Mo. App. 274, 281 (citing *Coble v. Coble*, 55 N. C. 392).

Indignity, as a ground for divorce, is not established by evidence of an act of drunk-

eness on the part of a wife, accompanied by acts of indecency as a result therefrom; the law also giving as a ground for divorce habitual drunkenness for the space of two years. *Kempf v. Kempf*, 34 Mo. 211.

"Indignities," as used in a statute giving the wife the right to a divorce on the ground of indignities offered to her, such as to render her condition intolerable, should not be construed to include the refusal of her husband to allow her to control the household in subordination to her husband, refusing to speak to her or to serve her at the table, reducing her to a menial condition, and treating her as a servant rather than as a helpmate and a wife. *Dwyer v. Dwyer*, 2 Mo. App. 17, 19.

"Indignity" in an instruction in an action for injuries caused by beating and forcible resistance of a railroad brakeman, stating that the plaintiff was entitled to recover compensatory damages for the outrage, an indignity put upon him, must be construed to mean and include mental anguish or pain, as distinguished from bodily suffering. *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa, 314, 319, 24 Am. Rep. 748.

#### INDIGNITIES TO THE PERSON.

See, also, "Personal Indignity."

"Indignities to the person," as used in a statute which authorizes a divorce where either party shall offer such indignities to the person of the other as shall render his or her condition intolerable, "falls short of *sævitia* in its ecclesiastical sense, and has been extended beyond insulting gesture or touch." *Kurtz v. Kurtz*, 38 Ark. 119, 123.

##### As bodily indignities.

The act of 1815 entitles the wife to a divorce when the husband shall have offered such indignities to her person as to render her condition intolerable and life burdensome, etc. Held, that the phrase "indignities to the person" was not equivalent to "personal indignities." Personal insults and reproachful language alone, though among the grossest personal indignities, will not constitute ground for divorce. They are included in the "injures graves" of the Code Napoleon, but are not, either in terms or by implication, made under our law the cause for the dissolution of the marriage bond. *Butler v. Butler* (Pa.) 1 Pars. Eq. Cas. 324, 344.

A statute authorizing divorce for indignities to the person has reference to bodily indignities, as contradistinguished from such as may be offered to the mere reputation. *Cheatham v. Cheatham*, 10 Mo. 296, 298.

##### As mental or moral indignities.

A statute providing that the court may grant divorces from bed and board, on the

application of the injured party, when the offending party shall offer such indignities to the person of the latter as shall render his or her condition intolerable and life burdensome, is not confined to indignities inflicted on the body of the injured party, but may be offenses to her mental and moral sensibilities, when they are of such a character and under such circumstances that, if continued, they will amount to cruelty. *Miller v. Miller*, 78 N. C. 102, 105.

Indignities to the person are not limited to those indignities which may be offered by striking the person of the wife, or even touching her, but would include contemptuous demeanor and charges of infidelity, or refusal to recognize her as his wife, or any threats to do her violence, or a refusal on his part to admit her to his home, etc. *Coble v. Coble*, 55 N. C. 392, 395.

##### Single act.

A statute authorizing the granting of divorce in case the husband offers such indignities to the person of a wife as to render her condition intolerable and life burdensome is not satisfied by a single act of indignity; but "there must be such a course of conduct or continued treatment as renders the wife's condition intolerable and her life burdensome." *May v. May*, 62 Pa. (12 P. F. Smith) 206, 210; *Richards v. Richards*, 37 Pa. (1 Wright) 225, 227.

#### INDIRECT—INDIRECTLY.

The use of the word "indirectly," in the sale of a business in which the seller agrees not to directly or indirectly compete with the purchaser, is to be construed as precluding the seller from becoming interested in any opposition business, and therefore he cannot re-establish the business in the name of his son. *Guerand v. Dandele*, 32 Md. 561, 570, 3 Am. Rep. 164.

A contract for the sale of a lumber business, which provides that the seller shall not "engage in the lumber business, directly or indirectly," at the town where the business sold is situated, means not only engaging in the business on his own behalf, but engaging in the service of a rival dealer, for the purpose of soliciting and making sales. *Nelson v. Johnson*, 36 N. W. 868, 869, 38 Minn. 255.

The words used in a contract by which one of the parties had sold his interest in a stage line to the other parties, and pledged himself not to be concerned "directly or indirectly" in any line of stages in opposition to them, are used for the special purpose of guarding against any kind of interference in the business of the parties operating the stage line, by aiding or in any manner permitting the establishment of or carrying on any opposition. Such language is to be so

construed that the party could not set up or carry on, or knowingly aid or intermeddle, in any way whatsoever, or be concerned in setting up or carrying on, any line of stages in opposition to his vendees. *Davis v. Barney* (Md.) 2 Gill & J. 382, 402.

In construing a usury statute, prohibiting usury on loans either directly or indirectly, it was said by Lord Mansfield: "Therefore, in all questions, in whatever respect repugnant to the statute, we must get at the nature and substance of the transactions. The view of the party must be ascertained, to satisfy the court that there is a loan and borrowing, and that the substance was to borrow on the one part and a loan on the other; and where the real truth is a loan of money, the will of man cannot find a shift to take it out of the statute. If the substance is a loan of money, nothing will protect the taking of more than 5 per cent.; and though the statute mentions only loan of moneys, wares, merchandise, or other commodities, yet any other contrivance, if the substance of it be a loan, will come under the word 'indirectly.'" *Floyer v. Edwards*, 1 Cowp. 112, 114.

#### INDIRECT ATTACK.

An action brought in equity to annul a judgment at law, though not a collateral, is an "indirect attack" on the judgment. *Eichhoff v. Eichhoff*, 40 Pac. 24, 25, 107 Cal. 42, 48 Am. St. Rep. 110.

#### INDIRECT CONFESSION.

The term "indirect confessions" is used in the criminal law to designate confessions inferred from the conduct, etc., of the defendant. *State v. Miller* (Del.) 32 Atl. 137, 141, 9 Houst. 564.

#### INDIRECT CONTEMPT.

See "Civil Contempt"; "Consequential Contempt"; "Constructive Contempt"; "Contempt"; "Criminal Contempt"; "Direct Contempt"; "Private Contempt."

Indirect contempt of court occurs where the alleged contempt is not committed in the presence of the court. *Stewart v. State*, 39 N. E. 508, 140 Ind. 7.

#### INDIRECT EVIDENCE.

Indirect or circumstantial evidence is that which tends to establish the issue by proof of various facts sustaining by their consistency the hypothesis claimed. Civ. Code Ga. 1895, § 5143; Pen. Code Ga. 1895, § 983.

Indirect evidence is that which tends to establish the fact in dispute by proving an-

other, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example, a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred. Ann. Codes & St. Or. 1901, § 685; Code Civ. Proc. Cal. 1903, § 1832.

#### INDIRECT TAX.

"Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes." *Pollock v. Farmers' Loan & Trust Co.*, 15 Sup. Ct. 673, 680, 157 U. S. 429, 39 L. Ed. 759.

"All taxes are usually divided into two classes—those which are direct, and those which are indirect; that under the former denomination are included taxes on land or real property, and under the latter taxes on consumption." *Springer v. United States*, 102 U. S. 588, 602, 26 L. Ed. 253 (citing 1 Story, Const. § 950).

All taxes on expenses or consumption are indirect taxes. A tax on carriages, imposed by Act Cong. June 5, 1794, entitled "An act to lay duties on carriages for the conveyance of persons," is an indirect tax. *Hylton v. United States*, 3 U. S. (3 Dall.) 171, 180, 1 L. Ed. 558, 560.

A tax on capital stock is an indirect tax on personal property. *People v. Knight*, 67 N. E. 65, 66, 174 N. Y. 475, 63 L. R. A. 87.

An excise is an indirect tax. *Thomasson v. State*, 15 Ind. 449, 451.

#### INDIRECT TRANSFER.

Rev. St. U. S. § 5110, subd. 9, relating to indirect transfers by an insolvent in contemplation of bankruptcy, includes every device of a bankrupt by which the same purpose and effect are accomplished as by a direct transfer. In *re Pitts* (U. S.) 8 Fed. 263, 264.

#### INDISPENSABLE.

A mechanical connection would not be indispensable, unless there was a necessity for it, or unless a mechanical separation created a difference in the means by which the result was accomplished, which, in view of the narrowness of the invention, was a radical difference. *Westinghouse Air-Brake Co. v. New York Air-Brake Co.* (U. S.) 63 Fed. 962, 973, 11 C. U. A. 528.

#### INDISPENSABLE EVIDENCE.

Indispensable evidence is that without which a particular fact cannot be proved.

Ann. Codes & St. Or. 1901, § 689; Code Civ. Proc. Cal. 1903, § 1836.

### INDISPENSABLE PARTY.

The term "indispensable," when used in reference to parties to an action, implies that they can never be dispensed with. *Alexander v. Horner* (U. S.) 1 Fed. Cas. 866, 370.

Indispensable parties are those who not only have an interest in the subject-matter of the controversy, but an interest of such nature that a final decree cannot be made without either affecting their interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Shields v. Barrow*, 58 U. S. (17 How.) 130, 139, 15 L. Ed. 158; *Colron v. Millaudon*, 60 U. S. (19 How.) 113, 15 L. Ed. 575; *Ribon v. Chicago, R. I. & P. R. Co.*, 83 U. S. (16 Wall.) 446, 450, 21 L. Ed. 367; *Williams v. Bankhead*, 86 U. S. (19 Wall.) 563, 571, 22 L. Ed. 184; *Kendig v. Dean*, 97 U. S. 423, 425, 24 L. Ed. 1061; *Alexander v. Horner* (U. S.) 1 Fed. Cas. 866, 370; *Chadbourn v. Coe*, 51 Fed. 479, 480, 2 C. C. A. 327; *Donovan v. Campion* (U. S.) 85 Fed. 71, 72, 29 C. C. A. 30; *Sioux City Terminal R. & W. Co. v. Trust Co. of North America* (U. S.) 82 Fed. 124, 126, 27 C. C. A. 73; *King v. Commissioners' Court of Throckmorton County*, 30 S. W. 257, 258, 10 Tex. Civ. App. 114.

Indispensable parties to a bill in equity are those whose interest in the subject-matter of the suit and the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. *Kendig v. Dean*, 97 U. S. 423, 425, 24 L. Ed. 1061.

In a bill in equity persons having an interest in the controversy and who ought to be made parties, in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice by adjusting all the rights involved in it, are commonly termed "necessary parties"; but if their interests are separable from those before the court, so that the court can proceed to the decree and do complete and final justice without affecting other persons not before the court, they are not indispensable parties. *Shields v. Barrow*, 58 U. S. (17 How.) 130, 139, 15 L. Ed. 158.

The term "indispensable parties," in equity practice, "includes those persons inseparably connected with the claim of parties litigant, so that the final decision cannot be made between them without affecting the rights of the absent parties. Where an equity case in the federal court may be final as between the parties litigant without bringing others before the court who would, gen-

erally speaking, be necessary parties, such parties may be dispensed with in the Circuit Court, or if its process cannot reach them, or if they are citizens of another state; but the peculiar constitution of the Circuit Court forms no ground for dispensing with the presence of indispensable parties." *Malloy v. Hinde*, 25 U. S. (12 Wheat.) 193, 6 L. Ed. 599.

"Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Where a person is interested in a controversy, but will not be directly affected by decree, he is not an indispensable party, but should be made a party if possible, and the court will not proceed to a decree without him if he can be reached." *Williams v. Bankhead*, 86 U. S. (19 Wall.) 563, 571, 22 L. Ed. 184.

It is a general rule that, where a party is directly affected by a decree, he is an indispensable party to the suit, and the courts only depart from the rule when the parties are so numerous that it would be inconvenient or impossible to comply with it. *Douglas County Sup'rs v. Walbridge*, 38 Wis. 179, 188.

Where a party occupies a neutral position, and is in a manner a stakeholder or trustee, or is otherwise bound to account to one or the other party, he is an indispensable party to the controversy between them, if he still has possession of the funds to be accounted for. *Perrin v. Lepper* (U. S.) 26 Fed. 545, 548.

### INDISPOSED.

The word has two meanings. It may mean unwilling to do an act, or it may mean unable to do the act. As used in a commission issued for the purpose of taking a deposition as follows: "And it being represented to our said court that M. F. is indisposed, so that she cannot travel to said court," etc.—it is construed to mean unable to travel. *Skinner v. Fletcher*, 23 N. C. 313, 316.

### INDISPUTABLE TITLE.

The term "indisputable title," as used in the covenants for a conveyance, requires a complete, connected paper title, and where an important link is wanting in the chain a title cannot be said to be indisputable. *Courcier v. Graham*, 1 Ohio (1 Ham.) 330, 351.

### INDIVIDUAL.

See "Quasi Individual."

Under the Nebraska statute providing that a person licensed to sell intoxicating liq-



riors shall pay all damages that the community or individuals may sustain in consequence of such traffic, a person to whom liquor is sold is included in the term "individual," and he may recover, where by drinking liquors at such saloon he became so intoxicated that he could not reach his home, and, falling down on the way, remained out over night, and was so badly frozen that his limbs were amputated. *Buckmaster v. McElroy*, 20 Neb. 557, 57 Am. Rep. 843, 31 N. W. 76, 78.

It also includes a married woman, who may sustain any damages on account of the traffic. *Gran v. Houston*, 64 N. W. 245, 247, 45 Neb. 813.

#### Corporation.

Within St. 1853, c. 319, § 3, providing that no abatement shall be made of the taxes assessed on any individual until he shall have filed a list under oath, the term "individual" includes both natural persons and corporations. *Otis Co. v. Inhabitants of Ware*, 74 Mass. (8 Gray) 509, 510.

"Individuals," as used in Act Feb. 1841, which levies an ad valorem tax of one-fourth of 1 per cent. on all money loaned on interest by individuals, includes natural persons or foreign banks or corporations; but it is used in contradistinction to banks incorporated under the laws of Mississippi. The term may be and is often used in contradistinction to banks or corporations, but there is no necessary and invariable opposition of ideas in the terms themselves. *Bank of United States v. State*, 20 Miss. (12 Smedes & M.) 456, 460.

In Rev. St. § 3462, as amended by Act April 15, 1880, providing that telegraph companies, etc., shall receive dispatches from and for an individual, the word "individual" should be construed to be used in the sense of "person," and embraces artificial or corporate persons, as well as natural. *State v. Bell Telephone Co.*, 36 Ohio St. 296, 310, 38 Am. Rep. 599.

The term "individuals" as used in Act April 15, 1834, authorizing individuals to place cars on a certain railroad, is not to be understood in a sense so narrow that it would exclude corporations. It means something more than single persons, and would not exclude a partnership, nor an incorporated company, authorized to carry goods or passengers on that road. *Pennsylvania R. Co. v. Canal Com'rs*, 21 Pa. (9 Harris) 9, 20.

The term "individuals," in a state statute providing that national banks shall not be taxed at a greater rate than is assessed against other moneyed capital in the hands of individuals, is of the same meaning as the term "individual citizens" in Rev. St. U. S. § 5219 [U. S. Comp. St. 1901, p. 3502], providing that the taxation of national banks shall not be at a greater rate than is assessed on

other moneyed capital in the hands of individual citizens. Neither term can be construed to include corporations. *Primm v. Fort*, 57 S. W. 972, 23 Tex. Civ. App. 605.

#### INDIVIDUAL BANKER.

"An individual is one entity, one distinct being, a single one, and when spoken of the human kind means one man or one woman. To individualize is to single out from the species." So that an individual banker is a person banking alone. *People v. Doty*, 80 N. Y. 225, 228.

Laws N. Y. 1857, c. 416, § 2, dispensing with days of grace on all checks or bills of exchange on any bank or individual banker carrying on a banking business, means a private individual who has organized a banking business under Laws 1838, c. 216, entitled "An act to authorize the business of banking," and does not include a private person exercising general privileges only in transacting business like a banking business, without an organization provided by the statute. *Kern v. Lewis*, 8 N. Y. Supp. 79, 80.

The term "individual bankers," in Laws 1832, c. 409, §§ 68, 69, providing that every banking association and every private and individual banker may charge 6 per cent. interest, but if they knowingly charge a greater rate they shall forfeit the entire interest, etc., has, since the passage of Laws 1840, c. 363, been frequently used in our statutes, and has acquired a definite meaning. It denotes a person who, having complied with the statutory requirements, has received authority from the banking department to engage in the business of banking, subject to inspection, supervision, and the burdens imposed. *Perkins v. Smith*, 23 N. E. 21, 23, 116 N. Y. 411.

#### INDIVIDUAL DEBTS.

A debtor, who was a member of an insolvent firm, made an assignment for the benefit of creditors, which provided that the trustee should pay certain specified creditors and divide the surplus among the individual creditors of the assignor. Held, that the words "individual debts" meant those which were not debts of the partnership. *Goddard v. Bridgeman*, 25 Vt. 351, 360, 60 Am. Dec. 272.

#### INDIVIDUAL DEPOSITS.

The expression "individual deposits," as used in V. S. 582-584, requiring savings banks and trust companies to pay a certain state tax on their deposits, including money or securities received as trustees, and providing that no other tax shall be assessed on such deposits or accumulations in savings banks or trust companies, except for individ-

ual deposits exceeding in the aggregate in a certain sum, is not used to distinguish between ordinary bank deposits and funds held upon special trust, but to resolve the aggregate as previously made up into its several holdings as a basis for exempting the specified amount of each. *Montpelier Sav. Bank & Trust Co. v. City of Montpelier*, 50 Atl. 1117, 1118, 73 Vt. 364.

### INDIVIDUAL EARNINGS.

Where a husband and wife undertook and carried on a business jointly, and the labor and skill of the husband was to be contributed and blended with that of the wife, the business is to be considered as that of the husband, and not as that of the wife, and the earnings of the business are the earnings of the husband, and not the individual earnings of the wife, within the meaning of Rev. St. § 2343, providing that the individual earnings of every married woman shall not be subject to her husband's control, nor liable for his debts, and she is not capable of binding herself in regard to such business. *Emerson Talcott Co. v. Knapp*, 62 N. W. 945, 90 Wis. 34.

### INDIVIDUAL EXPENSES.

A partnership agreement, providing that each party thereto is to pay his own "individual expenses," means private or family expenses not connected with the business of the partnership, and does not include the expenses of a partner when traveling in the interest of the partnership. *Withers v. Withers*, 33 U. S. (8 Pet.) 355, 358, 8 L. Ed. 972.

"Individual expenses," as used in Act May 7, 1889, fixing the compensation of the county commissioners at a certain sum per day for each day employed in the discharge of their duties, which should be in lieu of all other compensation and charges for the services and individual expenses, should be construed to include the expense which a commissioner incurred each day in going from his home to his office and returning. *Mansel v. Nicely*, 34 Atl. 793, 794, 175 Pa. 367.

### INDIVIDUAL SYSTEM OF LOCATION.

"Individual system of location" was a term used in Pennsylvania to designate the location of public lands by surveys, in which the land called for by each warrant was separately surveyed. *Ferguson v. Bloom*, 23 Atl. 49, 144 Pa. 549.

### INDIVIDUALLY.

"Individually," as used in 3 Rev. St. (2d Ed.) p. 222, making stockholders of manufacturing corporations individually liable for the debts of the corporation to the extent of their

respective shares of stock, means "personally," not "severally." *Mann v. Pentz* (N. Y.) 2 Sandf. Ch. 257, 270.

The word "individually," in the charter of a bank, making the stockholders individually liable to the depositors for default of the corporation in making payment of any debt, means separately, and thus an action may be maintained against a single stockholder. *Meisser v. Thompson*, 9 Ill. App. 368, 370.

### INDOOR MOVABLES.

A bequest of indoor movables should not be construed to include promissory notes belonging to the testatrix. "Indoor movables" meant such as were used for furniture or household stuff in the testator's house, while promissory notes should be considered as choses in action, not pertaining to the house, but to the person, following the person, whether indoor or outdoor. *Penniman v. French*, 34 Mass. (17 Pick.) 404, 406, 28 Am. Dec. 309.

### INDORSE—INDORSEMENT.

See "Accommodation Indorsement"; "Assignable by Indorsement"; "Full Indorsement"; "General Indorsement"; "Irregular Indorsement"; "Proper Indorsement"; "Regular Indorsement"; "Restrictive Indorsement"; "Special Indorsements", "Transfer by Indorsement."

Indorsing an instrument, in its literal sense, means writing one's name on the back thereof. *Daily v. Bartholomew*, 48 Pac. 923, 924, 5 Kan. App. 148, *Reed v. Garr*, 59 Ind. 299, 300; *Ryan v. Springfield First Nat. Bank*, 35 N. E. 1120, 1121, 148 Ill. 349.

It is held that, whenever the context shows it to be proper, the primitive and popular meaning of something written on the outside or back of a paper, on the opposite side of which something else had been previously written, should be given to the word "indorsement." *Powell v. Commonwealth* (Va.) 11 Grat. 822, 830.

An indorsement is that which is written on the back of the instrument in writing, and which has relation to it; writing one's name on the back of a promissory note or other negotiable instrument. *Bouvier*. *Anderson* gives the following definition of "indorse": To write upon the back of any instrument or paper, as to indorse a deed with the date or book of its record; to indorse a pleading filed with the time of receipt, payment of costs, etc. *Territory v. Perea*, 30 Pac. 928, 929, 6 N. M. 531.

The legal meaning of the term "indorse" means putting a name on the back

of any instrument or paper, and pursuant to this definition it is held that where a statute provided that all original writs should be indorsed on the back by the plaintiff, an allegation that a writ was indorsed was a sufficient allegation that it was indorsed on the back, as required by statute. *Hartwell v. Hemmenway*, 24 Mass. (7 Pick.) 117, 119.

The word "indorse" is a technical word, having in law a distinct meaning; and consequently an allegation that a note was "indorsed and delivered to the plaintiff" is sufficient, under a statute providing that the indorsee of a note may maintain action thereon, without the declaration explaining the mode or manner in which it was done. *Brooks v. Edson*, 7 Vt. 351, 354.

The term "indorse," written on a signed indorsement on the back of a promissory note: "Waiving demand and notice, we hereby indorse and guaranty the full payment of the within note, future payments of interest or principal in renewal thereof not releasing us as indorsers"—held to be used in its literal sense to describe the act of writing on the back of the note, and the signer as having signed on the back of the note, and not in the technical sense to denote the transfer of title to the note. The agreement rendered such indorsers liable as joint makers of the note, it being so indorsed before delivery. *Jackson Bank v. Irons*, 80 Atl. 420, 421, 18 B. I. 718.

In a physical sense, a person indorses a note when he writes his name upon the back of it. If the allegations of indorsement be accompanied by a history of the circumstances attending the execution and delivery of the note, and a charge that the indorsement was made upon the back with the intent to become liable to the payee thereon, a different legal relation to the other parties to it than that of indorser of a negotiable note is charged. *New York Security & Trust Co. v. Storm*, 30 N. Y. Supp. 605, 609, 81 Hun, 33.

The word "indorsement" has not a definite technical meaning in law or in fact, other than "upon the back," and its meaning is always determined by the context in which it is written, and its connection with spoken words. It is as applicable to the receipt of a payment upon the note as to a party to the note, and properly includes filing or any other memorandum which a person may place upon the back of an instrument. It may include entries which have no relation to the contract, or relate to things or persons which are entirely immaterial to the contract or its subject. Therefore an allegation in an indictment for forgery that the defendant forged and counterfeited "a certain indorsement" upon a promissory note, "which said indorsement" consisted of a certain name, was not sufficient, without an

affirmative showing that the words written, as written, became a part of the instrument which was the subject of the forgery. *Commonwealth v. Spilman*, 124 Mass. 327, 329, 26 Am. Rep. 668.

The act of one who writes his name upon a negotiable instrument, otherwise than as maker or acceptor, and delivers it with his name thereon to another person, is called "indorsement." Civ. Code Mont. 1895, § 4020; Rev. St. Okl. 1903, § 3607; Rev. Codes N. D. 1899, § 1060 (citing Neg. Inst. Law N. D. § 191, Rev. Codes N. D. 1899, § 4868, Civ. Code S. D. 1903, § 2183; Civ. Code Cal. 1903, § 3108).

#### Assignment.

"Every indorsement of a promissory note includes in it an assignment, but an assignment is not necessarily an indorsement." St. 3 & 4 Anne, c. 9, distinguished between the two methods of transfer when it authorized the holder, whether by indorsement or assignment, to bring an action in his own name against the maker and indorser. No action is given by the statute against the assignor. An indorsement is an authority to the holder to write over the signature an order on the maker in the nature of a bill of exchange. It is a commercial transaction, and the law merchant fixes the liability, as in bills of exchange. An assignment of a chose in action is in strictness unknown to the common law. It is, however, recognized in equity, and transfers to the holder the rights of the assignee at a price presumed to be no more than equal to the value of the claim against the maker, taking into consideration his character for punctuality and his ability to pay. On such a transfer the assignor is responsible for nothing but the genuineness of the claim. Where an overdue negotiable note was indorsed, "I assign the above to J. D.," the transaction amounted to an assignment. *Lyons v. Diveblis*, 22 Pa. (10 Harris) 185, 189.

An indorsement of a bill or note is not merely a transfer of title, but a fresh and substantive contract, by which the indorser becomes a party to the bill or note and liable for its payment on certain conditions. An assignment means a transfer of title. It neither includes nor implies becoming in any way a party to the payment or responsible for the insolvency or default of the maker. *Paine v. Smith*, 24 N. W. 305, 306, 33 Minn. 495.

"Indorsed," when applied to bills of exchange negotiable by the custom of merchants or to papers made negotiable by statute, may *ex vi termini* import a legal transfer of the title; but as to bonds and notes not negotiable the legal title to them passes by assignment, and as to them indorsement is not equivalent to an assignment. As to them assignment means more

than indorsement. It means indorsement by one party with intent to assign, and the acceptance of that assignment by the other party. *Bank of Marietta v. Pindall* (Va.) 2 Rand. 465, 475.

The word "indorsement" has but one meaning when used with reference to notes or bills, and therefore, where a statute declared that notes "shall and may be assigned by indorsement, whether the same be payable to the order or assigns of the obligee or payee or not," it merely made notes negotiable that were not so by the custom of merchants, and placed the indorser of such a note where he would have stood by the custom of merchants as the indorser of a negotiable note. In fact, it put in every note the words "or order," but it did not make notes not previously negotiable assignable in any other manner than by indorsement. Therefore an assignment of a nonnegotiable note by delivery did not pass the legal title, so as to authorize the assignees to sue at law in their own name. *Bacon v. Cohea*, 20 Miss. (12 Smedes & M.) 516, 523.

"Assignment" and "indorsement" are synonymous, and mean a transfer. *State v. McLeran* (Vt.) 1 Aikens, 311, 313.

The words "assignment" and "indorsement" are frequently used interchangeably. *Buckner v. Real Estate Bank*, 5 Ark. 536, 41 Am. Dec. 105.

In a declaration upon a nonnegotiable note, an averment that a person indorsed it, instead of assigned it, will be construed to be sufficient. *Smoot v. McGraw*, 35 S. E. 914, 915, 48 W. Va. 144.

#### Consideration necessary.

An indorsement is a contract, and, like several other contracts, requires consideration; and it has been held that between immediate parties want of consideration invalidates it. *Farmers' Sav. Bank v. Hansmann*, 86 N. W. 81, 114 Iowa, 49. See, also, *Drinkall v. Movious State Bank*, 88 N. W. 724, 727, 11 N. D. 10, 57 L. R. A. 341, 95 Am. St. Rep. 693.

#### Delivery imported.

An indorsement is like any other contract, and requires a delivery to constitute it. *Drinkall v. Movious State Bank*, 88 N. W. 724, 727, 11 N. D. 10, 57 L. R. A. 341, 95 Am. St. Rep. 693.

A legal indorsement of a promissory note or bill of exchange is the written indorsement made on the instrument, coupled with a delivery thereof. *Clark v. Sigourney*, 17 Conn. 511, 523.

Any mere writing upon the back of a note, after the delivery of the note, would not vest a right of action in the indorsee;

but an averment in the declaration that the payee of a note then and there indorsed the same to the plaintiff imports more than this. It imports a complete indorsement by the delivery of the note to the plaintiff. It has been held that the averment, "He made the bill," when used in reference to the drawer of a bill of exchange, imports the delivery of the bill to the payee, and there is no reason why a like meaning should not be allowed to the term "indorse" in a case like the present. *Higgins v. Bullock*, 66 Ill. 37, 39.

The word "indorsement," as used in the negotiable instruments act, means an indorsement completed by delivery. *Ann. Codes & St. Or.* 1901, § 4592; *Rev. Laws Mass.* 1902, p. 653, c. 73, § 207; *Code Supp. Va.* 1898, § 2841a; *Bates' Ann. St.* 1904, Ohio, § 8178; *Louisville Coal Min. Co. v. International Trust Co.* (Colo.) 71 Pac. 898, 899.

#### As guaranty.

A guaranty is an engagement to pay in default of solvency in the debtor, provided due diligence be used to obtain payment from him. The contract of a guarantor differs from that of an indorser. In the latter case the acknowledgment is to pay, if the maker does not, upon demand, after due notice. Something more than demand and notice on nonpayment is required to support an action on a guaranty. The contract for due diligence requires that a suit be brought within a reasonable time after the maturity of the claim, and be duly prosecuted to judgment, and execution, before an action can be sustained against the guarantor. *Brown v. Brooks*, 25 Pa. (1 Casey) 210, 212.

The word "indorse," as used in an assignment of a promissory note, reciting that I assign this note and indorse the prompt payment of it, should be construed in its broadest popular sense, as synonymous with the word "guaranty." It amounts to say the least, according to the popular meaning of the word "indorse," to a positive and unqualified assertion that the promise of the maker to pay a particular debt would be promptly complied with on his part. The word "indorse," when used in contracts, is generally understood in a technical sense, but it may be taken according to its popular and modern meaning when necessary to carry into effect the obvious intention of the contracting parties. *Tatum v. Bonner*, 27 Miss. 760, 765; *Greer v. Featherston* (Tex.) 68 S. W. 48, 50.

#### As an independent contract.

The "indorsement" of a note is not a part of the note. *Morris v. Case*, 46 Pac. 54, 55, 4 Kan. App. 691.

"The contract of indorsement is not an independent one, but a parasite, which, like

the chameleon, takes the hue of the thing with which it is connected. Attached to commercial papers, it becomes a commercial contract, operating as a contingent guaranty of payment and a transfer of title where the paper is negotiable. Attached to any other chose in action, it becomes an equitable assignment of the beneficial interest, without recourse to the assignor." *Patterson v. Poindexter* (Pa.) 6 Watts & S. 227, 234, 40 Am. Dec. 554.

An "indorsement" is a written contract, the terms of which, though usually omitted for the convenience of commerce, are certain, fixed, and definite, and not the less perfectly understood because not expressed in words. *Drinkall v. Movious State Bank*, 88 N. W. 724, 727, 11 N. D. 10, 57 L. R. A. 341, 95 Am. St. Rep. 693.

The indorsement of a note is not a mere transfer of the paper, but is a new and substantial contract, and, strictly speaking, is the order and appointment by the payee to the maker of a person to whom, according to the maker's contract, he has agreed to pay the amount as promised; and though it virtually carries with it a right of action against the maker, that right is rather for a breach of the original contract, than from any actual assignment of a claim against the maker. The legal construction of an indorsement is, not that it is an assignment of a claim against the maker, but an order or draft on the maker for the money he has agreed to pay; and it is on this legal fiction that the law merchant places the liability of the indorser if the maker does not pay the note at maturity. *Hicks v. Wirth* (N. Y.) 4 E. D. Smith, 78, 81. See, also, *Morris v. Case*, 46 Pac. 54, 55, 4 Kan. App. 691; *Madrox v. Duncan*, 45 S. W. 688, 689, 143 Mo. 613, 41 L. R. A. 581, 65 Am. St. Rep. 678.

An indorsement of a promissory note is substantially the drawing of a new note in the terms of the old. An indorsement of an inland bill of exchange would arise by the indorser ordering the maker to pay the money due to him to the indorsee. *De Hass v. Dibert* (U. S.) 70 Fed. 227, 230, 17 C. C. A. 79, 30 L. R. A. 189.

#### Indorsement on attached paper.

Rev. Laws, § 858, providing that the sheriff might depute any proper person to serve a writ by indorsing thereon a special deputation, does not require that the deputation should be written on the very fabric of the process itself, but it may be written on a piece of paper attached to the back of the process by the sheriff, or by another for him, though "to indorse" means "to write on the back of." *Cowdery v. Johnson*, 15 Atl. 188, 189, 60 Vt. 595.

St. 1830, c. 238, § 1, providing that a certificate of the oath of the debtor shall be in-

dorsed on the instrument assigning his goods, for the benefit of his creditors, is satisfied with the indorsement thereof on a separate sheet of paper which is attached to the assignment. *Brown v. Foster*, 43 Mass. (2 Metc.) 152, 155.

Court rule 13, requiring that a commissioner taking a deposition shall indorse upon the commission the time or times and place of executing it, is not complied with by a certificate annexed to the deposition reciting the facts required to be stated in such indorsement. Such a paper cannot be said to have been indorsed on the commission. *Beatty v. Ambs*, 11 Minn. 331, 333 (Gil. 234, 235).

The word "indorsed," as used in accident insurance policies, provides that, in consideration of warranties and agreements contained in the application hereon, the company accepted him as member, subject to all the conditions indorsed hereon, will not be construed in its technical sense, in which it is used in the law merchant, as applied to bills of exchange and promissory notes, where it means "written on the bill or note itself," but in the more primitive or popular sense, as something written or printed upon and attached to a document, on the opposite side of which something else has been previously written or printed, so that, where the application is attached to the policy, it is indorsed thereon. *Reynolds v. Atlas Acc. Ins. Co. of Boston*, 71 N. W. 831, 832, 69 Minn. 93.

Under a provision that the certificate of acknowledgment of the owner of land platted shall be "indorsed" on the plat or map, it is queried as to whether the word "indorse" must be interpreted as "to place on the back of," and nothing else; and it is said that, if so done, very few of the deeds recorded in the state have been properly acknowledged, as such acknowledgments almost universally are appended to the foot of the deed, and if the acknowledgment may be appended at the foot of the deed there can be no objection to its being appended upon a separate piece of paper, if such paper be attached to the deed or plat. *Davis v. Town of Fulton*, 9 N. W. 809, 810, 52 Wis. 657.

Where a lease for 999 years provided that after 7 years certain arbitrators to be chosen by the parties should determine the future rent and indorse their award on the lease, a determination and indorsement on a separate paper, which was affixed to the lease by a wafer, was held not to be an "indorsement thereon," within the terms of the contract. *Montague v. Smith*, 18 Mass. 396.

#### Indorsement on face of instrument.

Literally, "indorsement" means a writing upon the back of a note or bill; but it is

well established that, though such is its import, it may be made upon the face of the bill. Any form is sufficient which manifests an intention to transfer the note. *Farmers' Trust Co. v. Schenuit*, 83 Ill. App. 267, 273.

A note was made payable to B., and taken to him for his indorsement; but he wrote his name under that of the maker, instead of on the back of the instrument. Held that, while the term "indorsing" implies that the name is written on the back, yet it may be written on the face, of the instrument, and it be held in law an indorsement; and in this case the payee was properly chargeable as an indorser. *Haines v. Dubois*, 30 N. J. Law (1 Vroom) 259, 262.

A complaint upon a contract of sale, which refers to a warranty as indorsed thereon, may be proven by a contract followed by the warranty upon the face of the paper on which the contract was written. In such a case it seems clear that the word "indorsed," as used in the contract, is not to be understood in its literal sense. *Musselman v. Wise*, 84 Ind. 248, 251.

By Civ. Code, § 8108, it is declared that one who writes his name upon a negotiable instrument otherwise than as a maker or acceptor, and delivers it with his name indorsed thereon to another person, is called an "indorser," and his act is called "indorsement." Under such definition, an indorsement may be made upon the face of the note with the same effect as upon the back. *Shain v. Sullivan*, 89 Pac. 606, 106 Cal. 208.

#### **Indorsement of whole note.**

"Indorsement" is a term known in law, which by the custom of merchants transfers the property of the bill or note to the indorser, and is usually made on the back of the bill, and must be in writing. No precise form of words is necessary to make a valid indorsement. The signature of the indorser alone will transfer a note or bill of exchange. But the assignment of part of the demand due on a promissory note does not constitute the assignee and indorsee, either as to the maker or the payee. The note must be transferred as a whole, or the assignee acquires no rights under the laws as an indorser. *Douglass v. Wilkeson* (N. Y.) 6 Wend. 637, 639.

#### **Negotiable paper imported.**

There is no such thing as an indorsement, in its strict and proper commercial sense, of any other than negotiable paper. *Young v. Sehon*, 44 S. E. 136, 139, 53 W. Va. 127, 62 L. R. A. 490, 97 Am. St. Rep. 970.

#### **Signature merely.**

The proper definition of "indorsement," in the commercial sense, is the writing of one's name upon or across the back of a bill

of exchange, promissory note, or check, by which the property is assigned or transferred. Literally "to write on the back," but in practice the place of writing is not essential. It is a good indorsement if made upon the face, or even on a separate piece of paper. This effect—that is, a transfer—is not wrought upon a note not negotiable by a signature across the back of it. The title or property does not pass by merely writing the name thus upon it. It is not, therefore, properly and legally an indorsement when applied to the latter kind of paper. *Richards v. Warring* (N. Y.) 39 Barb. 42, 45.

While the word has no definite technical meaning, other than that of some writing upon the back, its particular meaning is always determined by the context if in writing, and by its connection if in spoken words. The word "indorsement" has its primitive and popular sense of something written on the outside or back of a paper, or on the opposite side from which something else had been previously written, when the context shows that the signing is necessary to give effect to the pleadings or other instrument in which it occurs. Hence, under Comp. Laws, § 2885, providing that a certificate of sale of land for taxes shall be assignable by indorsement, the assignment must be written on the back of the certificate in order to constitute the indorsement. The mere writing of his name by the purchaser on the back of the certificate is not sufficient; such certificate not being negotiable. *Territory v. Perea*, 30 Pac. 928, 929, 6 N. M. 531.

#### **Transfer of title.**

"Indorsement," is a technical mercantile term, denoting the act by which the legal title to that particular class of bills of exchange and promissory notes which are drawn payable to order is transferred. Like other technical words, it is used in relation to those instruments, not in its strict etymological sense, which would imply that it is written on the back of them, as is evident from the circumstance that what is in legal signification an indorsement of a bill or note need not be written on that part of it, but in an artificial sense, to signify the transfer of the legal title to these instruments. *Clark v. Sigourney*, 17 Conn. 511, 518.

#### **As warranty of payment, validity, and right to indorse.**

An "indorsement" of a promissory note, in the ordinary technical meaning of the word, is an act which transfers the instrument already perfected in the hands of the indorser to another person; certain well-defined liabilities attaching to the indorser, dependent upon certain conditions. *Holt v. Sweetzer*, 55 N. E. 254, 256, 23 Ind. App. 237.

An indorsement is a writing on the back of an instrument, and, as used with refer-

ence to negotiable instruments in general, means a writing by which the owner or holder of the instrument transfers title thereto, which may or may not warrant its validity and payment, according as such indorsement is full or restricted: *Fountain v. Bookstaver*, 81 N. E. 17, 141 Ill. 461.

Speaking generally, indorsing a note means writing one's name upon it with intent to incur the liability of a party who warrants payment of the instrument, provided it is duly presented to the principal at maturity, not paid by him, and such fact is duly notified to the indorser. *Frost v. Fisher*, 58 Pac. 872, 875, 13 Colo. App. 322; *Paine v. Smith*, 24 N. W. 805, 306, 33 Minn. 496; *Daily v. Bartholomew*, 48 Pac. 923, 924, 5 Kan. App. 148. Where a person has written his name on the back of a note, and by a separate instrument waived protest, it clearly appears that he intended an indorsement in its technical sense. *Daily v. Bartholomew*, 48 Pac. 923, 924, 5 Kan. App. 148.

"The indorsement of a note is a new contract. The indorser engages that the note will be paid according to its tenor; that is, upon proper presentment, demand, and notice. He engages that it is genuine, and the legal obligation that it purports to be, and that he has title to it and a right to indorse it." *Maddox v. Duncan*, 45 S. W. 688, 689, 143 Mo. 613, 41 L. R. A. 581, 65 Am. St. Rep. 678.

The customary method of indorsing a bill of exchange is writing the name of the indorser on the back of the instrument, where an unqualified indorsement is intended. The law then implies the contract intended by this act, which, extended, would be that the indorser intends to incur the liability of a party who warrants payment of the instrument, provided it is duly presented to the principal at maturity, not paid by him, and such fact is duly notified to the indorser. He impliedly engages that the note will be paid according to its purport, conditioned on due presentation or demand and notice; that it is in every respect genuine; that it is the valid instrument it purports to be; that the ostensible parties are competent; and that he has lawful title to it and the right to indorse it. This is the contract, and the only contract, the law imputes to the indorser by his act. He makes this contract to the indorsee or subsequent holder, and not to the antecedent parties to the instrument. *Gray Tie & Lumber Co. v. Farmers' Bank*, 60 S. W. 537, 539, 109 Ky. 694.

The exact and legal meaning of the word "indorsement," as applied to notes and bills, is the transfer of a negotiable note or bill by the indorsement of some person who has the right to indorse. There can be no indorsement, in this sense of the word, except by the payee of the bill; but he may be the

original payee, or he may have become by previous indorsement a second or subsequent payee. The writing on any note, "I assign over the within note to P.," constitutes an indorsement. *Davidson v. Powell*, 19 S. E. 601, 114 S. C. 575.

#### Writing imported.

See, also, "Written Instrument."

The word "indorsement" imports a writing, and, where an assignor of a note is sued on his indorsement, it must be set out in the complaint or be exhibited with it. *Huston v. Fatka*, 66 N. E. 74, 77, 30 Ind. App. 693.

#### As written upon.

The word "indorsement" has a known legal signification, and means a transfer of an instrument by writing thereon. *Williams v. Osbon*, 75 Ind. 280, 283. And, as used in an indictment charging one with forging an indorsement of a bill of exchange, is sufficiently intelligible and correct. *Commonwealth v. Butterick*, 100 Mass. 12, 13.

The word "indorsement" implies a transfer by a writing upon the instrument transferred; hence it is held that, where a note is assigned in writing by the payee by a separate instrument, such act is not equivalent to an indorsement. *Keller v. Williams*, 49 Ind. 504, 505.

#### INDORSEE IN DUE COURSE.

An indorsee in due course is one who in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer. Civ. Code S. D. 1903, § 2199; Civ. Code Idaho 1901, § 2883; *More v. Finger*, 60 Pac. 933, 935, 128 Cal. 813; *Reese v. Bell*, 71 Pac. 87, 89, 138 Cal. xix.

Where a note was overdue when it was delivered to plaintiff, he was not "an indorsee in due course," and so did not acquire an absolute title thereto, so that it would be valid in his hands notwithstanding any defect in the title of the plaintiff, from whom he acquired it. *Woodsum v. Cole*, 10 Pac. 331, 333, 69 Cal. 142.

#### INDORSE IN WRITING.

Rev. St. § 1696, provides that the assignees named in a general assignment for the benefit of creditors shall each, in the presence of the officer taking the bond, before delivering the copy of the assignment to said officer, indorse in writing on such copy their consent to take upon themselves the trust specified in the assignment, and that such officer shall indorse thereon his certificate.

It was held that it is sufficient if the names of the assignees and officer are affixed in their presence and at their request, and it is not necessary that such names shall be affixed in their own handwriting. *Scott v. Seaver*, 8 N. W. 811, 813, 52 Wis. 175.

### INDORSEMENT FOR DEPOSIT.

When a bank receives from a customer a check on another bank for the special purpose of collection, the title does not pass by the special indorsement for that purpose, nor does the receiving bank hold the amount until the check is collected. But where the customer has a deposit account with the bankers, on which he is accustomed to deposit checks payable to himself, which are entered on his pass book, and to draw against such deposits, an indorsement of the words "for deposit" on a check so deposited is, in the absence of a different understanding, presumptive of more than mere agency or authority to collect. It is a request and direction to deposit the sum to the credit of the customer, and gives to the bankers authority, not only to collect, but to use the check in such manner as, in their judgment and discretion, having reference to the conditions and necessities of their business, may make it most available to their protection, and they may have it certified by the bank on which it was drawn. *Metropolitan Nat. Bank v. Merchants' Nat. Bank*, 55 N. E. 360, 364, 182 Ill. 367, 74 Am. St. Rep. 180 (citing *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50).

### INDORSEMENT IN BLANK.

An indorsement in blank is made by the mere writing of the indorser's name on the back of the bill, without the mention of the name of any person in whose favor the indorsement is made. It has been adjudged that such an indorsement does not transfer the property and interests in the bill to the indorser without some further act, but it gives him, as well as any other person to whom it is afterwards transferred, the power of constituting himself assignee of the beneficial interest, by filling it up payable to himself, which he may do at the time of trial. *Thornton v. Moody*, 11 Me. (2 Fairf.) 255, 256.

"Blank indorsement" is a technical term that means exclusively a commercial transfer contrived by the merchants as a surer and more emphatic mode of giving negotiability to a chose in action than an indorsement in full. *Parker v. Kennedy* (S. C.) 1 Bay, 398, 414.

A blank indorsement on a certificate of indebtedness signifies that some person is expected to have the right to fill in the blank. *Scollans v. Rollins*, 60 N. E. 983, 984, 179 Mass. 346, 88 Am. St. Rep. 386.

A blank indorsement of a negotiable instrument consists only of the name of the indorser, as where the indorser simply writes his name on the back of negotiable paper. It differs from a full indorsement, which is that by which the indorser orders the money to be paid to some particular person by name. *Lee v. Chillicothe Branch State Bank* (U. S.) 15 Fed. Cas. 151, 153.

An indorsement which does not mention the name of the person in whose favor it is named is called an "indorsement in blank." Lord Mansfield says that "an indorsement on a blank note is a letter of credit for an indefinite sum." But this doctrine does not extend to one who indorses in blank nonnegotiable paper. He is at most an assignor, with an implied covenant that the assignee should receive the money from the obligor to his own use, and that, if the obligee should receive it, then he would be answerable over for it. *Folwell v. Beaver* (Pa.) 13 Serg. & R. 311, 315 (citing *Chitty*, 170).

One who indorses a negotiable promissory note in blank merely engages to pay upon the usual conditions of demand and notice, and parol evidence is not admissible to vary the legal effect of his undertaking. *Hall v. Newcomb* (N. Y.) 7 Hill, 416, 424, 42 Am. Dec. 82.

A blank or full indorsement imports that the indorsee is the holder of the bill, with all the negotiable qualities belonging to the nature of such an instrument; and any person receiving such a bill may recover the amount from the indorser, if the bill be dishonored contrary to his intentions. *Brown v. Jackson* (U. S.) 4 Fed. Cas. 402, 404.

An indorsement in blank consists merely of the signature of the indorsee written on the back of the instrument. *Malone v. Garver* (Neb.) 92 N. W. 726, 727 (citing 2 Rand. Com. Paper, § 705).

An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery. *Bates' Ann. St. Ohio* 1904, § 3172f; *Rev. Codes N. D.* 1899, § 1044 (citing *Neg. Inst. Law N. D.* § 34); *Wedge Mines Co. v. Denver Nat. Bank* (Colo.) 73 Pac. 873, 874.

### INDORSEMENT IN FULL.

An indorsement which mentions the name of the person in whose favor it is made is called an "indorsement in full." *Folwell v. Beaver* (Pa.) 13 Serg. & R. 311, 315 (citing *Chitty*, 170).

### INDORSER.

See "Accommodation Indorser"; "Irregular Indorser"; "Satisfactory Indorser."

Under the commercial law an indorser is the payee, who, acquiring from the maker,



indorses the note to convey title to another, the indorsee; and the indorsee becomes indorser when he in turn places his name on the note to transfer it. *Metropolitan Bank v. Muller*, 24 South. 295, 296, 50 La. Ann. 1278, 69 Am. St. Rep. 475.

An indorser is one who by his signature transfers the legal interest in a note. *Hall v. Newcomb* (N. Y.) 7 Hill, 416, 424, 42 Am. Dec. 82.

The term "indorser" in its legal sense cannot be applied to the maker of a note payable to his order, who indorses his name thereon, and delivers it to another person for value. Such act is merely part of the execution of the note, which becomes in legal effect payable to the holder or bearer. The only liability of such person is that of a maker. *Ewan v. Brooks-Waterfield Co.*, 45 N. E. 1094, 1096, 55 Ohio St. 596, 35 L. R. A. 786, 60 Am. St. Rep. 719.

An indorser undertakes to pay a note only in the event of the maker's not paying it. *Brower v. Wooten*, 4 N. O. 507, 508, 7 Am. Dec. 692.

One who writes his name upon a negotiable instrument, other than as a maker or acceptor, and delivers it, with his name thereon, to another person, is called an "indorser." *Civ. Code Mont.* 1895, § 4020; *Rev. St. Okl.* 1903, § 3607; *Rev. Codes N. D.* 1899, § 4868; *Civ. Code S. D.* 1903, § 2183; *Civ. Code Cal.* 1903, § 3108; *Rev. St. Wyo.* 1899, § 2344.

#### **Maker distinguished.**

"The difference between a maker of a note and an indorser or guarantor is that the contract of the first by its terms imports an unconditional obligation to pay money, and that of the last by its terms imports a conditional obligation. The rules of law settle this species of contracts, as well as others, and prescribe how they may be created, their legal effect, and mode of enforcement." *Aud v. Magruder*, 10 Cal. 282, 290.

### **INDUBITABLE.**

"Indubitable proof" means evidence that is not only found credible, but of such weight and directness as to make out the facts alleged beyond a doubt. *Hart v. Carroll*, 85 Pa. 508, 511; *Allison v. Burns*, 107 Pa. 50; *Erie & W. V. R. Co. v. Knowles*, 11 Atl. 250, 254, 117 Pa. 77; *Jermyn v. McClure*, 45 Atl. 938, 942, 195 Pa. 245.

Clear, precise, and indubitable evidence, within the meaning of the rule that a parol exchange of land must be established by clear proof and indubitable evidence, means no more than that there must be precision in the terms of the agreement set up, and that

the evidence to support it must be of a high order, carrying conviction, to a moral certainty, of its truth. *Jermyn v. McClure*, 45 Atl. 938, 942, 195 Pa. 245.

The law that an oral agreement to vary a written instrument must be established by "clear, precise, and indubitable proof" means that it must be found that the witnesses are credible, that they distinctly remember the facts to which they testify, and that they narrate the details exactly, and that their statements are true. *Ferguson v. Rafferty*, 18 Atl. 484, 485, 128 Pa. 337, 6 L. R. A. 33; *Spencer v. Colt*, 89 Pa. 314, 318. Absolute certainty is, of course, out of the question. Terms are used with relation to their subject-matter. The apparently distinct testimony of the most intelligent witness may possibly be fabricated. The clear statement of the most upright witness may possibly be mistaken. It has been in view of considerations like these that, in certain classes of cases, proof is required that is clear, distinct, and entirely satisfactory. *Spencer v. Colt*, 89 Pa. 314, 318.

A charge in a criminal case that the jury are required to acquit unless they are indubitably certain that the defendant is guilty requires too high a degree of proof, the word "indubitably" requiring the removal of all doubt from the minds of the jury. *Ross v. State*, 92 Ala. 28, 9 South. 357, 25 Am. St. Rep. 20.

### **INDUCE.**

"Induce," as used in a pleading stating that the respondent was induced to withdraw the distress on assurance that the debt was settled, means influenced, persuaded, and not to introduce; to bring into view. *Wollaston v. Stafford*, 29 Eng. Law & Eq. 263, 265.

In an indictment for obtaining goods under false pretenses, alleging that defendant induced prosecutor to sell certain goods to them, "induced" means moved, urged, or instigated, but cannot be held to be an averment that prosecutor did sell to defendant. *State v. Phelan*, 60 S. W. 71, 74, 159 Mo. 122.

### **INDUCED CRIME.**

An expenditure of public money authorized by a district attorney, by a county detective, in purchasing liquor at various saloons for the purpose of procuring evidence, cannot be said to have induced crime, so as to render such expenditure against public policy. *People v. Grout*, 77 N. Y. Supp. 321, 325, 38 Misc. Rep. 181.

### **INDUCEMENT.**

An inducement, in an action of assumpsit, is in the nature of a preamble stating

the circumstances under which the contract was made, or to which the consideration has reference. *Huston v. Tyler*, 36 S. W. 654, 656, 140 Mo. 252 (citing 1 Chit. Pl. \*296; *Bliss*, Code Pl. §§ 149, 150; *Steph. Pl.* § 53).

In pleading, a matter of defense set forth in the plea prior to the special traverse, where one is used, is called the "inducement"; the real traverse being the *absque hoc*. *Thomas v. Black* (Del.) 18 Atl. 771, 772, 8 Houst. 507.

In pleading, the "inducement" is the statement of matter which is introductory to the principal subject of the plea itself, and which is necessary to explain or elucidate it. *Consolidated Coal Co. v. Peers*, 97 Ill. App. 188, 194 (quoting *Bouv. Law Dict.*).

In a prosecution for forgery, where the acts of the defendant were properly described as false pretenses, the further describing them as inducements and representations and sayings did not render the indictment defective. *State v. Switzer*, 22 Atl. 724, 725, 63 Vt. 604, 25 Am. St. Rep. 789.

It is not easy to give an exhaustive definition, within reasonable terms, of exactly what is meant by the words "allurement or inducement" that legally operate to constitute an invitation to enter the premises of another. Mere temptation does not form such an inducement. In *Sweeny v. Old Colony & N. R. Co.*, 92 Mass. (10 Allen) 368, 87 Am. Dec. 644, a railroad company that had made a private crossing over its track, and allowed the public to use it as a highway, and stationed a flagman there, was held liable to one injured, who, using due care, was induced to cross by a signal from the flagman that it was safe. "Temptation," says *Holmes, J.*, in *Holbrook v. Aldrich*, 168 Mass. 15, 46 N. E. 115, 36 L. R. A. 493, 60 Am. St. Rep. 364, "is not always invitation. It does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen." *Paolino v. McKendall*, 53 Atl. 268, 272, 24 R. I. 432, 60 L. R. A. 133, 96 Am. St. Rep. 736.

#### In libel and slander.

"Inducement" is the statement of facts out of which the charge arises, or which are necessary or useful to make the charge intelligible. *Taverner v. Little*, 5 Bing. N. C. 678; *Grand v. Dreyfus*, 54 Pac. 389, 391, 122 Cal. 58.

Whenever words have the slanderous meaning alleged, not by their extrinsic force, but by reason of some extraneous fact, this fact must be averred in traversible form, which averment is called the "inducement." *State v. Grinstead*, 61 Pac. 976, 979, 10 Kan.

App. 78 (citing *Carter v. Andrews*, 33 Mass. [16 Pick.] 1, 6; *State v. Elliott*, 61 Pac. 981, 10 Kan. App. 69); *State v. Grinstead*, 64 Pac. 49, 53, 62 Kan. 593.

The inducement, in the law of pleading in libel and slander, is that portion of a complaint, the office of which is to narrate the extrinsic circumstances, which, coupled with the language published, affect its construction, and render it actionable, where, standing alone, and not thus explained, the language would appear either not to concern the plaintiff, or, if concerning him, not to affect him injuriously. *Squires v. State*, 45 S. W. 147, 149, 39 Tex. Cr. R. 96, 73 Am. St. Rep. 914; *Grand v. Dreyfus*, 54 Pac. 389, 391, 122 Cal. 58. This being the office of the inducement, it follows that if the language does not naturally and per se refer to the plaintiff, nor convey the meaning the plaintiff contends for, or if it is ambiguous and equivocal, and requires explanation by some extrinsic matters to show its relation to the plaintiff, making it actionable, the complaint must allege, by way of inducement, the existence of such extraneous matter. *Squires v. State*, 45 S. W. 147, 149, 39 Tex. Cr. R. 96, 73 Am. St. Rep. 904.

An inducement cannot be supplied by an innuendo. *State v. Grinstead*, 64 Pac. 49, 53, 62 Kan. 593.

#### INDUCING TRADE.

"Inducing trade," as used in Act 1888, prohibiting a sale of intoxicating liquors, refers to giving away, and not to selling. *King v. State* (Miss.) 6 South. 188, 189.

#### INDUCTION.

"Induction" is by the canon law called "corporal possession," and is compared in the books of common law to livery and seisin, by which possession is given to temporal estates. *Goodwin v. Lunan* (Va.) Jeff. 96, 100.

#### INDUCTIVE SCIENCE.

The term "inductive science" includes the science of medicine, if medicine can properly be termed a science. *Huffman v. Click*, 77 N. C. 55, 57.

#### INDUSTRIAL.

"Industrial" is defined by Worcester as "relating to manufactures, or to the product of industry or labor." *Louisville & N. R. Co. v. Fulgham*, 8 South. 803, 804, 91 Ala. 555.

#### INDUSTRIAL ENTERPRISE.

"Industrial enterprise," as used in Code 1886, § 1161, which prohibits railroad com-

panies from making any departure from their public freight rates, except to aid in the development of industrial enterprises in the state, includes all kinds of manufacturing. Hence it would include a mill for the manufacture of corn into meal. *Louisville & N. R. Co. v. Fulgham*, 8 South. 803, 804, 91 Ala. 555.

### INDUSTRIAL PURSUIT.

Rev. St. § 1889, provides that the legislative assemblies of the several territories shall not grant private charters or special privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacture, and other industrial pursuits, etc.; and it was objected that Wells, Fargo & Co., a corporation organized by a special act of the territory of Colorado, and authorized to engage in the express business, could not come into Washington Territory to do business there, because it was not a corporation engaged in an industrial pursuit, or at least not engaged in such an industrial pursuit as mining or manufacturing; and hence the Legislature of Colorado had no authority, under such act of Congress, to grant to such corporation a charter. "Industrial" is a very large word, and although it is associated with the words "mining" and "manufacturing," it would be contrary to the manifest purpose of Congress to so restrain it as that the pursuit must be literally, or almost literally, a mining one or a manufacturing one. The express business is an industrial pursuit, and one which the territorial Legislature could provide for the formation of corporations to engage in. *Wells, Fargo & Co. v. Northern P. R. Co.* (U. S.) 23 Fed. 469, 474, 475.

The term "industrial pursuits," in Rev. St. U. S. § 1889, which provides that the Legislative Assemblies of the several territories shall not grant private charters or special privileges, but may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, etc., includes a mercantile business for the sale of goods, mining supplies, etc. The term "industrial pursuit" is a very broad expression. *Bashford-Burmister Co. v. Agua Fria Copper Co.* (Ariz.) 35 Pac. 983; *Carver Mercantile Co. v. Hulme*, 19 Pac. 213, 214, 7 Mont. 566.

### INDUSTRY.

See "New Industry."

"Industry" is defined by lexicographers to be habitual diligence in any employment, either bodily or mental, and is as applicable to the sale of goods, which is the chief busi-

ness of a merchant, as to the transportation of goods, which is the chief business of an express carrier. *Carver Mercantile Co. v. Hulme*, 19 Pac. 213, 214, 7 Mont. 566.

### INEBRIATE.

An inebriate is any person who habitually, whether continuously or periodically, indulges in the use of intoxicating liquors to such an extent as to stupefy his mind and to render him incompetent to transact ordinary business with safety to his estate, provided the habit of so indulging in such use shall have been at the time of the inquisition of at least one year's standing. Code 1883, § 1671; *In re Anderson* (N. C.) 43 S. E. 649, 650.

In construing a statute authorizing the imprisonment in any inebriate or insane asylum of any person convicted of being an inebriate, habitual or common drunkard, it was said that "just what would make a person such is not very clearly defined. Manifestly it was intended that the drunkenness should be repeated to the extent of becoming habitual, but just how frequently it should occur, or the extent of the delirium or stupefaction, is left, as a matter of fact, to be determined by those who might differ widely in regard to it. Such conviction is not made dependent upon his inability to attend to business, nor to any want of physical self-control, nor upon his being dangerous to himself or others." Such a statute is in violation of Const. U. S. Amend. 14, § 1, which declares that no state shall deprive any person of liberty without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. *State v. Ryan*, 36 N. W. 823, 827, 70 Wis. 676.

### INEBRILIATION.

"Inebriation" is a word nearly synonymous with "ebriety" and "intoxication," and is expressive of that state or condition which inevitably follows from taking into the body, by swallowing or drinking, excessive quantities of intoxicating liquors. *Commonwealth v. Whitney*, 65 Mass. (11 Oush.) 477, 479.

### INEFFECTUAL.

The word "ineffectual" in Code Civ. Proc. § 1404, providing that a mortgage thereafter executed on a homestead is ineffectual until the exemption has been canceled, seems to have been chosen to express that the mortgage was ineffectual to cancel the exemption. It is not equivalent to "void," for it will be seen that it is ineffectual only until the exemption has been canceled. *Peck v. Ormsby*, 8 N. Y. Supp. 372, 378, 55 Hun. 265.

## INEFFICIENCY.

Within the meaning of Sp. Laws 1891, p. 70, creating a police commission for the city of Galveston, and investing it with exclusive jurisdiction to determine all charges against police officers for inefficiency, the word "inefficiency" is sufficiently broad to include the inability of a police officer to read or write the English language. *Steinback v. City of Galveston (Tex.)* 41 S. W. 822, 824.

## INELIGIBLE.

As disability, see "Disability."

The word "ineligible" means not eligible; disqualifying; not qualified to be chosen to an office. *Carroll v. Green*, 47 N. E. 223, 224, 148 Ind. 362.

The term "ineligible," as used in a judicial opinion declaring that an alien was ineligible to office, should be construed to mean that he was ineligible to hold the office, and not to mean that he could not be elected to the office; and hence, in case his disability is removed before the commencement of the term of office for which he was elected, he will be entitled to enter upon and hold such office. *State v. Murray*, 28 Wis. 96, 99, 9 Am. Rep. 489; *In re Barnum*, 8 N. W. 375, 376, 27 Minn. 466, 38 Am. St. Rep. 304.

## INEQUALITY.

In the legal and constitutional sense "inequality" refers to substantial differences relating to large classes of property, and to differences in the system or methods by which properties are assessed for taxation. *Railroad & Telephone Cos. v. Board of Equalizers (U. S.)* 85 Fed. 302, 306.

Under Laws 1885, p. 323, No. 227, § 5, providing that a township board may order such changes to be made as they may deem just, where there appears to be manifest error or inequality in assessments for a drain, there is no difficulty in determining what is meant by the term "inequality." The township board may determine that the benefits assessed upon some lands are too high, and upon others too low, and may exercise their judgment to equalize the assessment. *Thomas v. Walker Tp. Board*, 116 Mich. 597, 601, 74 N. W. 1049.

## INEQUITABLE.

*Pomeroy* (2 Pom. Eq. Jur. § 803) says the terms "fraud" and "fraudulent," as used by the courts in speaking of equitable estoppels, are virtually synonymous with "unconscientious" or "inequitable." *The Otumwa Belle (U. S.)* 73 Fed. 643, 648.

## INEVITABLE ACCIDENT.

An inevitable accident is an event which happens not only without the concurrence of the will of man, but in spite of all efforts on his part to prevent it. *State v. Lewis*, 12 S. E. 457, 460, 107 N. C. 967, 11 L. R. A. 105.

An "inevitable accident" is a catastrophe occurring without any intervention of man. *Russell v. Fagan (Del.)* 8 Atl. 258, 261, 7 Houst. 389.

Anderson, in his Dictionary of Law, p. 13, defines an "inevitable accident" as one which is absolutely unavoidable, because effected or influenced by the uncontrollable operations of nature. *Dreyer v. People (Ill.)* 58 N. E. 620, 623, 58 L. R. A. 869; *State v. Lewis*, 12 S. E. 457, 460, 107 N. C. 967, 11 L. R. A. 105.

"Inevitable accidents" are such as come from a force superior to all human agency, either in their production or resistance. *Louisville, C. & L. Ry. Co. v. Hedger*, 72 Ky. (9 Bush) 645, 647, 15 Am. Rep. 740.

"Inevitable accident" is a relative term, and must be construed not absolutely, but reasonably with regard to the circumstances of each particular case. *Amoskeag Mfg. Co. v. The John Adams (U. S.)* 1 Fed. Cas. 791, 795.

### As act of God.

An "inevitable accident" is an act of God; that is, any accident produced by physical causes which are inevitable, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death or illness. *Fish v. Chapman*, 2 Ga. (2 Kelly) 349, 356, 46 Am. Dec. 393; *Brosseau v. The Hudson*, 11 La. Ann. 427, 428; *McCall v. Brock (S. C.)* 5 Strob. 119, 124.

An act of God is an inevitable accident without the intervention of man; some casualty which human foresight could not discern, and from the consequences of which no protection could be provided. *Russell v. Fagan (Del.)* 8 Atl. 258, 261, 7 Houst. 389.

The words "inevitable accident," when used in law to designate the mode by which loss has or may happen to a common carrier, is synonymous with the phrase "the act of God." *Neal v. Saunderson*, 10 Miss. (2 Smedes & M.) 572, 576, 41 Am. Dec. 609.

"Inevitable accident," as used in reference to carriers, applies to "occurrences which no foresight or precaution of the carrier could prevent. It is not identical in meaning with 'the act of God,' which excludes all human agency." *Merritt v. Earle (N. Y.)* 31 Barb. 38, 45; *McArthur v. Sears (N. Y.)* 21 Wend. 190, 197.

"The expressions 'act of God' and 'inevitable accident' have sometimes been used

in a similar sense and as equivalent terms, but there is a distinction. That may be an 'inevitable accident' which no foresight or protection of the carrier could prevent, but the phrase 'act of God' denotes natural accidents that cannot happen by the intervention of man, as storms, lightnings, and tempests." *Redpath v. Vaughan* (N. Y.) 52 Barb. 489, 499.

The term "inevitable accident," as used to represent one of the contingencies which will excuse a carrier for loss of goods, has been criticised as a relaxation of the stringent rule of the common law, and as embracing cases of accident which must be regarded as inevitable, though not happening from causes that fall under the legal definition of "an act of God or of the public enemy." Such would be the irresistible force of robbers, or a fire commencing elsewhere and spreading to the place in which the goods were kept by the carrier. *Angell on Carriers*, §§ 154-156. And so, where the jury were instructed that the carrier was liable for every injury except such as human care and foresight could not prevent, the instruction was, if anything, too favorable to the carrier, since inevitable accidents, unless such as can be classed under the legal head of "acts of God or the public enemy," will not excuse them. *Hall v. Cheney*, 36 N. H. 26, 30.

#### Degree of care required.

An inevitable accident is such an accident as could not have been avoided by the use of the kind and degree of care necessary to the exigency and in the circumstances in which a party was placed. *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 296.

An inevitable accident is an occurrence which could not be avoided by that degree of prudence, foresight, care, and caution which the law requires of every one under the circumstances of the particular case. *Newport News & M. V. Co. v. United States*, 61 Fed. 488, 490, 9 C. C. A. 579 (citing *Weeks v. Wilson Transit Co.* [U. S.] 61 Fed. 120, 9 C. C. A. 393); *The Olympia* (U. S.) 61 Fed. 120, 127, 9 C. C. A. 393; *The Mary S. Blees* (U. S.) 120 Fed. 44, 45.

"Inevitable accident" must be understood to mean a collision which occurs when both parties have endeavored by every means in their power, with due care and caution and a proper display of nautical skill, to prevent the occurrence of the accident, and where the proofs show that it occurred in spite of everything that nautical skill, care, and precaution could do to keep the vessels from coming together. *The R. S. Mabey*, 81 U. S. (14 Wall.) 204, 215, 20 L. Ed. 881; *The Rebecca* (U. S.) 122 Fed. 619, 622, 60 C. C. A. 251 (citing *The R. S. Mabey*, 81 U. S. [14 Wall.] 204, 20 L. Ed. 881).

An "inevitable accident," sufficient to relieve a carrier from liability, means an acci-

dent "which ordinary human care and foresight could not guard against." *Macer v. Third Ave. R. Co.*, 47 N. Y. Super. Ct. (15 Jones & S.) 461, 466; *Caldwell v. Murphy*, 8 N. Y. Super. Ct. (1 Duer) 233, 241; *Harvey v. Dunlop* (N. Y.) *Lalor*, Supp. 193, 194; *Toudy v. Norfolk & W. R. Co.* (W. Va.) 18 S. E. 896, 897.

An accident is said to be "inevitable" when it is not occasioned in any degree, either remotely or directly, by the want of such care and skill as the law holds every man bound to exercise. *The Olympia* (U. S.) 61 Fed. 120, 127, 9 C. C. A. 393 (citing *Dygert v. Bradley* [N. Y.] 8 Wend. 473).

"Inevitable accident" may be regarded as an occurrence which the party charged could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. *The Morning Light*, 69 U. S. (2 Wall.) 550, 561, 17 L. Ed. 862; *The Ohio* (U. S.) 91 Fed. 547, 553, 33 C. C. A. 667; *Brainard v. The Worcester* (U. S.) 4 Fed. Cas. 9; *The Fontana* (U. S.) 119 Fed. 853, 858, 56 C. C. A. 365.

"Inevitable accident," as applied to navigation, is where a vessel is pursuing a lawful occupation in a lawful manner, using proper precaution against danger, and an accident occurs. The highest degree of caution that can be used is not required; it is enough that it is reasonable under the circumstances, such as is usual in similar cases, and has been found by long experience to answer the end in view—the safety of life and property. *The Grace Girdler*, 74 U. S. (7 Wall.) 196, 203, 19 L. Ed. 113; *Ladd v. Foster* (U. S.) 31 Fed. 827, 831; *The Austria* (U. S.) 9 Fed. 916, 918; *The Europa*, 2 U. S. Law Mag. 497, 499; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75, 81, 3 Am. Rep. 663.

"Inevitable accident," as applied to marine disasters occurring when the respective vessels are each seen by the other, means a collision which occurs when both parties have endeavored by every means in their power, with due care and caution and the proper display of nautical skill, to prevent the occurrence of the accident. *The Locklibo*, 3 W. Rob. 318; *Union S. S. Co. v. New York & V. S. S. Co.*, 65 U. S. (24 How.) 313, 16 L. Ed. 699.

"Inevitable accident," in the case of collision at sea, is only when the disaster happens from natural causes, and without negligence or fault on either side. "Inevitable accident," as applied to cases of this description, must be understood to mean a collision which occurs when both parties have endeavored by every means in their power, with due care and caution and a proper display of nautical skill, to prevent the occurrence of the accident. *Union S. S. Co. v. New York & V. S. S. Co.*, 65 U. S. (24 How.) 307, 313, 16 L. Ed. 699.

An "inevitable accident," when used in reference to a collision at sea, "is only when the disaster happens from natural causes, without neglect or fault on either side, and when both parties have endeavored by every means in their power, with due care and caution and with a proper display of nautical skill, to prevent the occurrence." *Sampson v. United States* (U. S.) 12 Ct. Cl. 481, 491. The definition of "inevitable accident," as respects a colliding vessel, is a collision notwithstanding such vessel has endeavored by every means in her power, with due care and caution and a proper display of nautical skill, to prevent it. *The New Mary Houston* (U. S.) 69 Fed. 362, 367; *Amoskeag Mfg. Co. v. The John Adams* (U. S.) 1 Fed. Cas. 791, 795.

It is not "inevitable accident" where a master proceeds carelessly on his voyage, and afterwards circumstances arise when it is too late for him to do what is fit and proper to be done. *Union S. S. Co. v. New York & V. S. S. Co.*, 65 U. S. (24 How.) 307, 313, 16 L. Ed. 699.

"In the Case of Fashion, 1 Newb. Adm. 8, an 'inevitable accident' is held to be one where no fault can be found on either side." *Austin v. New Jersey S. S. Co.*, 43 N. Y. 75, 81, 3 Am. Rep. 663. See, also, *The Morning Light*, 69 U. S. (2 Wall.) 550, 560, 17 L. Ed. 862.

#### As peril of sea.

"Inevitable accident," as the term is used to describe an exemption of a carrier from liability for loss occasioned by an inevitable accident, is synonymous with the words "perils of the sea," they being convertible terms, and any loss from a peril of the sea would be a loss by "inevitable accident" within the exception. *Blythe's Ex'rs v. Marsh* (S. C.) 1 McCord, 360, 364.

### INEVITABLE CASUALTY.

Inevitable casualty "is an accident which happens without the slightest degree of negligence." *Hodgson v. Dexter* (U. S.) 12 Fed. Cas. 283, 284.

### INFAMIA FACTI.

"Infamia facti" is the infamy existing "where a party is supposed to be guilty of an infamous crime, but it has not been judicially proved." *Commonwealth v. Green*, 17 Mass. 515, 540.

### INFAMIA JURIS.

Infamia juris "means infamy established by law as the consequence of crime." *Commonwealth v. Green*, 17 Mass. 515, 540.

### INFAMOUS.

Webster gives, as synonyms of "infamous" "detestable," "odious," "scandalous," "disgraceful," "base," "vile," "shameful," "ignominious." *Polson v. Polson*, 39 N. E. 498, 499, 140 Ind. 310.

"Infamous" means "without fame or good report." *United States v. Block* (U. S.) 24 Fed. Cas. 1174, 1175.

The term "infamous," as used in a statement of the rule that a witness cannot be compelled to testify to any fact which would render him infamous, etc., means more than mere degradation or reproach. The word does not include simply playing cards with a negro. *Sodusky v. McGhee*, 28 Ky. (5 J. J. Marsh.) 621, 622.

Within the rule that words spoken of a private person are actionable only when they contain a plain imputation not merely of some indictable offense, but of an infamous character or subject to an infamous and disgraceful punishment, the word "infamous" could not have been used in its technical, but rather in its popular, sense. The only crimes which work infamy and consequent incompetency of a witness are treason, felony, and every species of crimen falsi, such as forgery, perjury, subornation of perjury, attainder of false verdict, and other offenses of like character which involve the charge of falsehood and affect the public administration of justice. But "infamous," in the connection used, is not limited to crimes of this class, and will include those which involve moral turpitude as well. Thus words imputing the crime of adultery are actionable. And a charge that a person burned insured property to defraud the insurance company is actionable per se. *Davis v. Carey*, 21 Atl. 633, 635, 141 Pa. 314.

### INFAMOUS CRIME.

The term "infamous crime," as used in Const. art. 1, § 7, providing that no one shall be held to answer for an infamous crime unless on the presentation or indictment of the grand jury, means a crime that works infamy in the person who has committed it. *Butler v. Wentworth*, 24 Atl. 456, 457, 84 Me. 25, 17 L. R. A. 764.

An "infamous crime" is an offense implying such a condition of moral principles as carries with it the construction of a total disregard of the obligation of an oath. *People v. Parr*, 4 N. Y. Cr. R. 545, 546.

Probably the test of an "infamous crime" is to inquire whether the crime shows such depravity in the perpetrator, or such a disposition to pervert public justice of the courts, as to create a violent presumption against his truthfulness under oath. *King v. State*, 17 Fla. 183, 185, 186.

No crime is infamous, within the meaning of article 5 of the amendments to the federal Constitution, unless expressly made infamous or declared a felony by an act of Congress. *United States v. Wynn* (U. S.) 9 Fed. 888, 888.

At common law an infamous crime is one which on conviction renders the person convicted incompetent as a witness. *People v. Parr*, 4 N. Y. Cr. R. 545, 546.

An infamous crime is such a crime as involves moral turpitude, or such as renders the offender incompetent as a witness in court, on the theory that a person would not commit so heinous a crime unless he was so depraved as to be unworthy of credit. *State v. Bixler*, 62 Md. 354, 360.

An infamous crime is one which rises at least to the grade of a felony. *State v. Bixler*, 62 Md. 354, 360.

In 1 Greenl. Ev. § 372, it is said, in speaking of what are infamous crimes, that the usual and more general enumeration is treason, felony, and the *crimen falsi*. It is also held in *United States v. Field* (U. S.) 16 Fed. 778, 780, that "infamous crimes" are convertible with "felonies," and to the same effect is *Whart. Cr. Law*, § 561. *Sutherland v. Sutherland*, 61 N. E. 206, 27 Ind. App. 301.

A felony is an "infamous crime," within the rule of the common law which renders a person convicted of an infamous crime incompetent to testify. *O'Connell v. Dow*, 68 N. E. 788, 790, 182 Mass. 541.

Whenever the term "infamous crime" is used in the statute, it shall be construed as including every offense for which the offender, on conviction or sentence, is declared to be disqualified or rendered incompetent to be a witness or juror, or to vote at any election, or to hold any office of honor, profit, or trust within the state. *Rev. St. Mo. 1899*, § 2394; *Gen. St. Kan. 1901*, § 2310.

"Infamous crimes," as used in the common law, excluding persons convicted of infamous crimes from being witnesses, are regarded as comprehending treason, felony, and the *crimen falsi*. *United States v. Barefield* (U. S.) 23 Fed. 136, 137; *Hess v. Hess*, 22 Pa. Co. Ct. R. 135, 139.

The term "infamous," i. e., without fame or good report, was applied at common law to certain crimes, upon the conviction of which a person became incompetent to testify as a witness. This was upon the theory that a person would not commit a crime of such heinous character unless he was so depraved as to be altogether insensible to the obligation of an oath, and therefore was unworthy of credit. These crimes are said to be treason, felony, and the *crimen falsi*. As to treason and felony, the authorities are

agreed, but as to what or whether all species of the *crimen falsi* are to be considered infamous, there is some apparent disagreement among them. The term is borrowed from the civil law, where, as it implies, it included every species of fraud and deceit or wrong involving falsehood. But the better opinion seems to be that the common law has not used the term in this connection in so extensive a sense, and that therefore a crime is not "infamous," within the meaning of the prohibitions contained in the fifth amendment, unless it not only involves the charge of falsehood, but may also injuriously affect the public administration of justice by the introduction therein of falsehood and fraud, such as forgery, perjury, subornation of perjury, suppression of testimony by bribery, or conspiracy to procure the absence of a witness, or other conspiracy to accuse one of crime, and barratry. *United States v. Block* (U. S.) 24 Fed. Cas. 1174, 1175; *United States v. Yates* (U. S.) 6 Fed. 861, 863; *United States v. Pettit* (U. S.) 11 Fed. 58, 60.

"Infamous crimes" are every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, and offenses affecting the public administration of justice. *Wick v. Baldwin*, 38 N. E. 671, 672, 51 Ohio St. 51; *Webb v. State*, 29 Ohio St. 351, 358.

#### Determined by kind of punishment.

In some of the earlier decisions there was a tendency on the part of the courts to hold that the question of infamy was to be determined by the nature of the crime, and not at all by the character of the punishment, but the Supreme Court of the United States settled that the test to be applied in determining whether an offense is an infamous crime is the character of the punishment which may be inflicted. It is, however, held that the real criterion to be applied in such cases is whether the crime is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one. If the accused is in danger of being subjected to an infamous punishment, the crime is deemed to be infamous, although infamous punishment may not actually be inflicted. *State v. Clark*, 56 Pac. 767, 768, 60 Kan. 450. See *Ex parte Wilson*, 5 Sup. Ct. 935, 938, 114 U. S. 417, 29 L. Ed. 89; *In re Mills*, 10 Sup. Ct. 762, 763, 135 U. S. 263, 34 L. Ed. 107; *United States v. Johannesen* (U. S.) 35 Fed. 411, 412 (citing *Mackin v. United States*, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909); *Ex parte McClusky* (U. S.) 40 Fed. 71, 72; *In re Claassen*, 11 Sup. Ct. 735, 737, 140 U. S. 200, 35 L. Ed. 409; *Stokes v. United States* (U. S.) 60 Fed. 597, 598, 9 C. C. A. 152; *United States v. Maxwell* (U. S.) 26 Fed. Cas. 1221, 1222. It is so used in Act Cong. March 8,

1891, providing that a writ of error may be taken from an existing Circuit Court direct to the Supreme Court of the United States in cases of conviction of a capital or other "infamous crime." *In re Claassen*, 11 Sup. Ct. 735, 737, 140 U. S. 200, 35 L. Ed. 409.

"The words 'infamous crime,' have a fixed and settled meaning. In a legal sense they are descriptive of an offense that subjects a person to infamous punishment or prevents his being a witness." *United States v. Maxwell* (U. S.) 26 Fed. Cas. 1221, 1222.

The character of an offense, whether infamous or not, is to be determined by the punishment, and at common law the deprivation of civil and political privileges was considered as an infamous punishment. It is said in *Cooley*, Const. Law, p. 29, that the punishment of the penitentiary must always be deemed infamous, and so must any punishment that involves the loss of civil or political privileges. *Baum v. State*, 61 N. E. 672, 673, 157 Ind. 282, 55 L. R. A. 250.

A crime punishable by infamous punishment is an "infamous crime." *Gudger v. Penland*, 108 N. C. 593, 13 S. E. 168, 170, 23 Am. St. Rep. 78.

#### Same—Death or imprisonment in penitentiary.

Imprisonment in a state penitentiary or prison with or without hard labor being an infamous punishment, a crime punishable by such imprisonment is an "infamous crime." *Mackin v. United States*, 6 Sup. Ct. 777, 780, 117 U. S. 848, 29 L. Ed. 909; *Parkinson v. United States*, 7 Sup. Ct. 896, 121 U. S. 281, 30 L. Ed. 959; *In re Claassen*, 11 Sup. Ct. 735, 737, 140 U. S. 200, 35 L. Ed. 409; *United States v. Johannsen* (U. S.) 35 Fed. 411, 412; *United States v. Smith* (U. S.) 40 Fed. 755, 759; *United States v. Sutton* (U. S.) 47 Fed. 129, 180, 2 C. C. A. 115; *Hess v. Hess*, 22 Pa. Co. Ct. R. 135, 139 (citing *Mackin v. United States*, 6 Sup. Ct. 777, 117 U. S. 348, 29 L. Ed. 909). And a crime not so punished is not an infamous crime. *McKee v. Wilson*, 87 N. C. 300, 302; *People v. Parr*, 4 N. Y. Cr. R. 545, 546.

The words "infamous crime" are in a legal sense descriptive of an offense that subjects a person to an infamous punishment or prevents his being a witness. The fact that an offense may or must be punished by imprisonment in the penitentiary does not necessarily make it, in law, infamous. Citing *United States v. Maxwell* (U. S.) 26 Fed. Cas. 1221. As used in Const. art. 1, § 7, providing that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment by a grand jury, except in cases of impeachment, or of such offenses as are cognizable by a justice of the peace," it does not include every offense punishable by im-

prisonment. *State v. Nolan*, 10 Atl. 481, 483, 15 R. I. 529.

The term "infamous crime" includes every offense punishable with death or imprisonment in the State Prison. Gen. St. Minn. 1894, § 255, subd. 18; Code Miss. 1892, § 1504; *O'Brien v. Neubert* (N. Y.) 3 Dem. Sur. 156, 157.

A crime shall be deemed "infamous" which is punishable by death or imprisonment in the penitentiary, within the meaning of the term as used in a provision depriving any person convicted of an infamous crime of the privileges of an elector. *Balinger's Ann. Codes & St. Wash.* 1897, § 1324.

#### Same—Imprisonment for term of years.

An "infamous crime" is a crime which works infamy in the person who has committed it. "For a long time prior to the Declaration of Independence, and before the adoption of the federal Constitution, there were, as then understood, two kinds of infamy, the one based on the opinion of the people respecting the mode of punishment, and the other in relation to the future credibility of the culprit." *Eden*, Pen. Law, c. 7, § 5. Whether a crime was infamous or not was determined in the federal courts for some time by the nature of the crime as understood at common law, rather than the punishment inflicted. This doctrine, however, has since been expressly disapproved, and it is now settled that any crime punishable by imprisonment for a term of years is an infamous crime. *Butler v. Wentworth*, 24 Atl. 456, 457, 84 Me. 25, 17 L. R. A. 764 (citing *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; *Mackin v. United States*, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909; *Parkinson v. United States*, 121 U. S. 281, 7 Sup. Ct. 896, 30 L. Ed. 959; *Ex parte Bain*, 121 U. S. 1, 13, 7 Sup. Ct. 781, 30 L. Ed. 849; *United States v. De Walt*, 128 U. S. 393, 9 Sup. Ct. 111, 32 L. Ed. 485; *In re Medley*, 134 U. S. 160, 169, 10 Sup. Ct. 384, 33 L. Ed. 885; *In re Mills*, 135 U. S. 263, 267, 10 Sup. Ct. 762, 34 L. Ed. 107; *In re Claassen*, 140 U. S. 200, 205, 11 Sup. Ct. 735, 35 L. Ed. 409; *Jones v. Robbins*, 74 Mass. [8 Gray] 329; *United States v. Cobb* (U. S.) 43 Fed. 570; *Territory v. Blomberg*, 11 Pac. 671, 672, 2 Ariz. 204.

#### Determined by nature of crime.

Under a statute providing that one convicted of an "infamous crime" is an incompetent witness, it is the crime, and not the punishment, which creates the infamy and destroys the competency of the witness. At the present day a conviction of treason or felony, or of any species of crimen falsi, will incapacitate the party convicted from giving evidence while it continues in force, without regard to the punishment inflicted. *People v. Whipple* (N. Y.) 9 Cow. 707, 708.



Infamous crimes at common law were only such offenses as rendered the perpetrator infamous in blood, such as treason, felony, and the crimen falsi, which term is one of difficult and uncertain meaning; it not only involved falsehood, but offenses which injuriously affected the administration of justice. It was the infamy of the crime, and not the nature of the punishment, which constituted the crimen falsi. *People v. Toynbee* (N. Y.) 20 Barb. 168, 189; *People v. Sponsler*, 46 N. W. 459, 462, 1 Dak. 289.

Within the rule of the common law that persons convicted of treason, felony, and the crimen falsi were rendered infamous and were disqualified as witnesses, for determining whether a crime is infamous, the test seems to be whether the crime shows such depravity in the perpetration, or such a disposition to pervert public justice in the courts, as creates a violent presumption against his truthfulness under oath. It was not the severity of the punishment, but the nature of the offense, that created legal infamy and disqualification of a witness, and such is the use of the term in the statute providing that evidence of conviction for an infamous crime is admissible as affecting the credibility of the person convicted as a witness. *Smith v. State*, 29 South. 699, 129 Ala. 89, 87 Am. St. Rep. 47.

It is the actual conviction, and not the mere fact of guilt, which disqualifies. So it is the nature of the crime, and not the magnitude of the punishment, which constitutes a blemish on the moral character, and thereby incapacitates to testify by rendering infamous. The test seems to be "whether the crime shows such depravity in the perpetration, or such a disposition to pervert public justice in the courts, as creates a violent presumption against his truthfulness under oath." *Sylvester v. State*, 71 Ala. 17, 25 (citing 1 Bish. Cr. Law, § 974).

The best opinion is that it is the nature of the crime, and not the punishment, which determines the question whether or not it is an infamous crime, and that an infamous crime is an offense implying such a dereliction of morals and principles as carries with it a conviction of a total disregard of the obligation of an oath. *People v. Parr* (N. Y.) 42 Hun, 313, 316, 317.

#### **Assault and battery.**

A conviction of an assault and battery and of carrying concealed weapons is not a conviction for an infamous crime. *Smith v. State*, 29 South. 699, 129 Ala. 89, 87 Am. St. Rep. 47.

#### **Assault with intent to kill.**

An assault with intent to kill is an infamous crime. *Ex parte Brown* (U. S.) 40 Fed. 81, 83.

#### **Burglary.**

Burglary is an "infamous crime," within the statute providing that conviction of forgery or any infamous crime is ground for divorce. *Hess v. Hess*, 22 Pa. Co. Ct. R. 135, 139.

#### **Conspiracy to counterfeit.**

A conspiracy to make counterfeit coin is not an "infamous crime," within the meaning of article 5 of the amendments of the United States Constitution, and may be prosecuted by information. *United States v. Burgess* (U. S.) 9 Fed. 896.

#### **Embezzlement.**

At the present day imprisonment in the state prison or penitentiary, with or without hard labor, is an infamous punishment, and the crime of embezzlement and making false entries by the president of a national bank, being punishable by such imprisonment, is an infamous crime (*United States v. De Walt*, 9 Sup. Ct. 111, 128 U. S. 393, 32 L. Ed. 485), though they are denominated in this statute as misdemeanors. *United States v. Cadwallader* (U. S.) 59 Fed. 677, 679.

The statutory offense of embezzlement is not an "infamous crime," within the meaning of the fifteenth amendment to the Constitution, precluding a prosecution by information. *United States v. Baugh* (U. S.) 1 Fed. 784, 787; *United States v. Reilley* (U. S.) 20 Fed. 46.

#### **Offenses against the franchise.**

An "infamous crime," within Const. art. 6, § 9, providing that an officer convicted of misbehavior in office, or of any infamous crime, shall be thereby disqualified from exercising the duties of his office, means such a felony as would hold him up to public disgrace, such as forgery, perjury, treason, etc.; and hence the conviction of one, holding the office of sheriff, for bribing a voter previous to his election to the office, was not a conviction of misbehavior in office, nor was it an infamous crime, the offense being one created by the Legislature, not of itself infamous, and not having been made so by the act creating it. *Commonwealth v. Shaver* (Pa.) 3 Watts & S. 338.

Under Const. 1851, art. 2, § 8, providing that the General Assembly shall have power to deprive any one of the right of suffrage and to render ineligible to office one convicted of an infamous crime, the term "infamous crime" will be held to include not only such crimes as were at that time punishable by imprisonment in the penitentiary, but also all such offenses as were subject to the penalty of the loss of civil and political privileges, and thus as by Rev. St. 1843, attempting to restrain the freedom of election by threats, interference, bribery,

etc., was punished by disfranchisement, the Legislature has power to disfranchise one who sells his vote. *Baum v. State*, 61 N. E. 672, 673, 157 Ind. 282, 55 L. R. A. 250.

#### Gaming, libel, etc.

"Criminal libel," as defined by the Oklahoma statutes, is not an infamous crime. *Martin v. Territory*, 56 Pac. 712, 713, 8 Okl. 41.

Convictions for libel, or for seditious words, or for keeping a gaming house, were not such as could properly be said to render a man infamous, and were therefore not infamous crimes. *People v. Toynbee* (N. Y.) 20 Barb. 168, 189.

#### Larceny.

At common law all felonies, including larceny, were infamous crimes. *Crum v. State*, 148 Ind. 401, 409, 47 N. E. 833, 836.

Larceny is an "infamous crime" within the meaning of the provision of statute that all crimes not infamous may be tried on either information or indictment, so that a prosecution of larceny may not be by information. *Williams v. United States* (Ind. T.) 69 S. W. 849-852; *Ex parte McClusky* (U. S.) 40 Fed. 71, 72.

A conviction of petit larceny is a conviction of an infamous crime, so as to disqualify the person convicted from testifying in a court of justice. An infamous crime was regarded at common law as comprehending treason, felony, and crimen falsi, and grand and petit larceny were both felonies at common law. *Sylvester v. State*, 71 Ala. 17, 25; *People v. Spousler*, 46 N. W. 459, 462, 1 Dak. 289.

By 1 Hill's Ann. St. & Codes, § 845, it is provided that a crime shall be deemed infamous which is punishable by death or imprisonment in the penitentiary, and under such definition petit larceny is not an infamous crime. *State v. Payne*, 34 Pac. 317, 319, 6 Wash. 563.

#### Offenses against the mail.

The use of the mails for promoting a crime to defraud, being punishable by imprisonment in a state penitentiary not exceeding 18 months, is an infamous crime. *Stokes v. United States* (U. S.) 60 Fed. 597, 598, 9 O. C. A. 152.

Stealing from the mails is not an infamous crime. *United States v. Wynn* (U. S.) 9 Fed. 886, 888.

#### Manslaughter.

In 1 Greenl. Ev. § 372, it is said, speaking of "infamous crimes": "The usual and more general enumeration is treason, felony, and the crimen falsi." It was also held in

*United States v. Field* (U. S.) 16 Fed. 778, 780, that "infamous crimes" are convertible with 'felonies.' Burns' Ann. St. § 1044, subd. 7, specifies as ground for divorce, the conviction, subsequent to marriage, of an infamous crime. Section 1642 denominates crime punishable by imprisonment in the state prison a felony. Then conviction of manslaughter, being a conviction of felony, would be a ground for divorce, notwithstanding Rev. St. 1843, c. 54, § 79, repealed by Rev. St. 1852, c. 92, § 1, in defining infamous crimes, mentions murder, but omits manslaughter. *Sutherland v. Sutherland*, 61 N. E. 206, 27 Ind. App. 301.

#### Persuading witness not to attend prosecution.

The old notion that the infamy of the crime depended upon the nature of the punishment has been long abandoned, but nothing has been established which is on the whole much more satisfactory. Certainly, since legal infamy, as part of the punishment of crime, is by far the severest portion of the punishment in most cases, the number of such crimes should not be multiplied by construction; and though it has been decided in England in the case of *Bushel v. Barrett*, 21 Eng. Com. Law Rep. 790, that inducing one to absent himself from attending as a witness in a question pending before justices in relation to offenses against the revenue laws was an infamous offense, the courts in this country have never gone so far, and the mere persuading of a witness not to attend a public prosecution on the part of a state, though indictable, will not be held an "infamous offense" within the meaning of the seventh article of the amendment to the Constitution, which provides that in the trial of infamous offenses the accused shall be entitled to a trial upon indictment, etc. *State v. Keyes*, 8 Vt. 57, 63, 30 Am. Dec. 450.

#### INFAMOUS PERSONS.

"Infamous persons," says Blackstone (3 Comm. 370), "are such as may be challenged as jurors propter delictum, and therefore shall never be admitted to give evidence to inform that jury, with whom they were too scandalous to associate." *McCafferty v. Guyer*, 59 Pa. (9 P. F. Smith) 109, 116.

#### INFAMOUS PUNISHMENT.

Imprisonment in the state prison is "infamous punishment." *Gudger v. Penland*, 13 S. E. 168, 170, 108 N. C. 593, 23 Am. St. Rep. 73.

Imprisonment in a state prison or penitentiary with or without hard labor is an infamous punishment. *Mackin v. United States*, 6 Sup. Ct. 777, 778, 117 U. S. 348, 29

L. Ed. 909; *Gardes v. United States* (U. S.) 87 Fed. 172, 184, 30 C. C. A. 598. It is not necessary, to make a punishment infamous, that the law shall require that the party should in terms be sentenced to hard labor. If, under the law, he may be sentenced to a state prison or penitentiary, either with or without hard labor, his punishment is infamous. *Ex parte McClusky* (U. S.) 40 Fed. 71, 72.

Imprisonment at hard labor for a term of years is an "infamous punishment." *Ex parte Wilson*, 5 Sup. Ct. 935, 937, 114 U. S. 417, 29 L. Ed. 89.

"Infamous punishment," as used in the convention for extradition between the United States and Switzerland (11 Stat. 593), providing for the delivery of persons charged with crimes subject to infamous punishment, means subject to infamous punishment in the nation where it was committed, without regard to the measure of punishment in the country from which extradition is demanded. *In re Farez* (U. S.) 8 Fed. Cas. 1007, 1012.

Disqualification from office, if inflicted as punishment for crime, is an "infamous punishment." *People v. Kipley*, 49 N. E. 229, 239, 171 Ill. 44, 41 L. R. A. 775.

### INFAMY.

Mr. William Eden, afterwards Lord Auckland, in his *Principles of Penal Law*, which passed through three editions in England, and at least one in Ireland, within six years before the Declaration of Independence, observed: "There are two kinds of infamy, the one founded on the opinion of the people respecting the mode of punishment, the other in the construction of law respecting the future credibility of the delinquent." *Eden's Prin. P. L. c. 7, § 5*. At that time it was already an established law that the infamy which disqualified a convict to be a witness depended on the character of his crime, and not upon the nature of his punishment. *Ex parte Wilson*, 5 Sup. Ct. 935, 937, 114 U. S. 417, 29 L. Ed. 89.

"Infamy" is that state which is produced by the conviction of crime and the loss of honor, which renders the infamous person incompetent as a witness. A conviction for larceny is sufficient to render a person "infamous" in this sense. *Williams v. United States* (Ind. T.) 69 S. W. 849-852.

"Infamy" has been defined as a state of incompetency implying such a dereliction of moral principle as carries with it a conclusion of a total disregard to the obligation of an oath. *State v. Clark*, 56 Pac. 767, 768, 60 Kan. 450 (citing 1 Greenl. Ev. § 373).

"Infamy" means loss of character or public disgrace, which a convict incurs. *Com-*

*monwealth v. Shaver* (Pa.) 3 Watts & S. 332, 342.

### INFANT.

Webster defines an "infant" to be a "child in the first period of life, beginning at his birth; a young babe." *Town of Washington v. Town of Kent*, 88 Conn. 249, 251 (quoting *Webst. Dict.*).

An infant is one who has not attained the age of majority. *Keating v. Michigan Cent. R. Co.*, 53 N. W. 1053, 1054, 94 Mich. 219, 220.

The term "infant," when used in any statute, shall include any person, male or female, under 21 years of age. *Code Miss.* 1892, § 1505.

"If one be born the 1st of February at 11 at night, and on the last day of January, in the twenty-first year of his age, at 1 o'clock in the morning, he makes his will and dies, it is a good will, for he was then of age." *Anonymous*, 1 Salk. 44.

### INFECTION.

"Infection" is the subtle or virulent matter proceeding from diseased bodies and imparting the same to others. *Stryker v. Crane*, 50 N. W. 1132, 1133, 83 Neb. 690.

#### Contagion distinguished.

"Infection" and "contagion" are nearly synonymous, the only difference being, not in the infectious or contagious matter, but in the manner of its communication. Infection is communicated from the sick to the well by a morbid miasma or an exhalation diffused in the air. Contagion is communicated by actual contact. *Wirth v. State*, 22 N. W. 860, 862, 63 Wis. 51; *Stryker v. Crane*, 50 N. W. 1132, 1133, 83 Neb. 690.

### INFECTIOUS DISEASE.

An "infectious" disease is one originating from a cause acting by hidden influences, like the miasma of prison ships or marshes, or through the pollution of water or the atmosphere, or from the various dejections from animals, as distinguished from a "contagious" disease, which is communicable by contact or bodily exhalation. *Grayson v. Lynch*, 16 Sup. Ct. 1064, 1068, 163 U. S. 468, 41 L. Ed. 280.

### INFER.

"To infer" is derived from the Latin *inferre*, compounded of 'in,' from, and 'ferre,' to carry or bring, and its strict meaning is to bring a result or conclusion from something back of it; that is, from some evidence

or data from which it may be logically deduced." *Morford v. Peck*, 46 Conn. 380, 385.

The use of the word "inferred," in an instruction in a homicide case in defining a crime, in the place of the word "implied," as used in the statute defining the crime, is not erroneous, as there is no real distinction in meaning between the words. *State v. Millain*, 3 Nev. 409, 450.

The word "inferred," as used in an instruction that fraud cannot be inferred but must be proven, is misleading on the ground that the jury may construe it to mean that the fraud cannot be proven by circumstantial evidence. The use of the word "presumption" in place of the word "inferred" in such an instruction is, however, proper. *Bannon v. Insurance Co. of North America*, 91 N. W. 666, 669, 115 Wis. 250.

### INFERENCE.

An inference is a deduction which the reason of the jury makes from the facts proved. *Joske v. Irvine*, 44 S. W. 1059, 1064, 91 Tex. 574.

An inference is nothing more than a permissible deduction from the evidence. *Cogdell v. Wilmington & W. R. Co.*, 44 S. E. 618, 619, 132 N. C. 852.

"Inference" is defined by the New York Code, § 1957, to be a deduction which the reason of the jury makes from the facts proved, without an express direction of the law to that effect. An "inference" has also been defined to be a conclusion in favor of the existence of one fact from others proved. *Smith v. Western Union Tel. Co.*, 57 Mo. App. 259, 266.

"An inference is something inferred from precedent matter, separated from which it is a mere absurdity in language. There may be precedent matter and not inference, but there can be no inference without precedent matter." *Chambers v. Hunt*, 18 N. J. Law (3 Har.) 339, 354.

An instruction that the second proposition propounded by the plaintiff cannot be found in the "affirmative by inference," but must be established by affirmative proof, is equivalent to saying that the question could not be found in the affirmative except on direct and positive proof in favor of the affirmative. Inference is a deduction or conclusion from facts or propositions known to be true. When the facts themselves are directly attested, the jury may deduce or infer or presume from them the truth or falsity of the main proposition, and the principal question may be thereby determined in the affirmative or in the negative, as the conclusions may necessarily follow the attested premises. *Gates v. Hughes*, 44 Wis. 332, 336.

Inferences are the conclusions drawn by reason of common sense from premises established by proof, and are as applicable to questions of intention, where the intention of the parties becomes important, as to any other disputable fact. *American Freehold Land Mortg. Co. of London v. Pace*, 56 S. W. 377, 392, 23 Tex. Civ. App. 222.

An inference is the conclusion drawn by reason from premises established by proof. In a sense, it is the thing proved. Guesswork is not. *Whitehouse v. Bolster*, 50 Atl. 240, 243, 95 Me. 458.

An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect. Code Civ. Proc. Cal. 1903, § 1958; Ann. Codes & Sts. Or. 1901, § 783.

### Presumption distinguished.

"A 'presumed fact' is one taken for granted and accepted as a result of human experience and general knowledge, while an 'inference' is the conclusion drawn from the proof or admission of circumstances which, by reason of the same human experience and knowledge, would naturally lead to it. A man is presumed to regard his will as a private and sacred document, and on that account is presumed to keep it with the same degree of care and privacy as he does his most important papers and documents; and when it is shown by competent evidence that his will has been found in a place where he is in the habit of keeping his papers and documents of importance and value, with the signature erased, or no will is found in such a place, as the case may be, there is a legal inference arising from such evidence, together with the presumptions mentioned, that in the one case he canceled the document himself, and in the other that the destruction was by his own hand." *In re Hopkins' Will*, 72 N. Y. Supp. 415, 417, 35 Misc. Rep. 702.

### INFERENCE FACT.

An "inferential fact" is an inference or conclusion from evidence. It is true such conclusions are not conclusions of law, but they are inferences or conclusions of fact. It is therefore not necessary to set out the return or evidence from which the jury draw or infer such facts. Such inferences or conclusions being matters of fact purely, the jury alone can direct what are the proper and legitimate inferences or conclusions to be drawn from the inferential facts. *Louisville, N. A. & C. Ry. Co. v. Miller*, 37 N. E. 343, 348, 141 Ind. 533.

### INFERIOR.

An "inferior" is one who in relation to another has less power and is below him;

one who is bound to obey another. He who makes the law is the superior; he who is bound to obey it the inferior. 1 Bouv. Inst. No. 8; Black, Law Dict.

### INFERIOR AGENTS.

Agents of a lumber company which had entire control of the business in the place where located, and who held themselves out as managers and exercised discretion and independent judgment in the management of the business, and received as such an annual salary, did not occupy the position of "inferior agents" or "servants," in the sense in which these terms are used. *Foster v. Charles Betcher Lumber Co.*, 58 N. W. 9, 14, 5 S. D. 57, 23 L. R. A. 490, 49 Am. St. Rep. 859.

### INFERIOR COURTS.

The words "inferior court" are applied to courts of special and limited authority, erected on such principles that their proceedings must show jurisdiction. *Ex parte Cuddy*, 9 Sup. Ct. 703, 704, 131 U. S. 280, 33 L. Ed. 154; *Nugent v. State*, 18 Ala. 521, 524.

"Inferior courts," in the technical sense of those words, mean courts of a special and limited jurisdiction, which are erected on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. All courts from which an appeal lies are inferior courts in relation to the appellate court before which their judgment may be carried. *Kempe's Lessee v. Kennedy*, 9 U. S. (5 Cranch) 173, 185, 3 L. Ed. 70.

The term "inferior courts" applies to courts of special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and whose proceedings are nullities if their jurisdiction does not appear on their face, is this: A court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the former description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceed-

ings, or they are nullities. *Grignon v. Astor*, 43 U. S. (2 How.) 319, 341, 11 L. Ed. 283.

"Inferior courts" are courts of a limited or qualified jurisdiction. At common law they derive "their whole existence and jurisdiction from the statutes concerning them." *Ex parte Roundtree*, 51 Ala. 42, 44.

The term "inferior" is not of single meaning in law, but is used in different senses. Under the Constitution of the United States, Congress has no power to create courts which are not inferior to the Supreme Court. In England, error lay to the Common Pleas out of the King's Bench, making the former, in our constitutional sense, inferior to the latter; while both ranked as superior courts. So all of them were subject to review by the Exchequer Chamber, and that by the House of Lords. Our American constitutional use of the word refers to relative rank and authority, and not to intrinsic quality. Under the Constitution of Michigan, as under that of the United States, the Supreme Court could have no appellate power or supervision over the circuit courts, except on this idea that they are inferior to it, for none but inferior courts are subjected to it, and the jurisdiction of our circuit courts equals that of the English superior courts. *Swift v. Wayne Circuit Judges*, 31 N. W. 434, 64 Mich. 479. Another less accurate distinction is between courts of record, whose records establish themselves and are valid judgments in themselves, and courts not of record, proceeding under special conditions, whose jurisdiction is not presumed. *Swift v. Wayne Circuit Judges*, 31 N. W. 434, 435, 64 Mich. 479.

A court is "inferior" to another when it is placed under the supervisory or appellate control of such other court. A court of limited jurisdiction is also inferior to a court of general jurisdiction. *State v. Daniels*, 66 Mo. 192, 200, 201; *Bailey v. Winn*, 20 S. W. 21, 22, 113 Mo. 155.

In a technical sense, an "inferior court" is one of inferior or limited jurisdiction, whose judgment, standing alone, does not import verity; but, in a more general sense, any court from which an appeal or writ of review will lie is "inferior" to the court to which its judgments may be carried for review; and it is in this sense that the term is evidently used in the statute relating to the granting of writs of review. As so used, it refers to the relative rank and authority, and not to inherent quality, and was intended to include all courts and tribunals over which the circuit courts are given appellate jurisdiction and supervisory control by the Constitution. *Kirkwood v. Washington County*, 52 Pac. 568, 569, 32 Or. 568.

The term "inferior courts," in section 1, art. 4, of the Constitution, providing that the

General Assembly may establish such municipal and other inferior courts as may be deemed necessary, is used in its technical sense as signifying the court of special and limited powers, whose jurisdiction must appear on the face of the proceedings or its judgment will be void. *State v. Fillebrown*, 2 S. C. (2 Rich.) 404, 407.

Const. art. 6, § 1, vests the judicial power in one Supreme Court, circuit courts to be held in each county, and such inferior courts of law and equity as the General Assembly may establish. Held, that the phrase "inferior courts" means courts whose judgments or decrees can be reviewed by an appellate tribunal, whether that tribunal be the circuit or the Supreme Court, and not necessarily a court whose jurisdiction is "inferior" or "limited," within the meaning of that term at the common law. *Ex parte Orr*, 51 Ala. 42, 44; *Sanders v. State*, 55 Ala. 42, 44.

The words "inferior court," in Code, § 4513, providing "they [referring to judges of the Supreme Court] may also grant superseas to the execution of an interlocutory decree of an inferior court, in the cases provided for in sections 3933 and 3934," is here used in the same sense in which it is used in the Constitution, and means the inferior court itself, which has been ordained and established by the Legislature, and not the judge of the inferior court. *McMinnville & M. R. Co. v. Huggins*, 47 Tenn. (7 Cold.) 217, 231.

#### City court.

Within Const. art. 6, § 1, authorizing the General Assembly to create "inferior courts" of law and equity, a city court created by act of Legislature is included. *Perkins v. Corbin*, 45 Ala. 103, 118, 6 Am. Rep. 698.

#### County court

Rev. St. § 1908, provides that the judicial power of Arizona shall be vested in a Supreme Court, and in such "inferior courts" as the legislative council may by law prescribe. It was held that a county court having civil and criminal jurisdiction, whose judgments and decrees the Supreme Court had a right to review on appeal, is an inferior court. *Ex parte Lothrop*, 6 Sup. Ct. 984, 986, 118 U. S. 113, 30 L. Ed. 108.

Const. 1870, art. 6, §§ 1, 3, and 4, provide that the judicial power of the state shall be vested in one Supreme Court and in such circuit, chancery, and other inferior courts as the Legislature shall establish, in the judges thereof, and in justices of the peace, and that each of the judges of these courts shall have certain specified qualifications, and that his term of service shall be eight years. Held, that the term "inferior courts" includes a county court, and that the term of the judge of such court was eight years,

notwithstanding that Acts 1887, c. 148, p. 258, limited such term to four years. *State v. Maloney*, 20 S. W. 419, 421, 92 Tenn. 62.

#### Federal courts.

In *Kempe's Lessee v. Kennedy*, 9 U. S. (5 Cranch) 173, 185, 3 L. Ed. 70, it is said by Chief Justice Marshall that all courts are inferior courts in relation to appellate courts before which their judgments may be carried, but they are not therefore "inferior courts" in the technical sense of those words. They apply to courts of a special and limited jurisdiction which are erected on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities which may be totally disregarded. *Dowell v. Appelgate*, 14 Sup. Ct. 611, 615, 152 U. S. 327, 38 L. Ed. 463; *Kennedy v. Bank of Georgia*, 49 U. S. (8 How.) 586, 612, 12 L. Ed. 1209; *Ex parte Cuddy*, 9 Sup. Ct. 703, 704, 131 U. S. 280, 33 L. Ed. 154; *Ex parte Watkins*, 28 U. S. (3 Pet.) 193, 204, 7 L. Ed. 650.

The court in *McCormick v. Sullivant*, 23 U. S. (10 Wheat.) 192, 199, 6 L. Ed. 300, said that the inferior courts of the United States are all of limited jurisdiction, but they are not on that account "inferior courts" in the technical sense of those words, whose judgments alone are to be disregarded if the jurisdiction be not alleged in the proceedings. *Ex parte Cuddy*, 9 Sup. Ct. 703, 704, 131 U. S. 280, 33 L. Ed. 154; *Kennedy v. Bank of Georgia*, 49 U. S. (8 How.) 586, 612, 12 L. Ed. 1209.

Though the District and Circuit Courts of the United States are of limited jurisdiction, they are not "inferior courts" in the technical sense of the term. If jurisdiction do not appear on the proceedings, their judgments and decrees will be reversed on error or appeal, but they are not nullities which may be disregarded in a collateral proceeding. In this respect they stand on the same footing as courts of general jurisdiction. *Ruckman v. Cowell*, 1 N. Y. (1 Comst.) 505, 507.

#### Justice court.

A court of a justice of the peace is an "inferior court" in the technical sense of the term. *State v. Fillebrown*, 2 S. C. (2 Rich.) 404, 407.

#### Legislature.

"Inferior," as used in Const. art. 6, § 3, providing that the Supreme Court shall exer-

cise general superintending control over all inferior courts, applies only to courts of justice, and does not include the legislative houses. Auditor General v. Menominee County Sup'rs, 51 N. W. 483, 488, 89 Mich. 552.

**Police court.**

The term "inferior court," as used in Const. art. 6, § 1, providing that all the judicial power of the state shall be vested in certain specified courts, and in such other inferior courts as the Legislature may establish in any incorporated city or town, includes a "tribunal presided over by a police judge." Boys' & Girls' Aid Soc. v. Reis, 12 Pac. 796, 798, 71 Cal. 627.

**INFERIOR LOCAL COURTS.**

Const. 1848, art. 5, § 1, vesting the judicial power of the state in one Supreme Court, in circuit courts, in county courts, and in justices of the peace, and providing that "inferior local courts" of civil and criminal jurisdiction may be established in the cities of the state, should be construed to include a city court having concurrent jurisdiction with the circuit court in the county in which the city was located in all civil cases, but without such equal jurisdiction in criminal cases, and its jurisdiction in territorial extent being less than that of the circuit court, though it was a court of record, for it was, in dignity and in jurisdiction, an inferior court to the Supreme Court and to the circuit court. Reid v. Morton, 6 N. E. 414, 418, 119 Ill. 118; Rockwell v. Raymond, 5 N. Y. Supp. 642, 644.

The term "inferior local courts of civil and criminal jurisdiction," as used in the Constitutional provision that inferior local courts of criminal and civil jurisdiction may be established by the Legislature, has been defined by high authority to mean courts possessing a jurisdiction localized within the territorial limits of a city or village for which they are created, and by the electors of which the incumbents of each is chosen. Adams, J., in Baird v. Helfer, 42 N. Y. Supp. 484, 486, 12 App. Div. 23.

**INFERIOR TRIBUNALS.**

"Tribunal," as used in a court rule providing that, in appeals from justice courts or other inferior tribunals in civil cases, the appellant shall cause the case to be docketed, etc., includes the board of supervisors in the hearing or proceeding for the allowance of damages for the establishment of a highway. Scott v. Lasell, 32 N. W. 322, 324, 71 Iowa, 180.

Acts of the Twelfth General Assembly, c. 86, § 5, conferred upon the circuit courts exclusive jurisdiction of all appeals from an inferior tribunal. Section 4 gave the circuit court jurisdiction concurrent with the district court of all appeals in special proceed-

ings for the assessments of damages on account of the location of railroads. Section 2, c. 153, of the Acts of the Thirteenth Assembly gave the district court exclusive jurisdiction in appeals from inferior tribunals in criminal cases, and the circuit court in civil cases. Held, that the words "inferior tribunal," as used in the fifth section of chapter 86 and the second section of chapter 153, did not refer to the quasi judicial bodies from which appeals in special proceedings were authorized to be taken to either court by section 4 of chapter 86, and that therefore the district court retained concurrent jurisdiction of appeals from such bodies. Davey v. Burlington, C. R. & M. R. Co., 31 Iowa, 553, 554.

A county court sitting as a law court is an "inferior tribunal," within Laws 1899, p. 135, providing that the writ of review directed to an inferior tribunal shall be concurrent with the right of appeal. Kirkwood v. Washington County, 52 Pac. 568, 569, 32 Or. 568.

**INFIDEL**

An infidel "is one who does not believe the Bible, or that Jesus Christ was the true Messiah. He cannot be either a Protestant or a Roman Catholic, because he lacks the first and chief qualification of either, namely, a belief in Christianity. For while he, with the Protestant, denies the authority of the Pope, he differs from both in not believing the Bible or Jesus Christ and his religion. The infidel and the pagan stand alike. They are both anti-Catholic, and equally anti-Protestant. Jews believe in the Old Testament, and not in the New. Mohammedans receive the whole Bible in a sense, but receive and acknowledge the Alcoran as a higher authority, and accept Mohammed as a greater prophet than Jesus. Neither believes the system of Christianity as taught in the New Testament. They are both alike anti-Catholic and anti-Protestant. A Roman Catholic is a Christian who admits the authority of the Pope, a Protestant is a Christian who denies that authority; and no one not a Christian can be either a Catholic or a Protestant, any more than a man can be a Jew who does not believe in Moses or the Pentateuch, or than he could be a Mohammedan who did not believe in Mohammed or the Alcoran." Hale v. Everett, 53 N. H. 9, 54, 16 Am. Rep. 82.

An "infidel" is one who does not believe in a God, or, if he does, does not think that he will either reward or punish him in the world to come. Jackson v. Gridley (N. Y.) 18 Johns. 98, 103.

An "infidel" is one who does not recognize the inspiration or obligation of the Holy Scriptures, or the generally recognized facts of the Christian religion. Gibson v. Ameri-

can Mut. Life Ins. Co., 37 N. Y. 580, 584; Thurston v. Whitney, 56 Mass. (2 Oush.) 104, 109. "Infidels" are persons who do not believe in God. They are in law perpetual enemies. For "the law presumes, not that they will be converted, that being a remote possibility, for between them, as with the devil, whose subjects they be, and the Christians, there is perpetual hostility, and can be no peace." Heirn v. Bridalut, 37 Miss. 209, 228 (citing Calvin's Case, 7 Coke, 17).

## INFIRM.

Rev. St. Div. 5, § 956 et seq., providing that every poor person unable to earn a livelihood in consequence of bodily infirmity, idiocy, lunacy, or other causes, if having no relatives, shall receive relief from the county, and authorizing the commissioners to award contracts for the care of the "sick, poor, and infirm," and requiring the county physician to examine each week all paupers and to discharge those who are able to support themselves, means those who are both sick and infirm and poor, and does not authorize a contract for the care of the poor merely unless they are sick and infirm, or for sick and infirm who are not also poor. Lebcher v. Custer County Com'rs, 23 Pac. 713, 714, 9 Mont. 315.

## INFIRMARY.

Under a contract between certain physicians and the directors of the county infirm-ary relating to the treatment of its inmates, which "infirm-ary" was established by California statutes, all persons who are inmates of any of the buildings provided by the board of directors under the statutes for the purpose of caring for the sick are included, and not those in the main building alone. Johnson v. Santa Clara County, 28 Cal. 545, 548.

## INFIRMITY.

See "Bodily Infirmity."

An "infirmity" is defined as an imperfection or weakness, especially a disease, a malady; but where insured in a life policy warranted that he never had any bodily or mental infirmity, the court, in construing the word "infirmity," said: "Giving to the word its largest meaning, to include every ailment that flesh is heir to, and the result would be to warrant that the deceased had never had any disease, either trivial or temporary. Such a construction of the word is too unreasonable to be tolerated, but as the insurance was against accident, and death resulted therefrom within 90 days, the warranty that the insured had and did not have any infirmity should be construed as meaning any infirmity that increased the risk or accident, or a risk of death therefrom in case an injury

was sustained." Bernays v. United States Mut. Acc. Ass'n (U. S.) 45 Fed. 455, 456.

Within a life insurance policy providing that the insurance did not cover injuries resulting from any disease or bodily infirmity, "disease" and "infirmity" are practically synonymous, and will not be held to refer to a slight or temporary disorder. Meyer v. Fidelity & Casualty Co., 65 N. W. 328, 330, 96 Iowa, 378, 59 Am. St. Rep. 374 (citing Northwestern Mut. Life Ins. Co. v. Helmann, 93 Ind. 24; Metropolitan Life Ins. Co. v. McTague, 49 N. J. Law [20 Vroom] 587, 9 Atl. 766, 60 Am. Rep. 661; Pudritzky v. Supreme Lodge Knights of Honor, 76 Mich. 428, 43 N. W. 373; Brown v. Metropolitan Life Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894; Mutual Benefit Life Ins. Co. v. Daviess' Ex'r, 87 Ky. 541, 9 S. W. 812).

"Infirmities or disease," within the meaning of a life and accident policy, exempting the insurer from liability for any bodily injury happening directly or indirectly in consequence of bodily infirmities or disease, does not include insanity, during the time of which the insured, while unconscious of what he is doing, kills himself. Blackstone v. Standard Life & Accident Ins. Co., 42 N. W. 156, 74 Mich. 592, 3 L. R. A. 486.

## INFLAMMATORY.

A charge to the grand jury, after assuming that the crime of bribery had been committed, and that it was the duty of the jurors to indict therefor, concluded as follows: "There comes up from the people a command for a forward march all along the line of your duty. You should give heed to that cry, for it comes from the patient and long-suffering endurance which has at last reached its limit." An attorney for a person indicted by such grand jury moved to quash the indictment on the ground that the charge was "inflammatory," whereupon he was promptly adjudged guilty of contempt of court. Held, that the adjective "inflammatory," as here used, is derived from the verb "inflame," which is thus defined by Webster: "(1) To set on fire; to kindle; to cause to flame. (2) To excite or increase, as passion or appetite; to enkindle into a violent passion. (3) To exaggerate, aggravate, in description. (4) To heat; to excite excessive action in the blood vessels. (5) To provoke; to irritate; to anger. (6) To increase; to exasperate. (7) To increase; to augment." And, as so defined, the term "inflammatory," as applied to the charge, was a merited criticism. Clair v. State, 59 N. W. 118, 120, 40 Neb. 534, 28 L. R. A. 367.

## INFLICT.

Gen. St. c. 171, § 19, in providing a punishment for causing death within the state



by means of a mortal wound given or other violence or "injury inflicted" includes the causing of death by starvation or exposure. Any bodily harm which is caused to be suffered by the act of the accused is an "injury inflicted," within the meaning of the statute. It was said: "'Inflict' does not necessarily imply direct violence. There is no more appropriate use of the word 'inflict' than in connection with punishment, and to inflict punishment clearly includes imprisonment and involuntary restraint, as well as hanging, beheading, or whipping." *Commonwealth v. Macloon*, 101 Mass. 1, 23, 100 Am. Dec. 89.

## INFLUENCE.

See "Improper Influence"; "Local Influence"; "Parental Influence"; "Proper Influence"; "Undue Influence."

"The word 'influence' means to use the party's endeavors, though he may not be able to carry his point." *Respublica v. Ray* (Pa.) 3 Yeates, 65, 66.

"Influence" imputes some external constraint under which an act is done, so strong as to deprive the doer of free consent. *Farr v. Thompson* (S. C.) 1 Speer, 93, 102.

The "influence" which destroys the validity of a will is a fraudulent influence, controlling the mind of the testator so as to induce him to make a will which he would not otherwise have made. *Marshall v. Flinn*, 49 N. C. 199.

### As procure.

An agreement by defendants to pay plaintiff commissions on consignments of goods to them for sale, "influenced" by him for one year, was terminated by defendants, pursuant to its conditions, before the end of the year. Held, that the word "influenced" meant that plaintiff should be entitled to commissions on all sales which he should influence or procure, and included commissions on goods consigned and received before the termination of the agreement, though not then sold, where his influence directed the consignments. *Blake v. Volght*, 11 N. Y. Supp. 716, 717, 16 Daly, 398.

## INFLUENZA.

"Influenza," as affecting horses is an epidemic catarrh, caused by the season, weather, and its vicissitudes. The causes exist in the air and affect the throat or respiratory organs, and is commonly called a "cold," or "common cold," and is not contagious, being governed by the conditions of the atmosphere and seasons of the year. There is spring influenza and summer influenza. When and where it prevails it is likely to affect all horses under the same condition

in the same districts. *Wirth v. State*, 22 N. W. 860, 862, 63 Wis. 51.

## INFORM.

Act 1864, § 179, relating to the share in forfeitures of the person who should "first inform" of the violation of the revenue laws, cannot be construed to mean first learned or first ascertained. "The import of the words 'first inform' is that the information is to be imparted by one person to another and a different person; that the latter person is to be one whose official duty it is to act on such information by imparting it to his superior officers or otherwise; that he cannot obtain such information in the course of the discharge of his official duties, and impart it to himself, so as to make himself an informer under the law; and that the person who is to impart the information so as to be an informer must be a person who has imposed on him no official duty to impart the information." *In re Four Cutting Machines* (U. S.) 9 Fed. Cas. 589, 590.

## INFORMALITY.

Within the meaning of a statute providing that no indictment shall be quashed for any informality, the word "informality" means a deviation in charging the necessary facts and circumstances constituting the offense, from the well-approved forms of expression, and a substitution in lieu thereof of other terms, which, nevertheless, make the charge in as plain, intelligible, and explicit language as if it had been made in the usual approved form. *State v. Gallimon*, 24 N. C. 372, 377.

Though the word "informality" is the only word used in the statutes relating to amendments to describe what may be amended on the trial, the statute is not limited to mere matters of form only. *Franklin v. Mackey* (Pa.) 16 Serg. & R. 117, 118.

Within the meaning of a statute providing that upon the sale of any lands for taxes then due, if such sale should prove invalid on account of any informality in the proceedings of any officer having any duty to perform in relation thereto, the purchaser shall be entitled to receive from the proprietor of such land the amount of taxes, interest, etc., and the amount of taxes paid thereon by the purchaser subsequent to such sale, and such land shall be bound for the payment thereof, any substantial omission of legal duty, misconduct, or irregularity of any officer connected with the process, for which the sale should be held invalid, may be deemed an informality. The word "informality" should not be taken in a strict, literal sense, thereby limiting the obvious purpose of the statute. *Hunt v. Curry*, 37 Ark. 100, 108.

## INFORMATION.

See "Best Information"; "Best of His Information and Belief"; "Give Information."

"Information," as used in Rev. St. § 2026, providing that the chief supervisor of elections shall receive the applications of all parties for appointment as supervisors of elections, and shall present such applications to the judge and furnish information to him in respect to the appointment by the court of such persons, means such knowledge of the qualification and competency of the applicants as the chief supervisor might think fit to furnish orally to the judge. *United States v. Pointer*, 11 Sup. Ct. 752, 753, 140 U. S. 160, 35 L. Ed. 395.

Under a statute declaring that a physician shall not testify concerning any information which he may have acquired from any person while attending him in any professional character, and which information was necessary to enable him to prescribe for such patient, the term "information" is not limited to information which the physician obtains from the patient orally, but includes all information acquired by the physician from the inspection, examination, and observation of the person of the patient. *Gartside v. Connecticut Mut. Life Ins. Co.*, 76 Mo. 446, 451, 43 Am. Rep. 765. It "comprehends the knowledge which the physicians acquire in any way while attending the patient, whether by their own insight, or by verbal statements from him or from members of his homestead, or from nurses or strangers, given in aid of the physician in the performance of his duty. Such is the true significance of the word 'information.' Knowledge, however communicated, is information. It may be as well derived from the sense of sight as that of hearing." *Edington v. Mutual Life Ins. Co.* (N. Y.) 5 Hun, 1, 8.

The words "information" and "knowledge," as used in the statute requiring a denial on information and belief to allege that the pleader has "no knowledge or information upon which to base a belief," are not synonymous, and therefore an allegation that the pleader had not sufficient information on which to base a belief was insufficient. *Downing North Denver Land Co. v. Burns*, 70 Pac. 413, 414, 30 Colo. 283.

#### As an article of commerce.

Information or intelligence is not an article of commerce in any proper meaning of that word. Neither are they subjects of trade and barter offered in the market, as something having an existence and value independent of the parties to them. Neither are they commodities to be shipped or forwarded from one state to another, and there put up for sale. The information furnished by

mercantile agencies to subscribers of their rating books is like other personal contracts between parties. It is individual in its character, and has no relation to the general public. A mercantile agency is not a common carrier. It is no intermediate instrument to disseminate its information, but it is a collector, storer, and holder of it, to be given directly to those who wish to purchase or pay for it. *State v. Morgan*, 48 N. W. 314, 320, 2 S. D. 32.

#### As used in offer of reward.

"Information" means the communication of material facts for the first time, and, when used in a handbill offering a reward for information by which stolen property might be traced, it must be understood in this sense, and as offering the reward to the party who first communicated the material facts which would lead to the tracing. *Lancaster v. Walsh*, 4 Mees. & W. 10, 24.

"Information," as used in a public advertisement offering a reward to any person who would give such information as would lead to the conviction of a party who had robbed certain premises, comprehended every mode by which information can be conveyed that might have the effect of discovering and convicting the guilty person. And where one B., whom the plaintiff had taken into custody on suspicion of being concerned in the offense, offered to make disclosures if furnished with something to eat and drink, and the plaintiff communicated this offer to a sub-inspector of police, who took B. to a public house and gave him refreshments, whereon he made a confession, plaintiff was entitled to the reward. *Smith v. Moore*, 1 C. B. 438, 439, 440.

#### INFORMATION (In Criminal Law).

There is another mode of prosecution besides that by indictment, which exists by the common law, in regard to the grade of common misdemeanors. This species of procedure was in England at the suit of the King, without a previous indictment or presentment, and was termed an "information." It was a complaint or accusation, in writing, exhibited against a person for some misdemeanor, and differed in no respect from an indictment in its form and substance, except that it was filed in the Court of the King's Bench at the mere discretion of the proper officer of the government *ex officio*. The oppressive use of this mode of prosecution in England occasioned struggles to procure a declaration of its illegality, but in the Court of the King's Bench all the judges were clearly of the opinion that this proceeding was grounded on the common law and could not then be impeached. A few years after that decision informations were so restricted by act of Parliament that the law

officers should not file them without express leave from the court, and that every prosecutor permitted to promote such information should give security to prosecute the same, and to pay the cost to the defendant in case of an acquittal, unless the judge should certify that there was reasonable cause for filing it. *People v. Sponsler*, 46 N. W. 459, 462, 1 Dak. 289.

Proceedings by information were very early sanctioned in the English courts, and it is remarked by Mr. Justice Blackstone "that, while these proceedings were carried on in a regular and legal course in the Court of King's Bench, the subject had no cause of complaint. The same notice was given, the same trial by jury was had, and the same judgment was given, as if the prosecution had originally been by indictment; but when the statute of Henry VII had extended the jurisdiction of the Court of Star Chamber, and informations became restricted in practice to that court, the members of which were the sole judges of the law, the fact, and the penalty, a very oppressive use was made of them for something more than a century, so as continually to harass the subject and shamefully enrich the crown." 4 Bl. Comm. 310.

The Court of Star Chamber was abolished by Act 16 Car. I, and proceedings by information were again revived in the regular action of the Court of King's Bench. Such, however, was the prejudice which had arisen from long abuse of process of this description, that it was strenuously contended at this period in the King's Bench that all proceedings by information were illegal, as being contrary to the original frame and nature of English laws and to Magna Charta. These exceptions, however, after full consideration, were overruled, and it was remarked by Sir Matthew Hale "that, although in all criminal cases the most regular and safe way, and most consonant to the statute of Magna Charta, is by presentment, or indictment of twelve sworn men, yet, for crimes inferior to capital ones, proceedings might be by information; and this, from long and frequent practice, he held was certainly established as the law of the land." *Prynn's Case*, 5 Mod. 459, 463; *Rex v. Berchet*, 1 Show. 106; *Bac. Abr.* "Information," A; 2 *Hawk. P. C.* 260; 4 Bl. Comm. 310; 1 *Chit. Cr. Law*, 843; 1 *Ersk. Speeches*, 275. From that time to the present, proceedings by information have continued without exception in England, and the process was well known and established in the provincial courts in this country. It is said by Chief Justice Parsons, in the case of *Commonwealth v. Inhabitants of Waterborough*, 5 Mass. 257, 259, "that from time immemorial informations have been sustained in Massachusetts, and that it was a general rule that all public misdemeanors which might be prosecuted by indictment might be

prosecuted by information, unless the prosecution was restrained by statute to indictment." *State v. Town of Dover*, 9 N. H. 468, 470.

In holding that the term "information," in Const. art. 1, § 9, providing that, when prosecution is by indictment or information, the case shall be entitled to a speedy public trial by an impartial jury, did not include a complaint for a breach of the Sabbath, exhibited by a tithingman to a justice of the peace, and therefore that defendant was not entitled to a trial by jury. The court enters into an examination of the meaning of the term at common law, and says that an information differs from an indictment a little more than the source from whence it comes. "Informations," says Blackstone (4 Bl. Comm. 302), "are of two sorts: First, those which are partly at the suit of the King, and partly at that of a subject; and, secondly, such as are only in the name of the King. And the last are of two kinds: First, those that are truly and properly his own suits and filed ex officio by his own officer, the Attorney General; and, second, those in which, though the King is the nominal prosecutor, yet it is at the relation of some private person or common informer, and they are filed by the King's coroner and attorney in the Court of King's Bench, usually called the Master of Crown Office, who is for this purpose the standing officer of the public." An accusation, therefore, brought before a single magistrate is not, within the definition of this writer, an "information." And the term does not include such a thing; the law of the state does not have such meaning. *Goddard v. State*, 12 Conn. 448, 452.

Informations, as the basis of criminal prosecutions, are said to have existed coeval with the common law itself, but as a mode of determining civil rights between private parties they seem to owe their origin to a statute of Anne. Although informations in the nature of quo warranto were exhibited by the Attorney General long prior to the passage of that statute, yet the remedy given thereby was never extended beyond the limits of the old writ. Informations were not allowed at the instance of a private person before the statute of 4 Anne, nor after, except in the cases mentioned in that statute. Information was a criminal proceeding, although upon conviction or disclaimer there was also judgment of ouster or seizure into the King's hands, and although it has long been applied to trying the mere civil right, the fine being nominal only. *State v. Ashley*, 1 Ark. 279.

An information is an accusation or complaint exhibited against a person for some criminal offense, either immediately against the state or against a private person, which, from its enormity or dangerous tendency, the public good requires should be restrained and

punished. *State v. Kelm*, 79 Mo. 515, 516; *Territory v. Cutinola*, 14 Pac. 809, 810, 4 N. M. (Gild.) 305.

Bacon says there were two kinds of criminal informations used in England under the common-law procedure. The first was for offenses made immediately against the King, and was filed by the Attorney General *ex officio*, and without leave of court; the second was for offenses against private individuals, and was exhibited by the Masters of the Crown. *Territory v. Cutinola*, 14 Pac. 809, 810, 4 N. M. (Gild.) 305.

The word "information," in the act of 1784 (P. L. 340) imposing a penalty on any one keeping a billiard table without a license, the penalty to be recovered by "bill, plaint, or information," means that sort of information which by the law of England is partly at the suit of the King and that of a subject. These sorts of informations are a kind of *qui tam* action carried on by a criminal, instead of a civil, process. *State v. Mathews* (S. C.) 2 Brev. 82, 83.

An information for an offense is a surmise or suggestion upon record, on behalf of the King, to a court of criminal jurisdiction, and is, to all intents and purposes, the King's suit. *Haggerty v. People* (N. Y.) 6 Lans. 332, 346.

Criminal informations are "analogous to declarations for the redress of personal injuries, except that the latter are at the suit of a subject for the satisfaction of a private wrong, and the former are in the name of the King for the punishment of offenses affecting the interests of the public." *State v. Town of Concord*, 20 N. H. 295, 296 (citing 1 Chit. Cr. Law, 841).

By the common law an "information" has a meaning as certain and definite as an "indictment." The former differs from the latter principally in this: that an indictment is an accusation found by the oath of twelve men, whereas an information is only an allegation of the officer who exhibits it. 2 Toml. Law Dict. "There can be no doubt," says Blackstone, "but that this mode of prosecution by information or suggestion filed on record by the King's Attorney General, or by his Coroner or Master of the Crown Office in the Court of King's Bench, is as ancient as the common law itself." 4 Bl. Comm. 309. And the convention of Texas, when framing the Constitution, without doubt employed the word "information," as descriptive of a mode of instituting a criminal prosecution, in the sense in which it was known and used in the then existing law. *Clepper v. State*, 4 Tex. 242, 246.

The proceeding by criminal information comes from the common law without the aid of statutes, and is allowable by the common

law in a great variety of cases, the rule appearing to be that it is a concurrent remedy with the indictment for all misdemeanors, but not permissible in any felony. It is used in the Constitution in its technical common-law sense. *State v. Whitlock*, 41 Ark. 408, 406.

The information is the allegation in writing, made to a court or magistrate, that a person has been guilty of some designated offense. Code Crim. Proc. S. D. 1903, § 89; Pen. Code Idaho 1901, § 5219; Rev. St. Okl. 1903, § 5236; *People v. Mayer*, 84 N. Y. Supp. 71, 72, 41 Misc. Rep. 289; *Hewitt v. Newburger*, 20 N. Y. Supp. 913, 66 Hun, 230 (citing Code Cr. Proc. § 145); *People v. Wyatt*, 80 N. Y. Supp. 198, 200, 39 Misc. Rep. 456; *State v. Barnes*, 54 N. W. 541, 543, 3 N. D. 181.

#### Affidavit, signature, and verification.

Under the common law adopted in the various states, it is not essential that an information filed *ex officio* by a prosecuting attorney shall be supported by affidavit. *Territory v. Cutinola*, 14 Pac. 809, 810, 4 N. M. (Gild.) 305.

An information must be signed by the prosecuting attorney, and based upon the affidavit of some competent and reputable person. *Semon v. State*, 62 N. E. 625, 626, 158 Ind. 55.

*Burns' Ann. St. 1894*, § 1754 (Rev. St. 1881, § 1685), requiring a copy of an information to be served on a corporation in a criminal prosecution against it, does not require service of the affidavit on which the information is based. *Paragon Paper Co. v. State*, 49 N. E. 600, 601, 19 Ind. App. 314.

An information cannot be regarded as the substitute for an indictment, where the latter is required for the prosecution of a crime; nor can the verification of an information be regarded as an affidavit used in the arrest and removal of fugitives from justice, for the information is verified by the prosecuting attorney, who swears that he believes the contents to be true, not that they are true. *Ex parte Hart* (U. S.) 63 Fed. 249, 259, 11 C. C. A. 165, 28 L. R. A. 801.

An information is an accusation in writing, in form and substance like an indictment for the same offense, charging a person with a public offense, presented and signed by the county attorney, and filed in the office of the clerk of the district court. Pen. Code, § 1372. Under such statute no verification is necessary. *State v. Brantly*, 50 Pac. 410, 411, 20 Mont. 173.

An information is a formal charge against the accused of the offense, with such particulars as to time, place, and attendant circumstances as will apprise him of the na-

ture of the charge he is to meet, signed by the public prosecutor. In re Bonner, 14 Sup. Ct. 323, 325, 326, 151 U. S. 242, 38 L. Ed. 149.

An information is the allegation or statement made before a magistrate, and verified by the oath of the party making it, that a person has been guilty of some designated crime. Ann. Codes & St. Or. 1901, § 1581.

An information is an accusation in writing, in form and substance like an indictment for the same offense, charging a person with a crime or public offense, signed and verified by some person, and presented to a police magistrate or to the district court, and filed by said police magistrate, if presented to him, or, if presented to the district court, then in the office of the clerk of said court. Rev. Codes N. D. 1899, § 7883.

**By whom filed.**

An information, at the common law, is an accusation in writing filed by the King's Attorney, usually called the Attorney General. Lincoln v. Smith, 27 Vt. (1 Williams) 328, 360.

An information is the declaration of a charge or offense against any one at the suit of the King, filed by a public officer, without the intervention of a grand jury. In re Oliver, 21 S. C. 318, 322, 53 Am. Rep. 681; State v. Starling (S. C.) 15 Rich. Law, 120, 124.

An information is the official statement made to the court by the prosecuting attorney that a person has been guilty of some designated felony. Semon v. State, 62 N. E. 625, 626, 158 Ind. 55.

An information is an accusation in writing, in form and substance like an indictment for the same offense, charging a person with a public offense, presented and signed by the county attorney or his deputy, or by the attorney pro tem. for the state, and filed in the office of the clerk of the district court. Rev. St. Utah 1898, § 4606.

An information is a written statement, filed and presented in behalf of the state by the district or county attorney, accusing the defendant therein named of an offense which is by law subject to be prosecuted in that manner. Code Cr. Proc. Tex. 1895, art. 465.

An information is a criminal charge which at common law is presented by the Attorney General, or, if that office is vacant, then by the Solicitor General of England, and in this state (Missouri) by the prosecuting attorneys of the respective counties, who exercise the same powers as are exercised by the Attorney General or Solicitor General of England; that is, the power to present informations under their official oaths. In the Constitution and statutes of Missouri the term "information" is used in its common-law

sense. State v. Kyle, 65 S. W. 763, 767, 166 Mo. 287, 56 L. R. A. 115.

At common law "an information is a declaration of the charge or offense against any one at the suit of the King. Com. Dig. tit. 'Information,' A. An information is for the King that which for a common person is called a 'declaration.' Termes de la Ley, voc. 'Information.' In practice such informations were most usually filed by the Attorney General as the law representative of the crown, but the courts also were representatives of his majesty, and might therefore, by leave given, empower any other officer, or even a private person, to speak in the King's name to the like effect. Thus, whether the information was ex officio, requiring no leave from the court, or by private relation, which required a special leave, it has always been considered, in theory at least, as an emanation from the sovereign executive authority. Between a presentment of this character and a mere complaint or affidavit tendered by a subject or citizen, speaking for himself only, there is a broad distinction. The one bears an unquestionable guaranty of good faith and sufficient cause in the sleepless care for the common weal which the common law always ascribes to the sovereign power. The other conveys a comparative responsibility, and a possibility, at least, of mere recklessness or malice." Thus the information mentioned in Const. art. 2, § 12, declaring that no person shall be proceeded against criminally for felony otherwise than by indictment, and in all other causes offenses shall be prosecuted criminally by indictment or information as concurrent remedies, means an information filed or approved by the prosecuting authorities, and does not include a paper signed and sworn to by a private citizen. Ex parte Thomas, 10 Mo. App. 24, 25. So, also, State v. Shortell, 5 S. W. 691, 692, 93 Mo. 123; State v. Kelm, 79 Mo. 515, 516.

Rev. St. § 2025, provides that prosecutions before justices of the peace for misdemeanors must be commenced by an information in the form and nature of an affidavit, and section 2026 requires the information to set forth the offense in plain and concise language, with the name of the person charged therewith, and also prescribes the form of the affidavit. There is nothing in the body of the section or the prescribed form which indicates that the information or affidavit need be made by the prosecuting attorney or other officer. Such an affidavit is not an "information," within the meaning of that word as used in the common law, and as contemplated by section 12, art. 2, of the Bill of Rights, which expressly requires that, in all other than certain enumerated cases, offenses should be prosecuted criminally by indictment or information. State v. Russell, 88 Mo. 648, 649.

**As complaint.**

See, also, "Complaint."

The word "information," as used in the seventy-sixth section of the school law of 1872, means a complaint. *Newton v. People*, 72 Ill. 507, 508.

**Complaint in inferior courts.**

The term "information," when used in criminal proceedings, designates an accusation of crime made by the authorized public officers. At common law it was exhibited by the attorney general in a class of cases, and by subordinate officers of the crown in others. Where it is adopted in this country the proceeding is founded on the common law, and the power to make the information is in general exercised by the officer whose duty it is to prosecute for the state. In Code, § 4315, authorizing the state to appeal in criminal cases where the act under which an indictment or information is found, is held unconstitutional, the word is used with reference to some recognized proceeding other than the presentment of a grand jury. It may be, for want of other application, the term as used in a statute may include both a complaint filed on appeal, and an affidavit, when adopted as an incriminating charge in the higher courts; but it does not follow that this provision should be extended, by construction, beyond its literal meaning, so far as to include cases in all inferior courts. The statute does not authorize appeals from the police court of Birmingham. *State v. Hewlett*, 27 South. 18, 19, 124 Ala. 471.

**As a criminal proceeding.**

An information was properly in its origin a criminal proceeding. *People v. Albany & V. R. Co.* (N. Y.) 15 Hun, 128, 128.

**Indictment distinguished.**

"An information by the prosecuting attorney" has a well-defined meaning at common law, but differs from an indictment, in this: that whereas the indictment is the accusation of a grand jury, "an information is only the allegation of the officer who exhibits it." *State v. Cornelius*, 44 S. W. 717, 718, 143 Mo. 179 (quoting 5 Bac. Abr. pp. 167, 170, 172; *State v. Kelm*, 79 Mo. 515); *Territory v. Cutinola*, 14 Pac. 809, 810, 4 N. M. (Johns.) 160; *Clepper v. State*, 4 Tex. 242, 246; *State v. Whitlock*, 41 Ark. 403, 406; *State v. Carr*, 44 S. W. 776, 777, 142 Mo. 607; *Edwards v. Brown*, 67 Mo. 377, 379.

An indictment is an accusation by the grand jury, while an information is an accusation by a district attorney. *Nichols v. State*, 35 Wis. 308, 310.

**Libel in admiralty.**

The term "information" is not exclusively applied to a proceeding at common law. A libel on a seizure is in its terms and es-

sence an information. So it is held that where the cause is of admiralty jurisdiction and the proceeding is by information, the suit is not withdrawn, by the nature of the remedy, from the jurisdiction to which it otherwise belongs. *The Samuel*, 14 U. S. (1 Wheat.) 9, 14, 4 L. Ed. 23.

**As process.**

See "Process."

**INFORMATION IN THE NATURE OF QUO WARRANTO.**

An information in the nature of a quo warranto, to which has succeeded the writ of that name, was originally in form a criminal proceeding to punish the usurpation of franchises by a fine as well as to seize the franchise. This information has in process of time become, in substance, a civil proceeding to try the mere right to the franchise or office. *People v. Dashaway Ass'n*, 24 Pac. 277, 278, 84 Cal. 114, 12 L. R. A. 117.

The remedy by information in the nature of quo warranto in Kansas is a civil proceeding. *Foster v. State of Kansas*, 5 Sup. Ct. 97, 98, 112 U. S. 201, 28 L. Ed. 620.

An information in the nature of a writ of quo warranto is a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise as to oust him and seize it for the crown. For a long time it has been used for the mere purpose of trying civil rights, and seizing franchises or ousting unlawful possessors, of offices, the fine being nominal only. *People v. Utica Ins. Co.* (N. Y.) 15 Johns. 858, 886, 8 Am. Dec. 243.

An information in the nature of quo warranto lay at common law independently of any statute for intrusion into any office affecting the public, or for the exercise of a franchise of what was termed a "regal character." *Giles v. Hardie*, 23 N. C. 42, 50.

An information in the nature of a quo warranto is the appropriate remedy for obtaining the possession of an office to which a person has been legally elected and has become duly qualified to hold. *State v. Wheatley*, 66 N. E. 684, 687, 160 Ind. 183 (citing *Griebel v. State*, 111 Ind. 367, 12 N. E. 700).

An information in the nature of a quo warranto is the proper course of proceedings by which to ascertain, in behalf of the government, whether a charter has been abused with a view to declare it forfeited. *State v. Godfrey*, 12 Me. (3 Fairf.) 361, 367.

**INFORMER.**

See "Common Informers."

"An 'informer,' in the legal as well as the ordinary sense of the term, whether the information he gives applies to customs, internal revenue, criminal matters, or forfei-

tures for any other reason, is he who gives the information which leads directly to the seizure and condemnation, regardless of the questions of evidence furnished or interest taken in the prosecution." *The City of Mexico* (U. S.) 32 Fed. 105, 106 (citing *Westcot v. Bradford* [U. S.] 29 Fed. Cas. 736; *Sawyer v. Steel* [U. S.] 21 Fed. Cas. 583; *United States v. Simons* [U. S.] 7 Fed. 709; *One Hundred Barrels of Whiskey* [U. S.] 18 Fed. Cas. 712; *United States v. Isla De Cuba* [U. S.] 26 Fed. Cas. 551). It would not include one who merely communicates a vague rumor, commonly known in commercial circles and elsewhere, that a person has committed frauds against the revenue laws, unless the person claiming to be such informer gives some information as to what frauds have been committed and some clew to their detection. *Bradley v. United States* (U. S.) 12 Ct. Cl. 578, 593.

The term "informer," as used in Rev. St. § 5294 [U. S. Comp. St. 1901, p. 8607], providing that the Secretary of the Treasury may remit any fine or penalty provided for in laws relating to steam vessels, or discontinue any prosecution to recover penalties denounced in such laws, as he, in his discretion, should think proper, and all rights granted to informers by such lease should be held subject to the Secretary's power of remission, caused in cases where the claims of any informer to the share of any penalty should have been determined by a court of competent jurisdiction prior to the application for the remission of the penalty, should be construed to include the plaintiff in a popular action. He is an "informer," as that word is understood in the law and used in the statutes of England and this country. In its origin the word "informer" may have meant only one who sues by way of an information; but this was not the only mode of suing for penalties, and in time certainly, if not originally, a party suing, in whatever mode, was known as an "informer." The word also, no doubt, in some of its applications, includes a person who lodges information with a government officer which leads to a suit brought by the government itself. *Pollock v. The Laura* (U. S.) 5 Fed. 133, 135.

#### INFORMING OFFICER.

State attorneys are informing officers, within the meaning of the statute providing that all persons, etc., who shall be prosecuted by any informing officer legally appointed and sworn for that purpose, shall pay all the necessary costs, whether, on trial, they shall be found guilty or not. *Fowler v. Bishop* (Conn.) 1 Root, 198.

#### INFRACTION.

The delinquency of the state treasurer in failing to safely keep the money of the

state cannot be said to be an "infraction" of the revenue laws, within the meaning of the act appropriating money for prosecuting delinquencies for infraction of revenue laws. *Swift v. Doron*, 6 Nev. 125.

#### INFRINGEMENT.

See "Contributory Infringement."

Infringement is an unlawful making or selling or using of a patented invention. *Goodyear Shoe Machinery Co. v. Jackson* (U. S.) 112 Fed. 146, 148, 50 C. C. A. 159, 55 L. R. A. 692.

The infringement of a patent is a tort analogous to trespass or trespass on the case. *Tubular Rivet & Stud Co. v. O'Brien* (U. S.) 93 Fed. 200, 202; *Thomson Houston Electric Co. v. Ohio Brass Co.* (U. S.) 80 Fed. 712, 721, 26 C. C. A. 107.

#### All or equivalent elements.

It is a well-settled principle of patent law that where a valid patent has been obtained, any improved machine which performs the same functions by equivalent means is an infringement. *Tecktonius v. Scott*, 86 N. W. 672, 675, 110 Wis. 441.

A machine which contains all the essential elements or their equivalents of a patented machine infringes the patent, notwithstanding differences of form. *Taylor v. Sawyer Spindle Co.* (U. S.) 75 Fed. 301, 304, 22 C. C. A. 203.

#### Change of form.

A machine which contains all the essential elements, or their equivalents, of the patented machine, infringes the patent, notwithstanding mere differences of form. *Taylor v. Sawyer Spindle Co.* (U. S.) 75 Fed. 301, 22 C. C. A. 203, affirming decree *Sawyer Spindle Co. v. Taylor* (U. S. 1895) 69 Fed. 837; *Barrett v. Hall* (U. S.) 2 Fed. Cas. 914; *Sargent v. Larned* (U. S.) 21 Fed. Cas. 501; *Teese v. Phelps* (U. S.) 23 Fed. Cas. 832; *Foss v. Herbert* (U. S.) 9 Fed. Cas. 503; *Sickels v. Borden* (U. S.) 22 Fed. Cas. 67; *Latta v. Shawk* (U. S.) 14 Fed. Cas. 1188; *Judson v. Cope* (U. S.) 14 Fed. Cas. 10; *Potter v. Wilson* (U. S.) 19 Fed. Cas. 1193; *Cahoon v. Ring* (U. S.) 4 Fed. Cas. 1011; *Case v. Brown* (U. S.) 5 Fed. Cas. 248, affirmed 69 U. S. (2 Wall.) 320, 17 L. Ed. 817; *Howe v. Williams* (U. S.) 12 Fed. Cas. 689; *Union Sugar Refinery v. Matthiesson* (U. S.) 24 Fed. Cas. 686; *Blanchard v. Puttman* (U. S.) 3 Fed. Cas. 633; *Graham v. Mason* (U. S.) 10 Fed. Cas. 925; *Carter v. Baker* (U. S.) 5 Fed. Cas. 195; *Sewing Mach. Co. v. Frame* (U. S.) 24 Fed. 596.

"Infringement" is not avoided by a mere change of form or renewal of parts, or reduction of dimensions, or the substitution of mechanical equivalents, or the studious avoidance of the literal definition of specifi-

cations and claims, or the superadding of some improvements. If the device contains material features of the patent in suit it will constitute an infringement, though those features have been supplemented and modified to such an extent that the defendant may be entitled to a patent for the improvement. *Crown Cork & Seal Co. v. Aluminum Stopper Co.* (U. S.) 108 Fed. 845, 866, 48 C. C. A. 72; *O'Reilly v. Morse*, 56 U. S. (15 How.) 62, 14 L. Ed. 601.

Where the same result is effected by corresponding parts and by an identity in the mode of operation, mere formal changes will not avoid infringement. *Collignon v. Hayes* (U. S.) 8 Fed. 912.

#### Claim of patent as criterion.

"Infringement" cannot be safely determined by comparing a patented machine with an infringing machine without comparing the infringing machine with the claims of the patents. *Gessner v. Phillips* (U. S.) 63 Fed. 954, 960.

Infringement should not be determined by a mere decision that the terms of a claim of a valid patent are applicable to the defendant's device. Two things are not necessarily similar in a practical sense, because the same words are applicable to each. The question of infringement involves consideration of practical utility and substantial identity, and therefore must be quantitative as well as qualitative. *Goodyear Shoe Mach. Co. v. Spaulding* (U. S.) 101 Fed. 990, 994.

#### Colorable deviation.

Infringement is not avoided because, by some colorable variation or expedient, it merely impairs or narrows the function and usefulness of the patented device. *Whitely v. Fadner* (U. S.) 73 Fed. 486.

The true test of infringement is the use by the defendant of anything which the complainant has invented which includes mere colorable variations of his invention. *Crompton v. Knowles* (U. S.) 7 Fed. 204.

An infringement takes place whenever a party avails himself of the invention of the patentee without such variation as will constitute a new discovery. *Carter v. Baker* (U. S.) 5 Fed. Cas. 195; *May v. Fond du Lac County* (U. S.) 27 Fed. 691.

#### Degree of utility.

An infringement is not avoided because the infringing device is better, more useful, or more acceptable to the public than that of the patent infringed. *Whitely v. Fadner* (U. S.) 73 Fed. 486, 488.

The superior utility of the defendant's machine is not in itself a certain test, because it may contain the whole substance of

the plaintiff's invention in addition, and not be an infringement. *Pitts v. Wemple* (U. S.) 19 Fed. Cas. 762, 764; *Fruit-Cleaning Co. v. Fresno Home-Packing Co.* (U. S.) 94 Fed. 845, 863.

The degree of utility is not pertinent to the question of the validity of a patent, but may, perhaps, form a proper subject of inquiry in estimating the quantum of injury resulting from the infringement. *Tilghman v. Werk* (U. S.) 23 Fed. Cas. 1260.

A device is none the less an infringement because it contains an improvement upon the patented invention. *Elizabeth v. American Nicholson Pav. Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Pitts v. Wemple* (U. S.) 19 Fed. Cas. 762; *Imlay v. Norwich & W. R. Co.* (U. S.) 13 Fed. Cas. 1; *Howe v. Morton* (U. S.) 12 Fed. Cas. 663; *Forbes v. Barstow Stove Co.* (U. S.) 9 Fed. Cas. 395; *McComb v. Brodie* (U. S.) 15 Fed. Cas. 1290; *Adams v. Joliet Mfg. Co.* (U. S.) 1 Fed. Cas. 123; *De Florez v. Reynolds* (U. S.) 7 Fed. Cas. 355; *Frost v. Marcus* (U. S.) 13 Fed. 88; *Foye v. Nichols* (U. S.) 13 Fed. 125; *Evory v. Burt* (U. S.) 15 Fed. 112; *Roemer v. Simon* (U. S.) 20 Fed. 197; *Filley v. Littlefield* (U. S.) 25 Fed. 282; *Shaver v. Skinner Mfg. Co.* (U. S.) 30 Fed. 68; *Traver v. Brown* (U. S.) 62 Fed. 933; *Robbins v. Dueber Watch Case Mfg. Co.* (U. S.) 71 Fed. 186.

If two machines produce substantially a similar result by substantially similar means, no proof of difference between them lies in the fact that one is less effectual in operation, or more imperfect in structure, than the other. *Roberts v. Harnden* (U. S.) 20 Fed. Cas. 891, 903.

The question as to infringement is not whether the defendant's machine works the best, but does it use the plaintiff's invention? *Cox v. Griggs* (U. S.) 6 Fed. Cas. 678.

#### Identity.

An infringement takes place whenever a party avails himself of the invention of the patentee without such variation as will constitute a new discovery. An infringement involves the substantial identity, whether that identity is described by the terms "the same principle," "same modus operandi," or any other. It is a copy of the thing described in the specifications of the patentee, either without variation, or with only such variation as is consistent with its being in substance the same thing. *May v. County of Fond du Lac* (U. S.) 27 Fed. 691, 696.

In determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machine or other several devices or elements in the light of what they do or what office or function they perform,



and to find that one thing is substantially the same as another if it performs substantially the same function, in substantially the same way, to obtain the same result. *Union Paper Bag Mach. Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935; *Fruit-Cleaning Co. v. Fresno Home-Packing Co.* (U. S.) 94 Fed. 545, 863.

Infringement by the purchaser of a patented machine consists in the substantial rebuilding of the patented machine. The purchaser, in order to infringe, must make or reproduce in substance the whole patented invention. A purchaser stands in no different position from an ordinary infringer, except in the circumstance that he has bought a patented machine, and consequently his infringement does not consist in the construction of a wholly new machine, but in the reconstruction of such a machine after it is worn out or substantially destroyed. To constitute infringement, where the patented invention comprises several elements in combination, it is only necessary that he shall have reconstructed all of the material or essential elements of the combination. He is distinguished from the contributory infringer in that a contributory infringer only makes or sells a part of the patented invention. To prove infringement in such case it is only necessary to show a partial infringement by making or selling the material elements of a patented machine in aid of an unlawful complete infringement, while in the infringement by the purchaser a substantially full and complete infringement must be established. *Goodyear Shoe Machinery Co. v. Jackson*, 112 Fed. 146, 148, 50 C. C. A. 159, 55 L. R. A. 692.

The test of "infringement," when alleged against the manufacturer of a machine, and based solely upon the machine itself, is whether, as made and offered for sale, it contains the patented invention. If its structure is such that, when used in the manner contemplated by the manufacturer, it has the capacity of appropriating the invention, he can be treated as an infringer by participation with the user. But if its structure is such that it can only acquire that capacity by misuse, whether negligent or intentional, he is not responsible as an infringer. *Brown v. Traver* (U. S.) 70 Fed. 810, 816, 17 C. C. A. 424.

A person is an infringer of a patent which embraces one or more of the elements of a machine, but not the entire machine, when the part new and patented is made or used. *Union Sugar Refinery v. Matthieson* (U. S.) 24 Fed. Cas. 686.

Where two machines are substantially the same, and operate in the same manner to produce the same kind of result, they must be in principle the same. *Gray v. James* (U. S.) 10 Fed. Cas. 1015.

It is an infringement if a person had used a patentee's improvements or devices substantially the same, in which the same principles are brought into requisition, or, in other words, which are alike in their principle of operation. *Odiorne v. Winkley* (U. S.) 18 Fed. Cas. 581; *Parker v. Haworth* (U. S.) 18 Fed. Cas. 1135; *Parker v. Stiles* (U. S.) 18 Fed. Cas. 1163; *Smith v. Downing* (U. S.) 22 Fed. Cas. 511; *Coleman v. Liesor* (U. S.) 6 Fed. Cas. 63; *McComb v. Brodie* (U. S.) 15 Fed. Cas. 1290.

#### Of patent for combination.

A combination of the mechanical parts of an entire machine is no infringement except by the use of the entire combination. *Carter Mach. Co. v. Hanes*, 78 Fed. 346, 349, 24 C. C. A. 128 (citing *Brown v. Guild*, 90 U. S. [23 Wall.] 181, 23 L. Ed. 161); *Kinzel v. Luttrell Brick Co.* (U. S.) 67 Fed. 926, 927, 15 C. C. A. 82.

A patent for a combination is not infringed by the use of any number of the parts less than the whole. *Stimpson v. Baltimore & S. R. Co.*, 51 U. S. (10 How.) 329, 13 L. Ed. 441; *Mowry v. Whitney*, 81 U. S. (14 Wall.) 620, 20 L. Ed. 800; *Reese v. Gould*, 82 U. S. (15 Wall.) 187, 21 L. Ed. 39; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. Ed. 103; *McMurray v. Mallory*, 111 U. S. 97, 4 Sup. Ct. 375, 28 L. Ed. 365 (affirming decree *McMurray v. Same* [U. S.] 5 Fed. 593); *Rowell v. Lindsay*, 113 U. S. 97, 5 Sup. Ct. 507, 28 L. Ed. 906 (affirming decree [U. S.] 6 Fed. 290); *Garratt v. Seibert*, 131 U. S. Append. cxv, 21 L. Ed. 956; *P. H. Murphy Mfg. Co. v. Excelsior Car Roof Co.* (U. S.) 76 Fed. 965, 22 C. C. A. 653; *Adams Electric Ry. Co. v. Lindell Ry. Co.* (U. S.) 77 Fed. 432, 23 C. C. A. 223 (affirming decree [U. S.] 63 Fed. 986); *Barrett v. Hall* (U. S.) 2 Fed. Cas. 914; *Howe v. Abbott* (U. S.) 12 Fed. Cas. 656; *Brooks v. Jenkins* (U. S.) 4 Fed. Cas. 275; *Brooks v. Bicknell*, 4 Fed. Cas. 255; *McCormick v. Manny* (U. S.) 15 Fed. Cas. 1314 (affirming *Same v. Talcott*, 61 U. S. [20 How.] 402, 15 L. Ed. 930); *Pitts v. Wemple* (U. S.) 19 Fed. Cas. 766; *Rollhaus v. McPherson* (U. S.) 20 Fed. Cas. 1136; *Smith v. Higgins* (U. S.) 22 Fed. Cas. 560; *Bell v. Daniels* (U. S.) 3 Fed. Cas. 96; *Huggins v. Hubby* (U. S.) 12 Fed. Cas. 826; *Nicholson Pav. Co. v. Hatch* (U. S.) 18 Fed. Cas. 211; *Rich v. Close* (U. S.) 20 Fed. Cas. 670; *Fisher v. Craig* (U. S.) 9 Fed. Cas. 122; *Rowell v. Lindsay* (U. S.) 6 Fed. 290 (decree affirmed, 113 U. S. 97, 5 Sup. Ct. 507, 28 L. Ed. 906); *Matteson v. Calne* (U. S.) 17 Fed. 525; *Howe v. Neemes* (U. S.) 18 Fed. 40; *Gould v. Spicers* (U. S.) 20 Fed. 317; *Saladee v. Racine Wagon & Carriage Co.* (U. S.) 20 Fed. 686; *Royer v. Schultz Belting Co.* (U. S.) 28 Fed. 850; *Byerly v. Cleveland Linseed Oil Works* (U. S.) 31 Fed. 73; *Ott v. Barth* (U. S.) 32 Fed. 89; *Tatum v. Gregory* (U. S.) 41 Fed. 142;

Ross v. Montana Union Ry. Co. (U. S.) 45 Fed. 424; Engle Sanitary & Cremation Co. v. City of Elwood (U. S.) 78 Fed. 484; Pacific Submarine & Earthquake Proof Wall Co. v. United States (U. S.) 19 Ct. Cl. 234.

A patent for a combination of old things, applied to produce a new and useful result, is not violated unless all the parts or elements of the combination are used. Prouty v. Ruggles, 41 U. S. (16 Pet.) 330, 10 L. Ed. 985; Dodge v. Card (U. S.) 7 Fed. Cas. 791; Case v. Brown (U. S.) 5 Fed. Cas. 248; Hale v. Stimpson (U. S.) 11 Fed. Cas. 187; Roberts v. Harnden (U. S.) 20 Fed. Cas. 891; Bliss v. Haight (U. S.) 3 Fed. Cas. 711; Sands v. Wardwell (U. S.) 21 Fed. Cas. 348; Halles v. Van Wormer (U. S.) 11 Fed. Cas. 162, affirmed 87 U. S. (20 Wall.) 353, 22 L. Ed. 241; Sanford v. Merrimack Hat Co. (U. S.) 21 Fed. Cas. 380; Doane & Wellington Mfg. Co. v. Smith (U. S.) 15 Fed. 459.

A patent for a combination is infringed by the use of a similar combination, although one of the elements is omitted and another substituted for it, unless the substituted device is a new one, or was not known at the date of the patent as a proper substitute for the one omitted. Seymour v. Osborne, 78 U. S. (11 Wall.) 516, 20 L. Ed. 33; Imhaeuser v. Buerk, 101 U. S. 647, 25 L. Ed. 945; Union Sugar Refinery v. Matthlessen (U. S.) 24 Fed. Cas. 686; Sands v. Wardwell (U. S.) 21 Fed. Cas. 348; King v. Louisville Cement Co. (U. S.) 14 Fed. Cas. 533; Webster v. New Brunswick Carpet Co. (U. S.) 29 Fed. Cas. 554; Welling v. Rubber-Coated Harness Trimming Co. (U. S.) 29 Fed. Cas. 622; Rowell v. Lindsay (U. S.) 6 Fed. 290 (decree affirmed, 113 U. S. 97, 5 Sup. Ct. 507, 28 L. Ed. 906); Smith v. Woodruff, 8 D. C. (1 MacArthur) 459.

It is immaterial that certain elements which are claimed, and which are omitted from defendant's device, are not of the essence of the real invention. Kinzel v. Luttrell Brick Co. (U. S.) 67 Fed. 928, 927, 15 C. C. A. 82.

Where a patent is for a combination of parts, the substitution for one of said parts of an element not an equivalent is not an infringement. Eames v. Godfrey, 68 U. S. (1 Wall.) 78, 17 L. Ed. 547; Densmore v. Schofield (U. S.) 7 Fed. Cas. 493; Crompton v. Belknap Mills (U. S.) 6 Fed. Cas. 841; Burdett v. Estey (U. S.) 4 Fed. Cas. 718.

Infringement cannot be avoided by dividing a patented device into two parts, which, when combined, produce the same result in substantially the same way. Strobbridge v. Lindsay (U. S.) 6 Fed. 510.

Infringement of a patented combination cannot be avoided by merely using another part in addition to the combination. Rees v. Gould, 82 U. S. (15 Wall.) 187, 21 L. Ed. 39;

Pitts v. Wemple (U. S.) 19 Fed. Cas. 766; Williams v. Boston & A. R. Co. (U. S.) 29 Fed. Cas. 1358; Williams v. Barnard (U. S.) 41 Fed. 358.

#### Of patent for design.

The test of infringement, in relation to a patent for a design, is whether ordinary purchasers would be likely to mistake the one design for the other, giving such attention as such purchaser usually gives. Britton v. White Mfg. Co. (U. S.) 61 Fed. 93, 98.

Infringement of a design patent is to be determined by the inquiry whether the two designs would appear to be the same to the eye of an ordinary observer giving such attention to designs as a purchaser usually gives, and not whether an ordinary purchaser giving no attention to designs might be led to buy the article bearing one of the designs, supposing it to be the article bearing the other. Monroe v. Anderson (U. S.) 58 Fed. 398, 399, 7 C. C. A. 272.

#### Of patent for process.

In a patent for process every successive step enumerated in the claim is an essential part, and must be employed by defendants to render them liable for infringement. Hammerschlag v. Garrett (U. S.) 10 Fed. 479.

Where a patent process consists of a number of steps, all well known except the first and last, the use of all except the first and last steps will not infringe the patent. Heller v. Bauer (U. S.) 19 Fed. 96.

#### Of trade mark or name.

"Infringement of a trade-mark," as affecting a case involving trade-marks upon packages of cachaous, may be said to be the improper use by the defendants of the emblems constituting the trade-marks of the plaintiff, whether upon packages of cachaous of the same general appearance or not. T. B. Dunn Co. v. Trix Mfg. Co., 63 N. Y. Supp. 333, 335, 50 App. Div. 75.

The essential ingredients which constitute an infringement of a right of property to trade-mark are: First, that the mark has been applied properly—that is to say, that it is not a copied mark—and that it involves no false representations; secondly, that the article so marked is actually a vendible article in the market; and, thirdly, that the defendants, knowing that to be so, have imitated the mark for the purpose of passing other articles of a similar description. McAndrew v. Bassett, 4 De Gex, J. & S. 380. It is not essential that plaintiffs be the parties putting the article upon the market, and so a Union Hat Makers' Association might bring action for an infringement of their right to the use of the union label. Schmalz v. Wooley, 41 Atl. 939, 940, 57 N. J. Eq. 303, 43 L. R. A. 86, 73 Am. St. Rep. 637.

To constitute an infringement of a trade-mark, exact similitude is not required, but an infringement has been committed when ordinary purchasers, buying with ordinary caution, are likely to be misrepresented, and positive proof of fraudulent intention is not required when probability of deception has been established. Thus where the defendant, under the name of "Young," established a business similar to that done by plaintiff under its corporate name of "De Youngs," established himself in the same street, near plaintiff, used similar business signs and advertising devices, and displayed the name "The Youngs," so that it differed from plaintiff's in the prefix "the," such use will be enjoined. *De Youngs v. Jung*, 27 N. Y. Supp. 370, 372, 7 Misc. Rep. 56.

#### INFRINGER.

A valid patent secures to its owner three substantive rights—the right to make, the right to sell, and the right to use the patented article. Whoever invades one of these rights is an infringer. *Tuttle v. Matthews* (U. S.) 28 Fed. 98.

An infringer of a patent is one who attempts to accomplish the same results by mere substitutions which are equivalents of the means employed by the first patentee of the machine, which produces certain results, which are novel and useful, by means of certain mechanical appliances and contrivances. *Wilt v. Grier* (U. S.) 5 Fed. 450, 451.

Where a party merely substitutes another old ingredient for one of the ingredients of a patented combination, he is an infringer, if the substitute performs the same function as the ingredient for which it was substituted, and it appears that it was well known at the date of the patent that it was adaptable to that use. *Pacific Cable R. Co. v. Butte City St. R. Co.* (U. S.) 58 Fed. 420, 421 (citing *Imhaeuser v. Buerk*, 101 U. S. 647, 656, 25 L. Ed. 945).

#### INGENUITY.

One who perfects a device of confessed utility, which satisfactorily supplies a long-existing and imperative need of any branch of industry, and which excels in operation and results other existing appliances, superseding them at home and abroad, and by its structure overcoming difficulties and objections which have for years baffled the ingenuity of his fellow craftsmen the world over, has proved that average mechanical skill was not equal to what he has accomplished. The perfecting of such a device is the product of inventive faculty, not merely that of the inventor's training or vocation. *Consolidated Brake Shoe Co. v. Detroit Steel & Spring Co.* (U. S.) 59 Fed. 902, 908.

#### INGOTS.

Ingots or billets of steel are the steel bars when taken from the molds of a steel manufactory, the words being applied to the finished product as it is ready for shipping. *Illinois Steel Co. v. Bauman*, 53 N. E. 107, 108, 178 Ill. 351, 69 Am. St. Rep. 318.

#### INGREDIENT.

In the act (Pub. Acts 1901, p. 37, No. 22, § 1) making it an offense to manufacture or sell any product, made wholly or in part of any fat not produced from unadulterated milk or cream, which shall be an imitation of yellow butter, provided the act shall not be construed to prohibit the manufacture or sale of oleomargarine free from coloration or ingredient that causes it to look like butter, the term "ingredient" does not refer to an ingredient essential to produce oleomargarine, but to an ingredient used solely to produce a yellow color in imitation of butter, so that the act does not prevent the manufacture and sale of an article, the ingredients of which themselves naturally produce the yellow color. *Bennett v. Carr* (Mich.) 96 N. W. 26, 28.

#### INHABITANCY—INHABITANT.

See "Free Inhabitant"; "Taxable Inhabitant."

All inhabitants, see "All."

Burrill, in his Law Dictionary, vol. 2, p. 72, defines "inhabitant" as follows: "A dweller in a place; a resident; one who dwells or resides permanently in a place; one who has a fixed and permanent abode in a place." "Resident" and "inhabitant" mean the same thing, but "citizen" and "inhabitant" are not synonymous. The Latin "habitans" imports, by its very construction, frequency, contingency, permanency, closeness of connection and attachment, both physical and moral, and the word "in" serves to give additional force. *Ullman v. State*, 1 Tex. App. 220, 222, 28 Am. Rep. 405.

An inhabitant is defined to be one who has his domicile in a place, or a fixed residence there. *Kennedy v. Ryall*, 67 N. Y. 379, 386 (citing *Crawford v. Wilson*, 4 Barb. 504, 520); *Coleman v. Territory*, 47 Pac. 1079, 1081, 5 Okl. 201.

Tomlin's Law Dictionary defines an inhabitant as a dweller or householder in any place. *Gormully & Jeffrey Mfg. Co. v. Pope Mfg. Co.* (U. S.) 34 Fed. 818, 819; *Zambrino v. Galveston, H. & S. A. R. Co.* (U. S.) 38 Fed. 449.

Webster defines an inhabitant to be a dweller, one who dwells or resides permanently in a place, or who has a fixed resi-

dence, as distinguished from an occasional lodger or visitor; as the inhabitants of a house or cottage, the inhabitants of a town, city, or state. In re Wrigley (N. Y.) 4 Wend. 602, 603; Fry's Election Case, 71 Pa. 302, 307, 10 Am. Rep. 698; In re Colebrook, 55 N. Y. Supp. 861, 863, 26 Misc. Rep. 139; Gormully & Jeffrey Mfg. Co. v. Pope Mfg. Co. (U. S.) 34 Fed. 818, 819 (citing Imp. Dict.).

"By the term 'inhabitant' of a place or country, we understand one who has his domicile or fixed residence there, in opposition to one who is a mere sojourner or temporary resident." State v. Boyd, 48 N. W. 739, 752, 31 Neb. 682; Bicycle Stepladder Co. v. Gordon (U. S.) 57 Fed. 529, 531; State v. Primrose, 3 Ala. 546, 547; Long v. Brown, 4 Ala. 622, 630. Such, beyond all doubt, was the meaning of the term as used in the act of Congress of March 2, 1819, for the admission of Alabama into the Union, which granted certain sections of land to the inhabitants of every township for the use of schools. Long v. Brown, 4 Ala. 622, 630.

The word "inhabitants" bears a very general sense, and may extend to everybody living in the parish. Attorney General v. Clarke, 1 Amb. 422.

The words "residence," "inhabitancy" and "domicile" are generally used as synonymous. As used in a statute providing that no time during which the defendant is not an inhabitant of, or usually resident within the territory, is a part of the limitation, it means that no time during which the defendant did not have a fixed, permanent, and established home, where his personal presence might reasonably be known, would constitute any part of the period of limitation. Coleman v. Territory, 47 Pac. 1079, 1081, 5 Okl. 201.

"Inhabitants," as used in a charter providing that a justice of the peace was to be elected by the tenants and inhabitants of a manor, has not in itself any definite legal meaning, but must be explained in each case extrinsically, as by evidence of usage, or by reference to the context and object of the charter. King v. Mashiter, 6 Adol. & E. 158.

An inhabitant is defined to be a householder in a place, as inhabitants in a vill are the householders in the vill. The word "inhabitants" includes tenants in fee simple, tenants for life, tenants at will, and he who has no interest but his habitation and dwelling. In re Wrigley (N. Y.) 8 Wend. 134, 141 (citing Jac. Law Dict.).

After quoting from Crawford v. Wilson (N. Y.) 4 Barb. 504, 520, and Kennedy v. Ryall, 67 N. Y. 379, 386, it was said: "A person may be living in a certain place, and not be an inhabitant of the state in which

it is situated." In re Colebrook, 55 N. Y. Supp. 861, 863, 26 Misc. Rep. 139.

It was contended that the use of the word "inhabitants" in a constitutional provision that the Legislative Assembly shall not levy taxes upon the inhabitants or property in any county, city, or town or municipal corporation for county, town, or municipal purposes, but may vest such powers in the corporate authorities, indicated that such provision related to license taxes as well as taxation proper; the contention being that the word "inhabitants" meant persons, as distinguished from property, and that the only kind of tax which could be levied upon persons would be the license tax. But it was held that taxation proper is a tax against the property; that therefore such contention could not be sustained. State v. Camp Sing, 44 Pac. 516, 521, 18 Mont. 128, 32 L. R. A. 635, 56 Am. St. Rep. 551.

In discussing the meaning of the term "inhabitant" in an act relative to proceedings against the trustees of concealed or absconding debtors, the court says: "What is here intended by 'an inhabitant of this state'? It cannot mean that the person should have become legally settled here by his residence, nor can the man who merely passes through the state be called an inhabitant. A man may come into the state to accomplish some special object, leaving his family and concerns behind, and return to them as soon as the object of his coming is completed, and his stay here be so short that it would be absurd to treat him as an inhabitant, within the statute. Again, a man may come for a temporary purpose, and without his family, and yet tarry here so long, and do so great a business, and contract so many debts for and against himself with the citizens of this state, that, should he go back to his family and leave these affairs unsettled, justice could not be done without treating him as an inhabitant, and suffering the use of this kind of action. It is, therefore, difficult to fix upon any criterion that would be sure to satisfy the mind in all cases that may arise. If a man moves into the state and takes up his residence, with no design of returning, but should in fact move out after a very short residence, there would be no difficulty in deciding him to be an inhabitant while here, for the purposes of the process. But if he comes for a temporary object, with an intention to return, a much longer residence must be required, before there could be a pretense of his being an inhabitant, within the statute." Boardman v. Bickford (Vt.) 2 Aikens, 345, 348.

The word "inhabitant" means a person having an established residence in the place. Rev. St. Me. 1883, p. 59, c. 1, § 6, subd. 7.

Every person shall be considered an inhabitant, for the purpose of electing or being elected into any office or place within the state, in that town, district, or plantation where he dwelleth or hath his home. Const. Mass. c. 1, § 2, art. 2; *Langdon v. Doud*, 88 Mass. (6 Allen) 423, 425, 83 Am. Dec. 641.

"Inhabitants," as used in St. 9 Geo. I, c. 3, relating to attachments, the last clause of which is as follows, "Nothing in this act shall be construed to exempt the goods or effects of any persons not inhabitants of this province from being attached according to the directions of the former act" (St. 4 Anne, c. 28), has a plain meaning. It does not include a person coming into a place occasionally, as the captain of a ship in the course of trade, but it would include a person who has a settled habitation in a place, although he leaves it on occasional business trips to other places. It would also include one who comes into a place from another place to reside, and who introduces his family, takes a house, engages in trade, and contracts debts, though after some time he runs away, with the design of defrauding his creditors. *Barnet's Case* (Pa.) 1 Dall. 152, 153, 1 L. Ed. 77.

#### Absence as affecting.

In determining whether a person is an inhabitant of a place or not, actual residence, with his personal presence in such place, is one circumstance in determining it, but it is far from being conclusive. A seaman on a long voyage and a soldier in actual service may be respectively inhabitants of a place, though not personally present there for years. It depends, therefore, on many other considerations besides actual presence. If the departure from one's fixed and settled abode is for a purpose in its nature temporary, whether it be for business or pleasure, accompanied with an intent of returning and assuming the former place of abode as soon as such purpose is accomplished, in general such a person continues to be an inhabitant at such place of abode for all purposes of enjoying civil and political privileges and of being subject to civil duties. One born and educated and who has acquired his property in a town where he has his dwelling house, though absent in another city as a place of temporary and not of permanent abode—his dwelling house being leased during his absence, together with the furniture, for a very short term, so that his family establishment could be assumed on his return—he intending when he left the city to return, is still an inhabitant of such city, though he take a house for one year in the city to which he went, but did not engage, nor was it his intention to engage, in any business or occupation in such city. *Sears v. City of Boston*, 42 Mass. (1 Metc.) 250, 251.

Though a temporary absence from the state or county of plaintiff during the six

months next preceding the filing of a petition for divorce will not affect his right to maintain it, yet proof that he has been absent from the state almost continually for the preceding six years will bar him from bringing the action, though such absence was without intention to permanently abandon his domicile within the state. *Haymond v. Haymond*, 74 Tex. 414, 12 S. W. 90, 92.

#### As body politic or people.

It by no means follows that an inhabitant is a subject or citizen. A foreigner permanently resident is as much an inhabitant as if he were a citizen or subject. As used in Act Cong. Feb. 20, 1811, authorizing inhabitants of the territory of Orleans to form a constitution and state government, etc., the term "inhabitants" was used merely for the purpose of designating "the mass constituting the body politic, who were authorized to form a state Constitution preparatory to admission into the Union." *State v. Primrose*, 3 Ala. 546, 547.

An inhabitant is one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor, as the inhabitant of a house or a cottage; the inhabitants of a town, city, county, or state. The word "inhabitant" imports citizenship and municipal obligations. As used in a treaty giving citizens of a foreign country the same rights as inhabitants, it means the body politic; the collective political people of the state, having a fixed domicile in the state. *Succession of Givanovich*, 24 South. 679, 680, 50 La. Ann. 625.

"Inhabitants," as used in St. 1817, c. 190, providing that a probate court shall be held in the several counties of the commonwealth for taking the probate of wills and granting administration on the estates of persons deceased, being inhabitants or residents in the same county at the time of their decease, is not synonymous with "residents," and means something more than a person having a domicile. It imports citizenship and municipal relations, whereas a man may have a domicile in a country to which he is an alien, and where he has no political relations. An inhabitant is one who, being a citizen, dwells or has his home in some particular town, where he has municipal rights and duties and is subject to particular burdens; and this habitancy may exist or continue notwithstanding an actual residence in another town or in another county, providing the absence is not so long or of such a nature as to interrupt or destroy the municipal relation previously formed. "Habitation" means something different from mere residence. *Harvard College v. Gore*, 22 Mass. (5 Pick.) 370, 372.

The phrase "inhabitants of such town," as used in Act March 25, 1869, providing that

bonds in aid of a railroad company might be issued by a town with the approval of the inhabitants of such town, in popular signification, means the same as "people of a town," as used in bonds reciting that they were issued in pursuance of a vote of the people of such town. *Walnut v. Wade*, 103 U. S. 683, 693, 26 L. Ed. 526.

#### As citizen.

The term "inhabitant" is not synonymous with "citizen." "Inhabitant" comprehends a single fact—locality of existence; "citizen," a combination of civil privileges, some of which may be enjoyed in any state in the Union. The word "citizen" may properly be construed to mean a member of a political society; and, although he might be absent for years, and cease to be an inhabitant of its territory, the right of citizenship may not thereby be forfeited, but may be resumed whenever he may choose to return. In book 1, c. 19, § 213, Vattel says: "The inhabitants, as distinguished from citizens, are strangers who are permitted to settle and stay in the country. Bound by their residence to the society, they are subject to the laws of the state while they reside there, and they are bound to defend it while it grants them protection, though they do not participate in all the rights of citizens. The term 'inhabitant' is derived from abode and habitation, and not from political privileges." *Spragins v. Houghton*, 3 Ill. (2 Scam.) 377, 392.

"According to the common understanding, there is a plain difference between the meaning of the words 'inhabitant' and 'citizen.' The word 'inhabitant' means one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor. A citizen is a native or naturalized person." The word "inhabitant," as used in Const. art. 6, § 4, prohibiting any one not an inhabitant of a county from being elected to a county office, is not synonymous with the word "citizen," but means an inhabitant. *State v. Kilroy*, 86 Ind. 118, 120.

The word "inhabitant," as used in a statute enacting that a poll tax of 50 cents shall be assessed on every white male inhabitant of the state of the age of 21 years and upward, "and in the popular acceptance of the phrase, means something more than a person having a mere temporary residence; it imports citizenship and municipal relations; and, if the term were less equivocal than it is, it could never be presumed, in the absence of the most explicit enactment, that the Legislature designed to impose a poll tax on the citizens of another state. The idea is repugnant to every principle of sound policy, of just legislation, and of international comity. 'In imposing a tax,' says Chief Justice Marshall, 'the Legislature acts on its con-

stituents.'" *Potter v. Ross*, 23 N. J. Law (3 Zab.) 517, 520.

The Constitution declares that every person shall be considered an inhabitant, for the purpose of electing and being elected into any office, etc., within the state, in that town, district, etc., where he dwelleth or hath his home. Constitutional amendment 1820 confers the right of voting on the citizen who has resided within the town or district, etc. Held, that the descriptions, though differing in terms, are identical in meaning, and that "inhabitant," as used in the original Constitution, is synonymous with "citizen who has resided," as expressed in the amendments; both designating the same person. Both of these expressions are equivalent to, and synonymous with, the term "domicile"; and therefore the right of voting is confined to the place where one has his domicile—his home or place of abode. Opinion of the Justices, 46 Mass. (5 Metc.) 587, 588.

"Inhabitant," as used in the Constitution, providing that the elector of a senator must be an inhabitant of the district in which he votes, and that the elector of a representative must have resided one year in the town before he can be a voter, etc., means such inhabitants and residents only as are citizens. Opinion of the Justices, 7 Mass. 523, 525.

"Inhabitant," as used in Const. Amend. art. 21, requiring a representative to have been next preceding his election an inhabitant of the district for which he is chosen, means dwelling or having his home, and does not include citizenship. Opinion of the Justices, 122 Mass. 594, 599.

The term "inhabitant" does not necessarily imply citizenship, and cannot be substituted for it in an allegation, so as to confer jurisdiction on the courts of the United States by reason of diverse citizenship. *Allen B. Wrisley Co. v. George E. Rouse Soap Co.*, 90 Fed. 5, 6, 32 C. C. A. 496.

In Act Sept. 24, 1789, c. 20, § 11, providing that no civil suit shall be brought against an inhabitant of the United States in any other district than that whereof he is an inhabitant, the term "inhabitant" means citizen. *Ex parte Shaw*, 12 Sup. Ct. 935, 936, 145 U. S. 444, 36 L. Ed. 768.

The word "inhabitants," as used in a treaty between the United States and a foreign monarchical state, must be construed in the same sense as the term "citizens" or "subjects," when applied to persons owing allegiance to the United States, and extends to all persons domiciled in the foreign state. *The Pizarro*, 15 U. S. (2 Wheat.) 227, 245, 4 L. Ed. 226.

Under article 2862, Rev. St., providing that the petitioner for a divorce must be an

"actual, bona fide inhabitant of the state," who has resided in the county where the suit is filed six months next preceding the filing of the suit, an allegation that one is a bona fide citizen of the county, and has been so for more than six months prior to the filing of the petition, is not sufficient. *Haymond v. Haymond*, 12 S. W. 90, 92, 74 Tex. 414.

By the act of 1841, ca. sa. is prohibited from issuing against any citizen of the state without a previous affidavit of fraud, and by the act of 1785 ca. sa. is prohibited from issuing against any inhabitant of the state. It was contended that the act of 1845 was to be construed in connection with the act of 1785, but that, taken together, the restriction intended by the Legislature to be imposed on issuing process to take the body was designed to apply to resident citizens or inhabitants, and that the word "citizen," used in the act of 1841, was to be taken in that sense. It is true, these laws are on the same subject, but they are distinct enactments, applying in terms to different persons—the former to inhabitants, and the latter to citizens—and there is nothing from which it can be collected that the Legislature meant the same thing by both. On the contrary, by the use of different terms not having the same meaning, we are to suppose they mean different things. A man may be a citizen without being an inhabitant of the state, as a man may be an inhabitant without being a citizen. This is not only an obvious distinction, but one which the Constitution, itself makes, as in the qualification of voters it requires both citizenship and residence. *Quinby v. Duncan* (Del.) 4 Har. 383, 384.

The term "inhabitant," as used in an act of Congress providing that no civil suit shall be brought before certain courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ, is a mere equivalent description of citizen and alien. A person might be an inhabitant without being a citizen, and a citizen might be an inhabitant though he retained his citizenship. Alienage or citizenship is one thing; and inhabitancy, by which is understood local residence, *animo manendi*, quite another. *Picquet v. Swan* (U. S.) 19 Fed. Cas. 609, 613.

In *Spragins v. Houghton*, 3 Ill. (2 Scam.) 377, an "inhabitant" was defined to be one who resides in a place, and has there a fixed and legal settlement; and to determine whether one was an inhabitant, within a constitution conferring elective franchises on all white male inhabitants above the age of 21 years who had resided in the state for 6 months, it was wholly unnecessary to inquire whether he was a citizen of the United States, but only necessary to know he was an inhabitant of the state. *Dorsey v. Brig-*

*ham*, 52 N. E. 303, 305, 177 Ill. 250, 42 L. R. A. 809, 69 Am. St. Rep. 228.

The word "inhabitant," in the New Hampshire Constitution, is construed not to include aliens. *Orr v. Quimby*, 54 N. H. 590, 620.

#### Corporation.

An individual is almost universally held to be an inhabitant of the place in which he dwells, and, though he does business for a long time in another place, he will not be regarded as changing his domicile so long as the *animus revertendi* continues. In the case of a corporation, the question of inhabitancy must be determined not by the residence of any particular officers, but by the principal offices of the corporation, where its books are kept and its corporate business is transacted, even though it may transact its most important business in another place. Thus a railway company incorporated under the laws of the state, having its particular office within one district of such state, is an inhabitant of that district, and cannot be sued in another district. *Galveston, H. & S. A. Ry. Co. v. Gonzales*, 14 Sup. Ct. 401, 404, 151 U. S. 496, 38 L. Ed. 248.

The word "inhabitants" is one of great variation of meaning. Primarily it refers to one who is an established or permanent resident of a particular place. An examination of the authorities shows, however, that it is frequently given a much broader meaning than this. Thus in *Tripp v. Merchants' Fire Ins. Co.*, 12 R. I. 435, a mutual insurance company organized under the laws of the state of Rhode Island was considered an inhabitant of the place where its principal office was situated, for the purposes of taxation. In *Ontario Bank v. Bunnell* (N. Y.) 10 Wend. 186, an incorporated bank was held to be an inhabitant of the place where it did business. Other courts have held, however, that the word "inhabitant," as used in statutes, cannot be made to apply to incorporated companies. But as used in Comp. Laws, c. 55, which provides that all inhabitants of the territory who own or possess irrigable lands shall have a right to construct acequias, and section 7, which provides that the person or persons so taking water out of such ditch, etc., the word "person" and "persons" being often used to include corporations, the term "inhabitants" will also be held to apply to corporations. *Slosser v. Salt River Val. Canal Co.* (Ariz.) 65 Pac. 332, 335.

Under Act Cong. March 3, 1887, c. 373, § 1, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508], providing that, except when the jurisdiction is founded only on the fact that the action is between citizens of different states, no civil suit shall be brought against any person by original process or proceeding in any other district than that whereof he is an inhabit-

ant, a corporation is an inhabitant of the place where it has its principal place of business, where its corporate offices and records are kept and its corporate meetings are held. *Gormulley & Jeffrey Mfg. Co. v. Pope Mfg. Co.* (U. S.) 84 Fed. 818, 819.

A corporation may be an inhabitant of the state or county for purposes of taxation. *Davis v. Central R. & Banking Co.*, 17 Ga. 323, 329. See, also, *Zambrino v. Galveston, H. & S. A. R. Co.* (U. S.) 38 Fed. 449. It does not, however, include a bank, with reference to its capital stock. *Cherokee Ins. & Banking Co. v. Justices of Whitfield County*, 28 Ga. 121, 122.

"Inhabitants," as used in Act April 5, 1845, c. 159, § 2, providing that all personal property of the inhabitants of the state shall be subject to taxation, includes bodies corporate as well as natural persons. *Inhabitants of Baldwin v. Trustees of Ministerial Fund*, 37 Me. 369, 372.

Act Cong. Feb. 28, 1839, § 1, which provides that where, in any suit at law or in equity commenced in any court by the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought, etc., it shall be lawful for the court to entertain jurisdiction and proceed to the trial and adjudication of such suit between the parties that may be properly before it, etc., applies as well to corporators as to persons who are not. Hence corporations would come within the meaning of the statute. *Louisville, C. & C. Ry. Co. v. Letson*, 43 U. S. (2 How.) 497, 557, 11 L. Ed. 853.

The popular sense of the word "inhabitant" is the same as resident, or one who lives in a place. An inhabitant necessarily implies a habitation; an abode; a place of dwelling. As used in a statute authorizing the taxation of the stock of any person or persons who are inhabitants of the state, it does not include a corporation, since a corporation has no residence. *Hartford Fire Ins. Co. v. Hartford*, 3 Conn. 15, 24.

#### Same—Foreign corporation.

The term "inhabitant," as used in Act Cong. March 3, 1837, c. 373, 24 Stat. 552, and Act Aug. 13, 1838, c. 866, 25 Stat. 433, 434 [U. S. Comp. St. 1901, p. 507], which provides that no civil suit shall be brought before either the district or circuit courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, etc., would include a corporation, where it had gone into a state other than that under whose laws it had been organized for the purpose of carrying on its business; that is, it would be an inhabitant of the latter state, within the meaning of the section above referred to. *Riddle v.*

*New York, L. E. & W. R. Co.* (U. S.) 39 Fed. 290, 291; *Gilbert v. New Zealand Ins. Co.* (U. S.) 49 Fed. 884, 885, 15 L. R. A. 125; *Miller v. Eastern Oregon Gold Min. Co.* (U. S.) 45 Fed. 345, 348. It would include a corporation organized in England for the purpose of working a mine in the state of Oregon; that is, the corporation would be an inhabitant of Oregon. *Miller v. Eastern Oregon Min. Co.* (U. S.) 45 Fed. 845, 848.

A foreign insurance company, which, in compliance with the laws of the state, has appointed an agent therein, upon whom service may be made, is to be considered an inhabitant of the state, within the meaning of the judiciary act, and may be sued therein in the federal court. *Shainwald v. Davids* (U. S.) 69 Fed. 704, 706.

"Inhabitant" does not include a corporation created by the laws of a state other than that in which the suit is commenced, and maintaining its principal office in the state of its creation. "If an artificial person like a corporation may be an inhabitant of a city or district, it can with most propriety be said to be an inhabitant of the state that created it, or of the state where it keeps its records and principal office, and where its chief officers reside or may most usually be found. These are the tests which should determine the domicile of the corporation. In the case of *Louisville, C. & C. Ry. Co. v. Letson*, 43 U. S. (2 How.) 497, 556, 11 L. Ed. 353, the court said a corporation created by a state seems to us to be a person, though an artificial one, belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state." *Connor v. Vicksburg & M. R. Co.* (U. S.) 36 Fed. 273, 1 L. R. A. 331; *Weller v. Pennsylvania R. Co.* (U. S.) 113 Fed. 502.

In Pub. St. c. 11, § 20, providing that all personal estate within or without the commonwealth should be assessed to the owner in the city or town where he is an inhabitant on the 1st day of May, the word "inhabitant" means one whose domicile is in the place referred to, and cannot be construed to include a foreign corporation, where it has its principal place of business. *Boston Investment Co. v. City of Boston*, 33 N. E. 580, 158 Mass. 461.

#### Domicile.

"An inhabitant is one who has his domicile in a place." *Briscoe v. Southern Kansas Ry. Co.* (U. S.) 40 Fed. 273, 277 (quoting 1 Bouv. Law Dict. 709).

The word "inhabitancy" does not mean the same thing as "domicile," when the latter term is applied to successions to personal estate, but it means a fixed and permanent abode or dwelling place for the time being, as contradistinguished from a mere temporary locality of existence. *Way v. Way*, 64



Ill. 406, 413; *Drew v. Drew*, 37 Me. 398, 391 (citing *In re Wrigley* [N. Y.] 8 Wend. 134).

The words "inhabitant and resident" in a divorce statute relative to the residency and inhabitancy of the plaintiff, do not naturally or necessarily imply that the party, in order to be a resident or inhabitant, must have any established domicile in the state. A person may reside in and be a resident of a place or state for years without acquiring a domicile. *Wallace v. Wallace*, 50 Atl. 788, 792, 62 N. J. Eq. 509.

"Inhabitants," as used in Gen. St. c. 11, §§ 6, 12, providing that, to render persons liable to taxation in the particular municipality, they shall be inhabitants of that municipality on the 1st day of May of that year, means those domiciled in such municipality. *Borland v. City of Boston*, 132 Mass. 89, 98, 42 Am. Rep. 424.

"Inhabitant," as used in Civ. Code Or. § 869, giving to the county courts exclusive power to grant letters of administration on the estate of a person who at or immediately before his death was an inhabitant of the county, has a narrow and more limited significance than "domicile," and implies a personal presence in the county as a dweller therein. *Holmes v. Oregon & C. Ry. Co.* (U. S.) 5 Fed. 523, 527.

"Inhabitant," as used in Civ. Code Or. §§ 1051, 1053, which declares that the jurisdiction to grant letters of administration on the estate of a deceased person is vested in the county courts of the county of which the deceased was at or immediately before his death an inhabitant, means one who has an actual residence in the county, or who is ordinarily personally present there, not merely in itinere, but as a resident and dweller therein. It is not the equivalent of the technical term "domicile." *Holmes v. Oregon & C. R. Co.* (U. S.) 5 Fed. 523, 527.

#### As elector or voter.

In a statute providing that a majority of the inhabitants of the town, to be ascertained by an election, might authorize the issue of bonds, the word "inhabitant" means legal voter. *Walnut v. Wade*, 103 U. S. 683, 693, 26 L. Ed. 526.

In a notice of a town meeting, directed to the inhabitants of the town, "in common parlance and in the forms of notice immemorially used, the word 'inhabitants' imports those who are qualified to act in town meetings." *Baldwin v. Town of North Branford*, 32 Conn. 47, 53.

"Inhabitant," as used in Act Feb. 15, 1869, § 23 (Gen. St. 964), which provides that every inhabitant of the age of 21 years residing in the district (meaning school district), and liable to pay school tax therein,

shall be entitled to vote at any district meeting, is used in the same sense as the word "resident" in the act to provide a general election law, and means a person 21 years of age, who has resided in the state at least 6 months, in the county not less than 40 days, and the school district at least 10 days. *State v. School Dist. No. 9*, 7 N. W. 315, 316, 10 Neb. 544.

Act Cong. May 30, 1850, authorizing the inhabitants of the territory of Nebraska, etc., to form for themselves the constitution and state government, etc., means the free white male inhabitants above the age of 21 years, actual residents of the territory, citizens of the United States, and those who have declared on oath their intention to become such, and shall have taken an oath to support the Constitution of the United States. *State v. Boyd*, 48 N. W. 739, 750, 31 Neb. 682.

Act March 14, 1851 (P. L. p. 270) § 10, providing that an incorporated school district shall not be abolished or altered without a consent of a majority of the taxable inhabitants of the district, means legal voters who are taxable and live within the district, though the word "inhabitants" is sometimes used to signify not the citizens of a state, but those who merely dwell in it. *State v. Deshler*, 25 N. J. Law (1 Dutch.) 177, 179.

#### In grant.

A grant of land for cemetery purposes to the inhabitants of a certain school district in a certain town—the district, as such, being incapable of receiving the land for such purposes—is too indefinite to confer any title upon the inhabitants of such district as individuals; the ascertainment of such individuals not being within the reach of reasonable effort or expenditure. *Hunt v. Tolles*, 52 Atl. 1042, 1043, 75 Vt. 48.

The inhabitants of a town, not being incorporated, are incapable, in law, to take any estate in fee; and the proviso in a deed reserving to the inhabitants of the town of Rochester, which was not incorporated, the right to cut wood on the lands conveyed, when not in fence, was void. And if not, it would only give the right to the inhabitants of a town living at the time of the grant, as the proviso contained no words of perpetuity. *Hornbeck v. Westbrook* (N. Y.) 9 Johns. 73, 75.

A deed conveying land to the inhabitants of New Market, as a body politic and corporate, is a conveyance to the town of New Market, as a corporation. The grant is to the inhabitants in their collective capacity, as a permanent body, and having successors, and with the power to hold the land forever, which is not an unusual mode of describing a municipal corporation. *Town of New Market v. Smart*, 45 N. H. 87, 95.

**Of house.**

"Inhabitant," as used in a statute which makes the act of taking property from a house a less offense, when performed by an inhabitant thereof, than it would be if performed by another person, means one who lodges or boards in the house. *Richardson v. State*, 48 Tex. 456, 457.

**Intention as affecting.**

The term "inhabitant," within the meaning of the attachment laws, includes a person who remains in a state, though he avows an intention to withdraw from it. In *re Casey* (Pa.) 1 Ashm. 126, 127; *Lyle v. Foreman* (Pa.) 1 Dall. 480, 1 L. Ed. 232. But the term as thus used does not mean such an inhabitant as would be an object of domestic attachment. *Bainbridge v. Alderson* (Pa.) 2 Browne, 51, 55.

The word "inhabitant," as used in a statute providing that, when any inhabitant of the state shall remove out of the state and shall leave any moneys belonging to him with any inhabitant of the state, such person is declared to be an absconding debtor, does not mean that the person should have become legally settled in the state by his residence; nor can a man who merely passes through the state be called an "inhabitant." A man may come into the state to accomplish some special object, leaving his family and concerns behind, and return to them as soon as the object of his coming is complete, and his stay in the state be so short that it would be absurd to treat him as an inhabitant. Again, a man may come for a temporary purpose and without his family, and yet tarry so long and do so great a business and contract so many debts that, should he go back to his family and leave those affairs unsettled, justice would not be done without treating him as an inhabitant. If a man moves into the state and takes up his residence with no design of returning, but should in fact move out after a very short residence, there would be no difficulty in deciding him to be an inhabitant while in the state. If he comes for a temporary object with an intention to return, a much longer residence must be required before there could be a pretense of his being an inhabitant. The going to teach a school for three months with an intention of returning, and returning once or twice during such three months, does not make such person an inhabitant of the state. *Boardman v. Bickford* (Vt.) 2 Aikens, 345, 348.

The term "inhabitant," as used in a statute (Nix. Dig. 223, § 1) requiring that a person be an inhabitant of the state in order to bring a suit for divorce therein, would not include a citizen of another state who brought his effects into the state for the purpose of establishing a residence there with a manifest intent of procuring a divorce, and who

immediately commenced a suit for that purpose. *Winship v. Winship*, 16 N. J. Eq. (1 O. E. Green) 107, 109.

A person is not an inhabitant of a city, who, after living and trading there for some years, sails as a supercargo to a foreign country, carrying with him four-fifths of his property, having made a partial assignment of one-fifth for the benefit of his creditors in such city, and engages in new business in the foreign country, and is wholly silent about his return for nine months, though he expressed an intention, when he sailed, of returning in twelve or eighteen months at furthest. *Nailor v. French* (Pa.) 4 Yeates, 241, 242.

A person is no longer an inhabitant of a city who has left it and actually taken up a residence with his family in another country, without any intention of returning, for he assumed that country as his definite abode and place of residence until some new intention had been formed or resolution taken. *Thorndike v. City of Boston*, 42 Mass. (1 Metc.) 242, 247.

**As landholder.**

"Inhabitant," as used in the statute of Henry the Eighth concerning bridges and highways, and providing that bridges and highways shall be made and repaired by the inhabitants of the city, shire, or riding, etc., has been construed to include those who hold lands within the city where the bridge to be repaired lies, though they reside elsewhere. *Bank of United States v. Deveaux*, 9 U. S. (5 Cranch) 61, 88, 3 L. Ed. 88.

**Minor.**

The word "inhabitant" has many meanings. It has been construed to mean an occupant of lands, a resident, a permanent resident, one having a domicile, a citizen, a qualified voter. Its construction has generally been governed by the connection in which it is used. It was held that Act March 22, 1831, requiring the collector of taxes to sell a portion of the school lands located in a township, on the petition of the majority of the male inhabitants of the township, did not include infants under the term "inhabitants." *Brown v. Rushing*, 66 S. W. 442, 446, 70 Ark. 111.

"Inhabitant," as used in laws relating to paupers, would include a minor. *Town of Canton v. Town of Simsbury*, 6 Atl. 183, 184, 54 Conn. 86; *Town of New Hartford v. Town of Canaan*, 5 Atl. 360, 361, 54 Conn. 39; *Town of New Haven v. City of Bridgeport*, 37 Atl. 397, 68 Conn. 588.

**Pauper on poor farm.**

As used in Gen. St. c. 83, § 1, providing that no person shall have a right to attend school or to send any scholar to the school in

any district in which he is not an inhabitant, without the consent of the district, etc., "inhabitant" includes paupers supported at the county poor farm, and hence their minor children have the right to attend the public school in the district in which such poor farm is located. *School Dist. No. 2 v. Pollard*, 55 N. H. 503, 505.

#### Permanency implied.

The term "resident and inhabitant," in Poor Laws 1896, § 40, providing that every person of full age who shall be a resident and inhabitant of any city for one year, and the members of his family who have not gained a separate settlement, shall be deemed settled in such city, means the locality as permanent and permanently fixed as is legally conveyed by the word "domicile." *City of Syracuse v. Onondaga County*, 55 N. Y. Supp. 684, 636, 25 Misc. Rep. 371.

"In law the term 'inhabitant' is used technically with varying meaning in respect of permanency of abode. Cent. Dict. To be an inhabitant does not imply the relation of the inhabitant to the commonwealth. It refers primarily to one's abode or residence for the time being. If one is not an inhabitant, it is understood that he has no abode in the place spoken of." Thus a showing that defendant is not an inhabitant of the state is a sufficient compliance with Act Ky. Dec. 19, 1796, authorizing service by publication in certain cases on proof that defendant is out of the commonwealth, as the latter term implies one permanently out, as a nonresident or noninhabitant. *Foster v. Givens* (U. S.) 67 Fed. 684, 693, 14 C. C. A. 625.

"Inhabitant," as used in 3 Rev. St. (Banks' 8th Ed.) p. 2111, § 29, providing that every person of full age who shall be a resident and inhabitant of any town for one year shall be deemed settled in such town, means one possessing a locality of existence as permanent and firmly fixed as is legally conveyed by the word "domicile." Webster defines an "inhabitant" as "a settler; one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor, as an inhabitant of a house or cottage; the inhabitants of a town, county, city, or state, etc." Italian laborers who come to the United States in search of work, leaving their families in Italy, and are employed in constructing railroads, liable to be discharged at any time, and free to leave their employment when they see fit, and living in rough shanties built by the railroad contractors, are not inhabitants of the town in which they work for a year. *In re Town of Hector*, 24 N. Y. Supp. 475, 476.

As used in Rev. St. tit. 1, c. 21, providing that in actions on joint contracts, if all the defendants are not inhabitants of this

state, the service of a process on such as are inhabitants shall be sufficient notice to maintain a suit against all, "should be held to include, by a fair and liberal construction, every person who is in the state, whether here for a longer or shorter period." It does not require a permanent residence or domicile in the state. *Bishop v. Vose*, 27 Conn. 1, 9.

"Inhabitant," as used in Code, § 2304, providing that letters of administration shall be granted in the county in which the deceased was an inhabitant at the time of his death, is a synonym for "domiciliary resident," or one who has his domicile in a given place in the county; and the word "domicile" may be defined to be a residence at a particular place, accompanied by an intention, either positive or presumptive, to remain there permanently or for an indefinite length of time. The word "inhabitant" has been defined by Bouvier to be "one who has his domicile in a place; one who has an actual fixed residence in a place"; and in *Long v. Brown*, 4 Ala. 622, 630, it was defined as a "resident or dweller in a place, in opposition to a mere sojourner or transient person." *Merrill's Heirs v. Morrissett*, 76 Ala. 433, 437.

#### As where one sleeps.

In a case involving the settlement of a man, it was said that "a man properly inhabits where he lies; as in the case where the house is in two lots, he is to be summoned to that in which his bed is." *Parish of St. Mary Colechurch and Radcliffe*, 1 Strange, 60.

#### As resident.

The word "inhabitant" is synonymous with the word "resident." *Bell v. Pierce* (N. Y.) 48 Barb. 51, 53; *United States v. Penelope* (U. S.) 27 Fed. Cas. 486, 487; *Helle v. Durfield Tp.*, 96 Ill. App. 642, 643.

The word "inhabitant" implies a more fixed and permanent abode than "resident." *Howard v. Citizens' Bank & Trust Co.* (U. S.) 12 App. Cas. 222, 235 (citing *Frost v. Brisbin* [N. Y.] 19 Wend. 11, 32 Am. Dec. 423); *McFarlane v. Cornelius*, 73 Pac. 325, 329, 43 Or. 513; *In re Hughes* (N. Y.) 1 Tuck. 38.

In a statute which mentions "inhabitant" as well as "occupier," "inhabitant" must mean "resident," otherwise it would for this purpose mean the same as "occupier." *Rex v. Nicholson*, 12 East, 330, 345.

The words "inhabitant" and "resident," as used in Gen. St. 1901, § 2806, providing that upon the decease of any inhabitant of the state letters testamentary or letters of administration upon his estate shall be granted by the probate court of the county in which the deceased was an inhabitant or resident at the time of his death, are synonymous, and therefore but one court is pos-

assed of jurisdiction to administer the estate of a deceased—the probate court of the county of his residence at the time of his death. *Ewing v. Mallison*, 70 Pac. 369, 371, 65 Kan. 484, 93 Am. St. Rep. 299.

The word "inhabitant," as used in Act Cong. March 3, 1887, c. 373, § 1, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433, 434 [U. S. Comp. St. 1901, p. 507], providing that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, means in the sense of a "resident." It comprehends locality of existence, the dwelling place where one maintains his fixed and legal settlement, not the casual and temporary abiding place required by the necessities of present surrounding circumstances. A mere sojourner is not an "inhabitant" in the sense of the act. *Bicycle Stepladder Co. v. Gordon* (U. S.) 57 Fed. 529, 531.

In the several provincial statutes of 1692, 1701, and 1767, in reference to settlements for the purpose of the poor laws, the terms "coming to sojourn or dwell," "being an inhabitant," "residing, and continuing one's residence," and "coming to reside and dwell," are frequently and variously used, and we think they are used indiscriminately as to mean the same thing, namely, to designate the place of a person's domicile. This is defined in Const. c. 1, § 1, for another purpose, to be the place where one dwelleth or hath his home. *Inhabitants of Abington v. Inhabitants of North Bridgewater*, 39 Mass. (23 Pick.) 170, 176.

The term "inhabitant," as used in 1 Rev. St. p. 122, § 34, providing that every office shall become vacant on the incumbent ceasing to be an inhabitant of the state, or, if the office be local, for the district, county, town, or city for which he shall have been chosen or appointed, is synonymous with "resident," and means being domiciled in or having his home in the place mentioned. *People v. Platt*, 3 N. Y. Supp. 367, 369, 50 Hun, 454.

A statute provided that whenever a majority of the taxable "inhabitants" of any unincorporated town or village should petition the county board that they be incorporated as a village, and, if such county board should be satisfied that a majority of the taxable inhabitants of the proposed town have signed such a petition, and that the prayer of the petitioners is reasonable, and that the residents number 200 or more, the board of commissioners may declare such village incorporated. The order of incorporation recited that the petition for incorporation was signed by 428 taxable male residents, and the order recited that the petition was signed by a majority of all taxable inhabitants of said proposed city. It was contended that, as the words "actual residents" did not appear in

the order, it was not sufficient. But it was held that, as it was shown that 428 taxable inhabitants signed the petition, and the word "inhabitant" is defined to mean a resident, such fact was a sufficient finding that such petitioners were actual residents. *City of Wardner v. Pelkes* (Idaho) 69 Pac. 64, 67.

"Inhabitant" is not synonymous with "resident," for it implies a more fixed and permanent abode than the term "resident," and frequently imports many privileges and duties which a mere resident could not claim or be subject to. Approved lexicographers give a more fixed and definite character to the place of abode of an inhabitant than to a resident. *Frost v. Brislin* (N. Y.) 19 Wend. 11, 12, 32 Am. Dec. 423; *Tazewell County Sup'rs v. Davenport*, 40 Ill. 197, 204. There is a marked difference in the meaning of the terms "resident" and "inhabitant," growing out of their respective rights and duties. *Tazewell County Sup'rs v. Davenport*, 40 Ill. 197, 204.

The word "inhabitant," in statutes, may be construed to mean a resident in any place. *Horner's Rev. St. Ind.* 1901, § 240, subd. 4.

The word "inhabitant" may mean a resident in any city or town. *Rev. Laws Mass.* 1902, p. 88, c. 8, § 5, subd. 5.

The word "inhabitants," when used in a statute, may be construed to mean a resident of a city, township, village, district, or county. *Comp. Laws Mich.* 1897, § 50 subd. 6.

The word "inhabitant," when used in statutes, may mean a resident or person dwelling and having his home in any city, town, or place. *Pub. St. N. H.* 1901, p. 63, c. 2, § 6.

The word "inhabitant" shall be construed to mean a resident in the particular locality in reference to which that word is used. *Rev. St. Wis.* 1898, § 4971.

The word "inhabitant," in statutes, may be construed to mean a resident in another place. *Rev. Code Del.* 1893, p. 43, c. 5, § 1, subd. 4.

#### Resident trustees.

The term "inhabitants," in *Pub. Acts* 1893, No. 206, § 8, subd. 6, declaring that, for the purposes of taxation, personal property "shall include all credits of every kind belonging to the inhabitants of this state," includes resident trustees in whom is vested the absolute legal title to choses in action. *City of Detroit v. Lewis*, 66 N. W. 958, 960, 109 Mich. 155, 163, 32 L. R. A. 439.

#### As taxpayer.

An allegation that a justice of the peace is a "lawful inhabitant and citizen" of a town does not import that he was liable to pay

taxes, and therefore interested in a cause or matter before him in which the town was interested. *Pierce v. Butler*, 16 Vt. 101, 105.

"Inhabitants," as used in a charter of 6 Edw. VI, granting that the inhabitants of the village of S., within the parish of C., should have a chapel for all the said inhabitants, with a chaplain to be paid out of the profits of the vicarage of C., and that the inhabitants of S. should not be charged toward the support of the church at C. otherwise than the other inhabitants of C., meant inhabitants paying church and poor rates. *Rex v. Davie*, 6 Adol. & E. 374.

#### Temporary presence or residence.

A person is said to be an "inhabitant" of a place when he is ordinarily personally present there, not merely in itinere, but as a resident and dweller therein. A person may be an inhabitant of one country and a citizen or subject of another. *Miller v. Eastern Oregon Gold Min. Co.* (U. S.) 45 Fed. 345, 348.

"Inhabitant" is derived from the Latin "habito," and signifies to live in, to dwell in; and is applied exclusively to one who lives in a place, and has there a fixed and legal settlement. It embraces locality of existence. It refers to the place of a person's actual residence, and excludes the idea of an occasional or temporary residence. *Spragins v. Houghton*, 3 Ill. (2 Scam.) 377, 383.

As used in Gen. St. c. 11, § 12, providing that all personal estate within or without the state shall be assessed to the owner in the city or town where he is an inhabitant on the 1st day of May, "inhabitant" does not mean any man who may happen to be personally in the town on such date, but means a man who has a home in a place; any man who has there established a permanent home for himself and family, if he has one; who there performs his municipal duties and exercises his municipal rights, and thus, as well as in other matters, identifies himself with the town as his home. *Thayer v. City of Boston*, 124 Mass. 132, 136, 26 Am. Rep. 650.

As used in Act April 11, 1866, § 6, which provides that the tax on personal property shall be assessed upon each inhabitant liable to a tax in the township or ward where he resides, etc., "inhabitant" means one who has his domicile or fixed habitation and home, from which he has no present intention of removing, in the ward or township. It does not include one who has an actual but merely temporary residence in the ward or township. *Sharp v. Casper*, 36 N. J. Law (7 Vroom) 367, 368 (citing *State v. Ross*, 23 N. J. Law [3 Zab.] 517; *Story, Const. Law*, §§ 41, 43).

No exact definition can be given of the word "inhabitant" as applicable to all cases. It was said in *Brown v. Rushing*, 66 S. W.

442, 446, 70 Ark. 111, that "inhabitant" has many meanings. It has been construed to mean an occupier of lands, a resident, a permanent resident, one having a domicile, a citizen, or a qualified voter. As used in a statute providing for the prohibition of the sale of intoxicating liquors in a district on petition of a majority of the adult inhabitants, a person having a fixed place of abode within the district for a definite time only is not an inhabitant. *Wilson v. Lawrence* (Ark.) 69 S. W. 570, 572.

As used in Rev. St. c. 7, § 9, providing that all personal estate shall be assessed to the owner in the town where he shall be an inhabitant on the 1st day of May, "inhabitant" means one who dwells and has his home in the town for the purpose of voting and being voted for; and, as one dwells and has his home where he has his domicile, most of the rules of the law of domicile apply to the question whether one is an inhabitant. Where a native of a town removed to another city, where he resided for several years, and then returned to the first town, and continued an inmate of his father's family for several years, during the whole of which time he frequently expressed an intention of leaving the town and removing to some other city or country, which he did on April 5th, going to another city intending to sail for Europe, and either to fix his residence in Paris or return to New York, but instead of sailing from New York returned to Boston, his native city, on the 7th of May, and sailed for Europe, he was an inhabitant of Boston on May 1st for the purpose of taxation. *Otis v. City of Boston*, 66 Mass. (12 Cush.) 44, 48.

#### INHABITED BUILDING.

Any building which has usually been occupied by any person lodging therein at night is an "inhabited building." Pen. Code Idaho 1901, § 4924; Gen. St. Minn. 1894, § 6675; Rev. St. Utah 1898, § 4328; Pen. Code Cal. 1903, § 449; *State v. Collins*, 31 Pac. 1048, 3 Idaho (Hasb.) 467.

An "inhabited building" is any building, any part of which has usually been occupied by any person lodging therein at night. Rev. St. Okl. 1903, § 2412; Pen. Code N. Y. 1903, § 494; Rev. Codes N. D. 1899, § 7384.

#### INHABITED DWELLING HOUSE.

The characterization of a burned building as an "inhabited dwelling house," in a prosecution for arson under Code 1886, § 3780, making burning of any inhabited dwelling house arson, whether there is at the time in such dwelling house any human being or not, sufficiently describes the nature of the property; and an averment that there was at the time no human being in the house is surplusage, as it is not descriptive of any ele-

ment of the offense. *Paine v. State*, 8 South. 133, 89 Ala. 28.

## INHALE—INHALATION.

Looking alone to the etymology of the word "inhale," and to its ordinary dictionary definition, it means to draw in, as air into the lungs, and to inspire, as to inhale air—a process of life that goes on whether sleeping or waking; and in such sense it may be said that a person, when sleeping, breathes the air without any volition or intelligent action. As used in an insurance policy declaring that the insurance does not cover injuries or death resulting from anything accidental or otherwise taken, administered, or "inhaled," it means a voluntary and intelligent act by the insured, and not an involuntary and unconscious inhalation. *Lowenstein v. Fidelity & Casualty Co. of New York* (U. S.) 88 Fed. 474, 478; *Mennelly v. Employers' Liability Assur. Corp.*, 43 N. E. 54, 55, 148 N. Y. 596, 31 L. R. A. 686, 51 Am. St. Rep. 716; *Id.*, 25 N. Y. Supp. 230, 231, 72 Hun, 477; *Fidelity & Casualty Co. of New York v. Waterman*, 44 N. E. 283, 284, 161 Ill. 632, 32 L. R. A. 654; *Id.*, 59 Ill. App. 297, 299. An accidental asphyxiation by illuminating gas which escaped into the room where insured slept was not within such clause in an accident policy. *Fidelity & Casualty Co. of New York v. Waterman*, 44 N. E. 283, 284, 161 Ill. 632, 32 L. R. A. 654; *Paul v. Travelers' Ins. Co.*, 20 N. E. 347, 349, 112 N. Y. 472, 8 L. R. A. 443, 8 Am. St. Rep. 758.

"Inhalation of gas," as used in an accident insurance policy excepting death caused by inhalation of gas from its indemnity, does not apply to a cause of death resulting from asphyxia caused by involuntarily inhaling gas accumulated at the bottom of a well. *Pickett v. Pacific Mut. Life Ins. Co.*, 22 Atl. 871, 872, 144 Pa. 79, 13 L. R. A. 661, 27 Am. St. Rep. 618.

## INHERENT.

When examining a body of systematic law in order to determine whether certain characteristics are substantial or merely accidental, language is used according to the subject-matter, and in such a connection the word "inherent" does not import a physical, moral, or mathematical necessity, but rather a scientific fitness and congruity, having regard to inveterate usage, historical development, and the nature of legal things. *Flanigan v. Guggenheim Smelting Co.*, 44 Atl. 762, 764, 63 N. J. Law, 647.

## INHERENT POWER.

The courts of justice possess powers which were not given by legislation, and

which no legislation can take away. These are "inherent powers" resident in all courts of superior jurisdiction. These powers spring not from legislation, but from the nature and constitution of the tribunals themselves. Among the inherent powers of a court of superior jurisdiction is that of maintaining its dignity, securing obedience to its process and rules protecting its officers and jurors from indignity and wrong, rebuking interference with the conduct of business, and punishing unseemly behavior. *Little v. State*, 90 Ind. 338, 339, 46 Am. Rep. 224.

The "inherent powers" of a court are an unexpressed quantity and undefinable term, and courts have indulged in more or less loose explanations concerning it. It must necessarily be that the court has inherent power to preserve its existence, and to fully protect itself in the orderly administration of its business. Its inherent power will not carry it beyond this. *In re Waugh*, 72 Pac. 710, 32 Wash. 50.

The power vested in a constitutional court, such as a circuit court, of maintaining its existence and dignity by punishing those who assume to treat it with contempt, has often been held an inherent one, and exists independently of statute. *Hawkins v. State*, 125 Ind. 570, 573, 25 N. E. 818, 819.

The power to punish for direct contempt is inherent in all courts of superior jurisdiction. This power is not conferred by legislation, but is an inherent power residing in all superior courts. It is a power that the Legislature can neither create nor destroy. It is as essential to the preservation of the existence of courts as is the natural right of self-defense to the preservation of human life. *Holman v. State*, 5 N. E. 556, 557, 105 Ind. 513.

The power to protect itself from contempt, and also to determine what is a contempt, is inherent in every court of superior jurisdiction, and it is not in the power of legislation to prevent the one or to abridge the other. *Cheadle v. State*, 110 Ind. 301, 309, 11 N. E. 428, 430, 59 Am. Rep. 199 (citing *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224).

That courts possess inherent powers not derived from any statute is undeniably true. Among these powers are the right to correct their records so as to make them speak the truth, to pass upon the constitutionality of statutes, to prevent the abuse of their authority or process, and to enforce obedience to their mandates. *Sanders v. State*, 85 Ind. 818, 328, 44 Am. Rep. 29.

The power of courts of general jurisdiction to grant equitable relief is not only conferred by our Code of Practice, but has

often been recognized as among their inherent powers necessary to the complete administration of justice. *Ratliff v. Stretch*, 80 N. E. 30, 31, 130 Ind. 282, 284.

The power to grant an appeal upon a proper application, notwithstanding the statutory limitation, where the appeal within the time limited by law is prevented by the fraud of the appellee or his counsel, exists not by virtue of legislation, but by virtue of the inherent right of every superior court to maintain its dignity and independence and to control its process and maintain its inherent jurisdiction. *Smythe v. Boswell*, 117 Ind. 365, 368, 20 N. E. 263, 264.

Among the inherent powers of a court is that of vacating judgments entered by mistake, of relieving against judgments procured by fraud, and of annulling sales and entries of judgments, satisfactions of judgments, and decrees. *Curtis v. Gooding*, 99 Ind. 45, 46.

#### INHERENT RIGHT.

The Bill of Rights of the state of Arkansas provides: "All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying life and liberty, of acquiring possession and protecting property and reputation, and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the government." The term "inherent and inalienable rights," as used in said Bill of Rights, undoubtedly includes the right to purchase, lease, and cultivate lands, and to perform honest labor for wages with which to support one's self and family. A conspiracy between two or more persons to prevent negro citizens from exercising the right to lease and cultivate land because they are negroes is a conspiracy to deprive them of a right secured to them by the Constitution and laws of the United States, within the meaning of Rev. St. § 5508 [U. S. Comp. St. 1901, p. 3712], which provides that, if two or more persons conspire to injure, oppress, threaten, or intimidate any persons in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, they shall be fined, etc. *United States v. Morris*, 125 Fed. 322, 326.

#### INHERIT.

Inherit as applicable to personalty, see "Inheritance."

Inheritable capacity distinguished from legitimacy, see "Legitimacy."

To "inherit" is to take as an heir at law by descent or distribution. *Warren v. Pres-*

*cott*, 24 Atl. 948, 949, 84 Me. 483, 17 L. R. A. 435, 30 Am. St. Rep. 370; *Lyon v. Lyon*, 88 Me. 395, 405, 34 Atl. 180.

The word "inherited," as applied to real estate, implies taking immediately from the testator upon his death as heirs. *McArthur v. Scott*, 5 Sup. Ct. 652, 661, 113 U. S. 340, 28 L. Ed. 1015.

"Inherit," as used in a will directing that testator's grandchildren are to inherit equally as one of his heirs at law, means to take by law and not under the will, as one of the heirs at law of the estate. *Cochran v. Elwell*, 19 Atl. 672, 674, 46 N. J. Eq. (1 Dick.) 333.

The words "inherit" and "heir," in a technical sense, relate to right of succession to the real estate of a person dying intestate. And when used in a statute, as well as in a will or other instrument, they will be taken to have been employed in their legal sense. So it is held that the use of the words "inherit" and "heir" in statutes relative to legitimation, and declaring that the persons legitimated shall become the heirs of the putative father and shall inherit in the same manner as if born in lawful wedlock, is to be construed as conferring upon the persons so legitimated all the rights of inheritance and succession that would attach to them had they been born in lawful wedlock. *Swanson v. Swanson*, 32 Tenn. (2 Swan) 446, 457.

#### Nontechnical sense.

The word "inherit," when confined to the definition as accepted in law, is applicable only to a right of possession as vested in a lineal heir. The word was held not to be used in such sense in a paper in which the signers pledged themselves that the beneficiary should inherit a certain sum from a certain one of them within 30 days of his death, but the instrument was held to operate to make such sum a claim against the estate of the person from whom the beneficiary was to receive the money. *Donald v. Forger*, 55 N. Y. Supp. 579, 580, 28 Misc. Rep. 16.

The word "inherit," as used in a clause in the will which, after providing that the estate shall be divided in single parts among my children or their heirs, provides that the issue of the children dying shall inherit the share of its parent, is not used as a word of limitation to indicate that the issue of the dead child shall take from and through the parent and not from a testator, but loosely in lieu of "take." *Dohn's Ex'r v. Dohn*, 62 S. W. 1033, 1036, 110 Ky. 884.

In a similar case it was held that the word "inherit," as thus used, was not to be taken in its strict sense as taking by descent, but merely as equivalent to "take," since in

its strict sense the word "inherit" would be wholly inappropriate to a devise. *Harris v. Dyer*, 28 Atl. 971, 972, 18 R. L. 540.

The word "inherit," as used in an antenuptial agreement, evidenced by a writing made after the marriage between the husband and wife, both of whom had children by a former marriage, that neither of the parties should inherit any claim, right, or interest in or to any estate of the other, will not be used in its strict technical sense, but in the sense of "take" or "have," and thus the wife was excluded from taking a dower interest in the husband's estate. *Kohl v. Frederick*, 88 N. W. 1055, 115 Iowa, 517.

"Inherit," as used in a devise as follows, "All my estate, both real and personal, that I shall inherit as my portion after my father's decease," means to become possessed of, and is not used in its technical sense. *Graham v. Knowles*, 21 Atl. 398, 399, 140 Pa. 325.

The words "be inherited by," in a will in which testator devises a residue of his estate during the devisee's natural life, and directs that at her decease such portion shall be inherited by her surviving issue, etc., was construed to be the equivalent of "go to," or "be received by." *Hill v. Giles*, 50 Atl. 758, 759, 201 Pa. 215.

## INHERITANCE.

See, also, "Estate of Inheritance."

An inheritance is an estate descended to the heir immediately on the death of the ancestor by virtue of his right or representation as a descendant. It is cast upon the latter by operation of law. This is the ordinary, well-known signification of the word, and it is so used in the statutes providing that if a person die leaving several children, or leaving one child and the issue of one or more other children, and any such surviving children shall die under age, and not having been married, all the estate that came to the deceased child by inheritance from such deceased parents shall descend in equal shares to the other children; and hence the statute does not affect a devise. In *re Donahue's Estate*, 36 Cal. 329, 332.

The term "inheritance," as used in Const. art. 15, § 5, providing that the property and pecuniary rights of every married woman at the time of marriage, or after acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of the husband, "is in legal parlance the exact equivalent of 'descent.'" *Starre v. Hamilton* (U. S.) 22 Fed. Cas. 1107, 1111.

"Inheritance" is the estate in real property which the law, immediately on the an-

cestor's decease, casts on the heir. Appeal of *Dodge*, 106 Pa. 216, 220, 51 Am. Rep. 519 (citing 2 Minor, Inst. 452; 2 Bl. Comm. 201); *Barclay v. Cameron*, 25 Tex. 233, 241.

The word "inheritance" signifies real property descended as prescribed by law. Code Civ. Proc. N. Y. 1899, § 2514, subd. 13.

The share of the decedent's estate to which a married woman succeeds as next of kin is property coming to her by "inheritance," within the meaning of the statute making such property her separate property. *Horner v. Webster*, 33 N. J. Law (4 Vroom) 387, 391.

### As appropriate to homestead.

"Inheritance," as used in Comp. Laws, § 678, providing that in all cases where the deceased leaves a wife the inheritance shall not pass therefrom so long as the name of the dead shall be perpetuated thereon, applies more appropriately to the homestead than to anything else. *Dooly v. Stringham*, 7 Pac. 405, 407, 4 Utah, 107.

### As applicable to personality.

The words "descend," "inherit," and "inheritance," in the statutes in reference to the estates of decedents, ordinarily relate to real estate; but while this is true, it is in the power of the Legislature to give them a different inflection, and expand their meaning. The words "descend," "inherit," and "inheritance," in their broader meaning, are frequently applied to personal property. *Rountree v. Pursel*, 39 N. E. 747, 749, 11 Ind. App. 522.

The word "inheritance" cannot properly be applied to anything but real estate. Personal property of an unsubstantial character, such as household furniture, is not within the meaning of the term. In *re Griffiths' Estate* (Pa.) 1 Lack. Leg. N. 311.

While in the strict legal signification of the term "inheritance" as formerly employed, and as may now appear when so intended, it refers to the devolution of realty, yet, as has been often held in its popular acceptation, personal property is also included, and in meaning is as broad as the word "succession." Citing *Horner v. Webster*, 33 N. J. Law (4 Vroom) 387; *Swanson v. Swanson*, 32 Tenn. (2 Swan) 460; *Adams v. Akerlund*, 168 Ill. 632, 48 N. E. 455; *Fort v. West*, 44 Pac. 104, 14 Wash. 10; In *re Donahue's Estate*, 36 Cal. 329. Hence, as used in a release by a daughter of all the "inheritance" by her father and mother, property of every description will be included. *Stolenburg v. Diercks*, 90 N. W. 525, 526, 117 Iowa, 25.

The word "inheritance," as used in 1 Hill's Code, § 1480, subds. 6, 7, relating to the descent of the property of the deceased, an unmarried minor, applies to both real and



personal property. It was contended that the word "inheritance" can only apply to lands, but this argument would carry with it the proposition that if, in administering upon the estate of the father, it had become necessary to sell the land, and part of the proceeds had remained and had been distributed to the child, it would have been regarded as personalty, and therefore not taken by inheritance. This would give rise to an inconsistency, and a result not contemplated by the Legislature. The old, refined, or sentimental reason for the distinction drawn between the descent of lands and the descent of personal property does not exist in this country. When the rule originated, real estate did not change hands as frequently as it does at the present day with us, but was usually kept in the same family on the male side from generation to generation. Here land is looked upon more as a commodity and as a common subject of bargain and sale, and hence a more extended meaning has been given by other courts to the word "inheritance." *Fort v. West*, 44 Pac. 104, 105, 14 Wash. 10.

At common law, "inheritance" is a word technically applicable to an estate in land. But the word "inherit," in a statute providing that bastards shall be capable of inheriting from and through their mothers, obviously has a more enlarged signification, and embraces all classes of property, real, personal, and mixed. And the right to inherit imports the capacity to take not only land, but, in addition thereto, personal and mixed property. *Blair v. Adams* (U. S.) 59 Fed. 243, 244.

The word "inheritance," as used in statute defining the relation of parent and adopted child, giving them the right to inheritance, is not used in its strict meaning, as referring only to real estate, but in its broad sense, as the right to both real and personal property of which the parent died seised or owning. *Simmons v. Burrell*, 28 N. Y. Supp. 625, 635, 8 Misc. Rep. 388.

Testator gave to his wife an interest in his land during her life, in lieu of dower, for her support, and then provided that at her death and on his youngest child coming of age the same should be sold and the proceeds divided among his seven youngest children, their heirs and assigns, forever, and that "if one or more of the children should die before "inheriting his, their, or her inheritance, to be equally divided amongst the remainder of the seven." Held, that the words "inheriting" and "inheritance" refer to the same thing—the distributive share of the proceeds arising from the sale of the land. Those words could not refer to title by descent, since the children could not take their share until long after the death of the testator, whereupon the title that descended

to all his children was not the legal title to the land, but the right to the proceeds arising from its sale. *Ridgeway v. Underwood*, 67 Ill. 419, 426.

#### As property.

See "Property."

#### Succession as well as descent.

Bouvier defines the term "inheritance" as follows: "A perpetuity in lands to a man and his heirs; the right to succeed to the estate of a person who dies intestate. The term is applied to lands. Property which is inherited is called an 'inheritance.' The term 'inheritance' includes not only lands, tenements, etc., which have been acquired by descent, but every fee simple or fee tail which a person has acquired by purchase may be said to be an inheritance, because the purchaser's heirs may inherit it." He also says that in the civil law the term means "the succession to all the rights of the deceased. It is of two kinds, that which arises by testament, when the testator gives his property to a particular person, and that which arises by operation of law, which is called 'succession ab intestato.'" Inheritance has also been defined to be "an estate which descends or may descend to the heir upon the death of the ancestor." Estates of freehold are estates of inheritance, absolute or limited. 2 Bl. Comm. 104, 120; 10 Am. & Eng. Enc. Law, 777. The word "inheritance," in its usual legal acceptation, applies to lands descended. In its popular acceptation it includes all the methods by which a child or relation takes property from another at his death except by devise, and includes as well succession as descent. *Adams v. Akerlund*, 48 N. E. 454, 457, 168 Ill. 632 (citing *Horne v. Webster*, 33 N. J. Law [4 Vroom] 418).

In law, the word "inheritance" is defined to be the estate cast upon the heir at law immediately upon the death of the ancestor; in a more general sense, any property passing by death to those entitled to succeed. Cent. Dict. That which is to be inherited; whatever is transmitted by descent or succession. Standard Dict. And such is the meaning in the Revised Statutes of 1898, § 4024: "Provided that an adopted child shall be deemed for purposes of inheritance and succession of such child the same to all intents and purposes as if the child had been born in lawful wedlock of such parent by adoption." *Glascott v. Bragg*, 87 N. W. 853, 854, 111 Wis. 605, 56 L. R. A. 828.

#### INHERITANCE BY RIGHT OF REPRESENTATION.

Inheritance or succession by right of representation is the taking by the descendants of a deceased heir of the same share or right

In the estate of another person as their parent would have taken if living. Rev. Laws Mass. 1902, p. 1267, c. 133, § 6. Rev. Codes N. D. 1899, § 3737, provides, in addition, that posthumous children are considered as living at the death of their parents.

### INHERITANCE TAX.

See "Collateral Inheritance Tax."

"It is well settled that inheritance taxes are not taxes on property or persons, but on the transfer or passing of legacies or distributive shares. For the privilege to bequeath property the state exacts a certain percentage thereof, which must be deducted before it reaches the hands of the beneficiary. In re Hoyt, 76 N. Y. Supp. 504, 505, 87 Misc. Rep. 720 (citing *United States v. Perkins*, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 287; *Knowlton v. Moore*, 20 Sup. Ct. 747, 178 U. S. 41, 44 L. Ed. 969; In re *Swift's Estate*, 32 N. E. 1096, 137 N. Y. 77, 18 L. R. A. 709); In re *Gihon's Estate*, 62 N. E. 561, 169 N. Y. 448.

An inheritance tax is not one on property, but on the succession. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege—and therefore the authority which confers it may impose conditions upon it. From these provisions it is deduced that the states may tax the privilege, discriminate between relatives and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation. *Black v. State*, 89 N. W. 522, 528, 113 Wis. 205, 90 Am. St. Rep. 853 (quoting *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037).

### INHUMAN TREATMENT.

Cruel and inhuman treatment, see "Cruelty."

Inhuman treatment which is a sufficient foundation for a divorce is such conduct as endangers the plaintiff's life. *Whaley v. Whaley*, 27 N. W. 809, 68 Iowa, 647; *Freerking v. Freerking*, 19 Iowa, 84, 36.

### INHUMAN TREATMENT ENDANGERING LIFE.

"Treatment endangering the life" of the wife, made a ground for divorce by statute, may be of such a nature either because of the physical violence involved, which in itself endangers life, or because of the effect which it has on the wife in impairing her health. Mere cruel treatment is not within the statute. *Wells v. Wells*, 89 N. W. 98, 116 Iowa, 59.

A divorce will not be granted a wife on the ground of inhuman treatment endangering the life, where the treatment complained of consisted in the use of profane and indecent language, false accusations of unchastity, and threats against her life in the presence of their child, no physical violence being shown, when such language was provoked by the undignified and improper conduct of the wife with other men. *Evans v. Evans*, 48 N. W. 809, 82 Iowa, 462.

A statute providing that inhuman treatment which "endangers the life" of the wife is ground for divorce should be construed to include ill treatment which endangers the health of the wife. To impair health is to endanger life. To do an act involving injury to the health of a party is ex necessitate to endanger life. True, it may not endanger or involve the life at once. It is that treatment which involves the health and undermines the vigor and soundness of the constitution, which precedes death, and such treatment cannot involve the one without involving the other. *Cole v. Cole*, 23 Iowa, 433, 438.

Code, § 1842, clause 7, providing that divorce may be decreed against the husband when he is guilty of such inhuman treatment as to "endanger the life" of his wife, is not to be construed as meaning that it is necessary that the party, before seeking the aid of the court, shall wait until she is incontestably and beyond all question satisfied that there is danger to life; but the true inquiry is whether there is a reasonable apprehension of such danger. "There may have been no act done in the way of attempting the apprehended injury, and yet the court as well see that there is danger as though there had been many attempts." *Beebe v. Beebe*, 10 Iowa, 133, 139.

The "inhuman treatment" endangering the life of a wife, to entitle her to a divorce, need not amount to barbarity, though "inhuman" may amount to barbarous and savage. If the conduct is marked with cruelty, if it is cruel and unfeeling, indicating an absence of that kindness and tenderness that belongs to a human being, it is sufficient, if it endangers life. Whatever form the treatment assume, if a continuance of it involve the life or health of the wife, it is inhuman treatment. *Cole v. Cole*, 23 Iowa, 433, 438.

"Inhuman treatment," within the statute authorizing a divorce, means something entirely more and beyond the conduct of a wife towards another man, not amounting to criminal intercourse, resulting in inattention to her household duties, and unpleasant notoriety in the newspapers, and unhappiness and ill health of her husband. *Ennis v. Ennis*, 60 N. W. 228, 229, 92 Iowa, 107.

Miller, J., in a concurring opinion in an action brought for divorce on the ground of

cruelty, in which the Supreme Court confirmed the judgment, dismissing the petition, states as his opinion that the wife's right to divorce for cruel treatment by the husband ought to be determined upon the character of such ill treatment, whether it had been such as to seriously endanger her life or health, without reference to whether she had been at all times a submissive and obedient wife, or at times had been ill-tempered or willful. No provocation like this will justify a man in cruelly treating his wife, or deprive her of her right to be divorced if his treatment of her is such as is admitted by the statute as a ground for divorce. *Knight v. Knight*, 81 Iowa, 451, 460.

#### **Insanity as affecting.**

A divorce cannot be granted on the grounds of inhuman treatment endangering life, where such treatment occurred during the insanity of the defendant. *Wertz v. Wertz*, 43 Iowa, 534, 536; *Tiffany v. Tiffany*, 50 N. W. 554, 84 Iowa, 122.

#### **Threats of harm.**

The term "inhuman treatment," as used in Code, § 1482, cl. 7, providing that divorce from the bonds of matrimony may be decreed against the husband when he is guilty of such inhuman treatment as to endanger the life of his wife, is not to be construed in that limited signification which would confine it to cases of withholding by the husband of food and medicine from the wife when sick, or where he confined her in a small and unhealthy room, to the detriment of her health and with danger to her life, or to those instances in which he beats and bruises her so as to cause her to apprehend the like danger; but threats of violence, where there is danger of harm—that is, of harm or injury to the life of the party—is sufficient, though the terms doubtless imply, primarily, such inhuman conduct as injures the body and thus endangers the life. *Beebe v. Beebe*, 10 Iowa, 133, 137. See, also *Caruthers v. Caruthers*, 13 Iowa, 266, 267.

### **INITIAL**

Initials are not a name, and cannot be used for the Christian names of parties to actions, except in cases where parties inscribed by initial letters in bills of exchange, promissory notes, or other written instruments. *Elberson v. Richards*, 42 N. J. Law (13 Vroom) 69, 70.

#### **INITIAL CARRIER.**

An "initial carrier" is the carrier first receiving the goods. *Beard v. St. Louis, A. & T. H. Ry. Co.*, 44 N. W. 803, 804, 79 Iowa, 527.

### **INITIATE.**

See "Courtesy Initiate."

### **INJUNCTION.**

See "Final Injunction"; "Mandatory Injunction"; "Perpetual Injunction"; "Preliminary Injunction"; "Special Injunction"; "Temporary Injunction."

Mr. Justice Story, in speaking of the writ of injunction, says that it may be described to be a judicial process whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ. *United States v. Haggerty* (U. S.) 116 Fed. 510, 515 (citing 2 Story, Eq. Jur. § 861); *Waugelin v. Goe*, 50 Ill. 459, 463; *Rossiter v. Aetna Life Ins. Co.*, 71 N. W. 898, 96 Wis. 466.

An injunction is a writ, framed according to the circumstances of the case, commanding an act which the court requires as essential to justice, or restraining an act which it esteems contrary to equity and good conscience. *Commercial Bank of Manchester v. State*, 12 Miss. (4 Smedes & M.) 439, 514 (citing *Jeremy*, Eq. Jur. 307); *Parsons v. Marye* (U. S.) 23 Fed. 113, 121 (citing *Jeremy*, Eq. Jur.).

"An 'injunction' is defined to be a writ issued by the order and under the seal of a court of equity. The term is also indiscriminately applied to interlocutory orders in the nature of injunctions, though not enforced by the means of the writ of injunction." *Michigan Cent. R. Co. v. Northern Indiana R. Co.*, 3 Ind. 239, 241.

A writ of injunction may be said to be a process capable of more modifications than any other law. It is so malleable that it may be molded to suit the various circumstances and occasions presented to a court of equity. It may be special, preliminary, temporary, or perpetual, and it may be dissolved, reviewed, continued, extended, or contracted; in short, it is adapted and used by courts of equity as a process of preventing wrong between, and preserving the rights of, the parties before them; and a court has jurisdiction to give an injunction the force and effect of a right of possession where there is no adequate remedy at law. *Sproat v. Durland*, 35 Pac. 682, 689, 2 Okl. 24.

An injunction emanating from a competent authority is a command of the law, and the citizen is bound to yield implicit obedience until the restriction has been removed by the authority which imposed it. *Muller v. Henry* (U. S.) 17 Fed. Cas. 978, 980.

An injunction is an appropriate remedy for a violation of all statute rights that are

granted of course. The remedy is contemporaneous and concurrent with the grant itself, and it cannot be separated from it. The remedy is a part of the grant, and cannot be taken away. *Livingston v. Van Ingen* (N. Y.) 9 Johns. 507, 536.

The writ of injunction goes to persons, and not to courts, whether it be limited to questions publici juris or extended to the adjustment of private rights. *State v. First Judicial District Court*, 63 Pac. 395, 400, 24 Mont. 539.

By the word "injunction" is commonly meant the writ of injunction. *Treasurers v. Clowney* (S. C.) 2 McMul. 516, 517.

Code Proc. art. 296, declares that an injunction is a mandate obtained from a court by a plaintiff, prohibiting one from doing an act which he claims may be injurious to him or impair a right which he claims. *Dupre v. Anderson*, 13 South. 743, 744, 45 La. Ann. 1134.

An injunction is a command to refrain from a particular act. *Ann. St. Ind. T.* 1899, § 2487; *Bates' Ann. St. Ohio* 1904, § 5571; *Rev. St. Wyo.* 1899, § 4038; *Chesapeake, O. & S. W. R. Co. v. Reasor*, 1 S. W. 599, 600, 84 Ky. 369; *City of Alma v. Loehr*, 22 Pac. 424, 42 Kan. 368; *Wabaska Electric Co. v. City of Wymore*, 82 N. W. 626, 627, 60 Neb. 199; *Rossiter v. Aetna Life Ins. Co.*, 71 N. W. 898, 96 Wis. 466.

An injunction is a writ or order requiring a person to refrain from a particular act. *Comp. Laws Nev.* 1900, § 3206; *Rev. St. Utah* 1898, § 8057; *Wallace v. Helena Electric Ry. Co.*, 25 Pac. 278, 281, 10 Mont. 24.

An injunction is an order requiring a defendant in a suit to refrain from a particular act. *Ann. Codes & St. Or.* 1901, § 417.

An injunction is a writ or order requiring a person to refrain from the particular act. It may be granted by the court in which the action is brought, or by a judge thereof, and when made by a judge it may be enforced as an order of the court. *Code Civ. Proc. Cal.* 1903, § 525; *Civ. Code Idaho* 1901, § 3283.

#### As action or suit.

See "Civil Action—Case—Suit—Etc."  
Application for, as suit in equity, see "Suit in Equity."

#### Attachment and certiorari distinguished.

See "Attachment"; "Certiorari."

#### As mandate.

See "Mandata."

#### As a prerogative writ.

An injunction is a high prerogative writ, executed and enforced in a summary manner. By service of the writ the party is required immediately to withdraw and cease operations. Hence the propriety in requiring a bond for the indemnity of the party in such damages as he may sustain by reason thereof. *Gear v. Shaw* (Wis.) 1 Pin. 608, 615.

The writ of injunction given to the court by the Constitution, being classed with mandamus, habeas corpus, quo warranto and certiorari, was a quasi prerogative writ, and all of such writs were given to the Supreme Court for prerogative uses only. *State v. City of Milwaukee*, 78 N. W. 756, 757, 102 Wis. 509 (citing *Railroad Cases*, 35 Wis. 425).

#### As a preventive remedy.

The function of a writ of injunction is to afford preventive relief. It is powerless to correct wrongs or injuries already committed. *City of Alma v. Loehr*, 22 Pac. 424, 42 Kan. 368.

The ordinary use of the writ of injunction is to prevent wrongs and injuries to persons and their property, or to reinstate the right of persons to their property when they have been deprived of it. It is the most efficient, if not the only, remedy to stay irreparable injury and to punish those who disobey the orders of the court granting the writ. *United States v. Haggerty* (U. S.) 116 Fed. 510, 515.

The province of an injunction is not to afford remedy for what is past, but to prevent future mischief. Hence past injuries are in themselves no grounds for an injunction. *Society for Establishing Useful Manufactures v. Morris Canal & Banking Co.*, 1 N. J. Eq. (Saxt.) 157, 21 Am. Dec. 41.

An injunction is a preventive remedy only, and cannot be invoked to restrain a party from doing an act which he has not already done. In such a case the party injured must be remitted to his remedy at law, which is in every respect competent to afford adequate relief. *Kahn v. Old Telegraph Min. Co.*, 2 Utah, 13-18; *Wangelin v. Goz*, 50 Ill. 459, 463.

#### Restraining order synonymous.

Code Proc. § 1409, provides that in all cases where a final judgment or decree shall be rendered by any superior court in a cause wherein a temporary injunction or restraining order has been granted, and the party at whose instance it was granted shall appeal therefrom to the Supreme Court, such restraining order or injunction shall remain in force until the appeal was finally returned. It was held that the words "in-

junction" and "restraining order," as thus used, are synonymous, and apply only to such as are granted after notice to the adverse party, and do not apply to an emergency restraining order. The court said that the Legislature, in speaking of injunctions and restraining orders, meant to use terms which would make it proper for the court to put its order in the shape of a formal injunction, as known to the common law, if it saw fit to do so, and that, if it did not see fit to go into all the formalities required by the use of such a writ, it could accomplish the same purpose by issuing a simple order restraining the acts complained of. *State v. Lichtenberg*, 30 Pac. 716, 717, 4 Wash. 407.

#### Stay of proceedings.

By Rev. St. § 2773, an injunction is a command to refrain from a particular act. Under such definition a stay of proceedings, which is defined to be the act of stopping or arresting a judicial proceeding by order of the court or judge, is not an injunction such as gives a writ of appeal from an order refusing a stay. An injunction by order, which is a substitute for the judicial writ, operates upon the conduct of the parties and their attorneys in respect to matters outside of those occurring in the ordinary progress of the action. A stay of proceedings operates in relation to something within the usual course of judicial proceedings, and which the court, by its authority over the parties and their attorneys, can regulate and control, without resort to the extraordinary writ of injunction. The fact that the injunction is now by order, instead of writ, does not extend its scope or operation. *Rossiter v. Etna Life Ins. Co.*, 71 N. W. 898, 96 Wis. 466.

#### As a writ of right.

An injunction is not a writ of right. It will not be issued when, on a broad consideration of the situation of all the parties in interest, good conscience does not require it. *Hellman v. Lebanon & A. St. Ry. Co.*, 34 Atl. 647, 648, 175 Pa. 188.

An injunction is an extraordinary proceeding, the propriety of the allowance of which depends upon a variety of circumstances, aside from the strictly defined rights of the complainant. In this respect writs of injunction are akin to those other extraordinary remedies, certiorari and quo warranto. Neither of these writs is allowed as a matter of strict right. Whenever public interest may suffer, a writ of certiorari may be refused. The same rule applies to writs of quo warranto, where the motive of the defendant or the effect upon public or private interest will be considered in granting or refusing the writ. The allowance of an injunction is a matter of discretion, and

an injunction will not be granted, if it will cause great injury to the defendants without corresponding advantage to the complainant. So it is perceived that whether writs of this class will be allowed depends, not upon the strict rights of the parties to some redress, nor upon the question whether the defendants have violated some legal right, but it depends upon whether, under the circumstances, this extraordinary process should go in the particular instance. *Bray v. Ocean City R. Co.* (N. J.) 37 Atl. 604, 605.

An injunction is of grace, and not of right. It is the conscience of the chancellor which is to be aroused or quieted; and he, to enlighten his conscience as to whether he should put forth his hand or withhold it, will look upon those facts which aggravate or mitigate the alleged wrongdoing. *Pennsylvania Min. Co. v. Ohio River Junction R. Co.*, 54 Atl. 259, 263, 204 Pa. 336.

It is said that an "injunction is of grace." This does not mean that a chancellor may grant or refuse an injunction as he pleases, but that his action is controlled by considerations of conscience. He does that which in good conscience he ought to do. The question in each case must depend upon the circumstances out of which it grows, and requires the exercise of judgment in determining the equities involved. *Hellman v. Lebanon & A. St. Ry. Co.*, 37 Atl. 119, 120, 180 Pa. 627.

## INJURE.

"Injure," when applied to animals, business, persons, or property, see "Injury to Animals"; "Injury to Business"; "Injury to the Person"; "Injury to Property."

To injure means to do harm to; inflict damage or detriment upon; impair or deteriorate in any way. *State ex rel. Star Pub. Co. v. Associated Press*, 60 S. W. 91, 100, 159 Mo. 410, 51 L. R. A. 151, 81 Am. St. Rep. 368.

In a statute making the husband or wife a competent witness where he or she is the party injured by the offense committed, the word "injured" must be construed in its plain, ordinary sense, as signifying the privation of a legal right, a wrong, a tort, and not to be limited to personal or physical injuries; the word "injuries" in law meaning any wrong or damage done to a man's person, rights, reputation, or goods. *Jordan v. State*, 41 N. E. 817, 818, 142 Ind. 422.

As used in 3 How. Ann. St. § 3208r7, providing that any bank officer, who with intent to injure or defraud the bank or any company, etc., "injure or defraud" means

any infraction of the banking law which would tend to depreciate, destroy, squander, or dissipate some of its property or assets. *People v. Comstock*, 73 N. W. 245, 247, 115 Mich. 305.

#### As damage.

The word "injury," as used in Acts 1869, No. 4, providing that any person who unlawfully furnishes intoxicating liquors to another shall be liable for any injury caused by such person while under the influence of liquor, should be construed to be used in the sense of unlawful damage or hurt, and not to include anything done in lawful self-defense. *Smith v. Wilcox*, 47 Vt. 537, 545.

As used in Comp. St. 1895, c. 50, § 6, providing that any person who may be "injured" by reason of the selling of intoxicating liquor by a person licensed may sue on the licensee's bond, the word "injured" is synonymous with the word "damaged." *Gran v. Houston*, 64 N. W. 245, 248, 45 Neb. 813.

#### As defraud.

The phrase "injure or defraud," as used in Code, § 4370, which imposes a penalty for obtaining money or property by any false pretense or token, with the intent to "injure or defraud," expresses no more than is implied in the word "defraud"; the word "injure" being surplusage. *Carlisle v. State*, 76 Ala. 75, 77.

The word "injure," in Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], making it criminal for any officer or employé of any national bank to make any false entry to injure or defraud the association or any other company, is used in designating an injury which may come to the party whose property is taken, without any reference to whether the party who converts it is benefited or not. It has a different meaning than the word "defraud," which in such connection necessarily implies that advantage comes to the party defrauded and corresponding damage to the party who is defrauded. *United States v. Lee* (U. S.) 12 Fed. 816, 819.

#### As destroy.

Under a statute providing that "whoever willfully and maliciously destroys or injures the personal property of another," etc., shall be punished, etc., defendant was charged with willfully and maliciously injuring four dresses and five skirts, by willfully and maliciously cutting and tearing each of them into many pieces, whereby they were all greatly damaged and injured. The evidence was that the dresses and skirts were so cut and torn that they were unfit for further use, and worthless as dresses and skirts in their then condition. The defendant requested the judge to instruct the jury

that, if they found that the articles were destroyed, they should acquit him. It was held that the jury were properly authorized to convict on the ground that the goods were injured. *Commonwealth v. Sullivan*, 107 Mass. 218, 219.

Laws 1860, c. 345, which provides that the lessees or occupants of any building which shall, without any fault or neglect on their part, be destroyed or be so injured by the elements, etc., as to be untenable and unfit for occupancy, shall not be liable or bound to pay rent, etc., refers to an injury to the premises short of total destruction which is caused by the elements acting with unusual power or by human agency. *Suydam v. Jackson*, 54 N. Y. 450, 455. So, also, under like Ohio statutes, *Hilliard v. New York & Cleveland Gas Coal Co.*, 41 Ohio St. 662, 669, 52 Am. Rep. 99.

#### As make less valuable.

The word "injure," as used in a contract for the sale of a certain ship, to be paid for by installments, by which, after the first payment, the purchaser should take possession of the ship, with liberty to make such repairs as he might wish, to load the ship, or to secure passengers for her, provided nothing was done to injure the vessel, means something which makes the vessel less valuable to the owners, and does not prevent him making an alteration therein which does not produce such an effect. *The Ferax* (U. S.) 8 Fed. Cas. 1147.

#### As vex.

The expression "injuring and harassing," as used in an affidavit for a distress warrant, stating that the warrant is not served out for the purpose of injuring or harassing the defendant, is equivalent to the phrase "vexing or harassing," as used in a statute requiring such affidavits to state that the warrant is not for the purpose of vexing or harassing the defendant. *Blesenbach v. Key*, 63 Tex. 79, 81.

### INJURED FEELINGS.

See "Feelings."

### INJURED IN PROPERTY.

Laws 1873, c. 646, § 1, providing that every employer, who shall be injured in property or means of support in consequence of the intoxication of any person, shall have a right of action against any person who shall, by selling the intoxicating liquors, have caused the intoxication of such person, applies to something which one legally owns, not that to which he has only a moral claim, or which another person will probable permit him to have, so that it does not apply to services to be rendered by another

during minority. *Streever v. Birch*, 17 N. Y. Supp. 195, 197, 62 Hun, 293.

### INJURED PARTY.

See "Injured Person."

### INJURED PERSON.

See, also, "Injury to the Person."

Crimes Act, § 13, providing that the "party injured" shall in all cases be a competent witness, means "the person who is the immediate and direct sufferer from the offense committed." *People v. Howard*, 17 Cal. 63, 64.

A statute giving rights of action for penalties to a person injured or aggrieved by certain acts refers to the person immediately injured by the very act prohibited, or by some direct and immediate or necessary and natural consequence of such act, and does not ordinarily include persons only collaterally or incidentally injured by such act. Flour inspectors are not the persons injured by the selling of flour required to be inspected without procuring the same to be inspected, for which sale a penalty is given. *Hatch v. Robinson*, 26 Vt. 737, 739.

Code Cr. Proc. 1895, art. 606, providing that no judge shall sit in any case where the party injured may be connected with him by consanguinity, etc., includes a party injured either as to his person or property. *January v. State*, 38 S. W. 179, 180, 36 Tex. Cr. R. 488.

The term "person injured," in Acts 1874, No. 51, requiring notice to be given to the selectmen in case of injury on a highway, and providing that nothing in the section shall be construed to apply to any case where the person injured shall in consequence thereof be bereft of his or her reason, refers to the person injured in the accident, not to the person injured pecuniarily as a result of the accident. *Eames v. Town of Brattleboro*, 54 Vt. 471, 475.

Rev. St. c. 58, § 13, which provides that any person injured by a dog may recover double the amount of the damage sustained by him, is not limited to a person who receives on his own person a wound or other damage from a dog. The statute only declares the general principle, giving double damages to any "person injured" by a dog; and hence the parent or master can recover his appropriate damages, and the minor or servant may recover in his own name damages for personal suffering. *McCarthy v. Guild*, 53 Mass. (12 Metc.) 291, 293.

Under 1 Rev. St. p. 588, § 54, which makes it an offense to forcibly pass any gate on any turnpike or plank road, and pro-

vides for the forfeiture of a fixed pecuniary sum to the "corporation injured," a corporation which owned a plank road, but had assigned the management of a part of the road to another for the purpose of collecting tolls, etc., would not be included (the corporation having no interest in such tolls), where the gate passed was on the portion of the road over which the management had been assigned to another. *Monterey, C. P., P. P. & C. Plank Road Co. v. Chamberlain*, 32 N. Y. 659, 664.

Laws 1870, c. 3, § 3, makes a person unlawfully furnishing liquor responsible for injuries resulting therefrom to a party injured. Held, that the word "party" is broad enough to include persons, male or female, and bodies corporate and politic. *Hollis v. Davis*, 56 N. H. 74, 77.

Acts 1887, c. 71, authorizing the recovery of damages for the mental and physical pain to the "injured person" and the expense occasioned to him in his life and to his estate upon his death, must be construed to mean, not only the injury to the deceased resulting from sufferings, etc., but also the injury resulting to his family. *French v. Mascoma Flannel Co.*, 20 Atl. 363, 68 N. H. 90.

Code, §§ 1883, 1891, authorizing a party injured to sue on the bond for failure to discharge an official duty, applies to the plaintiff who sues for the penalty given for such failure. *Joyner v. Roberts*, 16 S. E. 917, 112 N. C. 111.

The phrase "party injured," in Rev. St. § 7146, providing that, when one accused of misdemeanor is brought before a magistrate on complaint of the party injured, and pleads guilty to the charge, the magistrate shall sentence him, refers to the person who suffers some particular injury from the offense, as distinguished from that which results to the public or local community where it was committed. *Hanaghan v. State*, 36 N. E. 1072, 51 Ohio St. 24.

### INJURES GRAVES.

Personal insults and reproachful language are included in the "injures graves"—grievous insults—which are by the Code Napoleon made a just cause of divorce, but are not, either in terms or by implication, made under our law the cause for the dissolution of the marriage bond. *Butler v. Butler* (Pa.) 1 Pars. Eq. Cas. 324, 344.

### INJURIA.

By "injuria" is meant a tortious act. It need not be willful and malicious; for, though it be accidental, if it be tortious, an action will lie. *Sprague v. Heaps*, 7 Ill. App.

(7 Bradw.) 438, 446; *Hutcheson v. Peck* (N. Y.) 5 Johns. 195, 205; *Barnes v. Allen* (N. Y.) 1 Abb. Dec. 111, 117 (citing *Winsmore v. Greenbank*, Willes, 577, 581).

### INJURIOUS.

Anything that is hurtful, disturbs happiness, impairs rights, or prevents the enjoyment of them is "injurious," and, if it causes displeasure or gives pain or unpleasant sensations, it is offensive. The disturbing cause must be real, not fanciful, and something more than mere delicacy or fastidiousness; but it need not necessarily be apparent to the senses of sight, smell, or hearing, for it may be injurious without offending either. Thus, by the general principles of equity, the continuance of a powder, dynamite, or fire establishment, or a house of ill fame, will be enjoined at the suit of one who is deprived of the comfortable enjoyment of his property by the close proximity of such a nuisance. The use of premises as an undertaker's establishment for the sale of caskets and furnishing of goods for funerals, also for embalming bodies for autopsies and post mortem examinations, and for the reception and temporary deposit of human remains awaiting burial, is offensive and injurious within the meaning of a covenant that such premises shall not be used for any trade or business injurious or offensive to the neighboring inhabitants. *Rowland v. Miller*, 15 N. Y. Supp. 701.

### INJURIOUSLY AFFECTED.

"Injuriously affected" is synonymous with and equivalent to "damaged." *Town of Longmont v. Parker*, 23 Pac. 443, 444, 14 Colo. 386, 20 Am. St. Rep. 277.

The English courts have usually held that the words "injuriously affected," as used in statutes relating to compensation for land injurious affected by railroads, only allow compensation where a right of action would have existed at common law; yet in their application of this construction they have been extremely liberal, sometimes declaring that actionable at law which we generally do not so consider. *City of Denver v. Bayer*, 2 Pac. 6, 11, 7 Colo. 113.

Under an act which allowed damages when lands were injuriously affected, it was held, that the test applied to determine the proper meaning of the words "injuriously affected," as giving a right to compensation, was whether the act done in carrying out the works in question was an act which would have given a right of action if the works had not been authorized by the statute. In other words, if the act affecting the land had been done by an individual, he would be liable for damages. *Delaplaine v. Chicago & N. W. R. Co.*, 42 Wis. 214, 24 Am.

Rep. 886. And in *McCarthy v. Board of Works*, L. R. 8 C. P. 209, it is said: "The act, therefore, injuriously affecting, must be that which would be wrongful, but for the statute. It is enough \* \* \* that it might be prevented by injunction." *Memphis & C. R. Co. v. Birmingham S. & T. R. Ry. Co.*, 11 South. 642, 643, 96 Ala. 571, 18 L. R. A. 166.

The words "injuriously affected," in the land clauses of Consolidated Act, § 68, requiring compensation for lands injuriously affected, characterize a cause of injury independent of taking land, and are not limited to damages sustained by persons whose lands or part of whose lands are taken, used, or directly interfered with, and the right of compensation extends to and may be asserted in respect to consequential damages. *East & West India Docks & B. J. Ry. Co. v. Gatlke*, 3 Macn. & G. 155, 161.

Gen. St. 1878, c. 34, requiring corporations exercising the right of eminent domain to compensate for property injuriously affected, means that the damage must be special, differing in kind from that sustained by the public generally, and which by common law would have given a private right of action. *Rochette v. Chicago, M. & St. P. Ry. Co.*, 20 N. W. 140, 141, 32 Minn. 201.

Land adjoining a road which is lowered by the act of a railroad company is land "injurious affected," within the meaning of an act providing that compensation should be made. *Reg. v. Eastern Counties R. Co.*, 2 Adol. & E. 347, 363.

### INJURY.

See "Actionable Injury"; "Bodily Injury"; "Civil Injuries"; "Continuous Injury"; "Direct Injury"; "Great Bodily Injury"; "Intentional Injury"; "Irreparable Injury"; "Malicious Injury"; "Material Injury"; "Necessary Injury"; "Pecuniary Injuries"; "Permanent Injury"; "Physical Injury"; "Private Injury"; "Public Injury"; "Serious Bodily Harm or Injury"; "Sudden Injury"; "Unlawful Injury."

Willful injury, see "Willful—Willfully."

"An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right." *Parker v. Griswold*, 17 Conn. 287, 298, 42 Am. Dec. 739; *Carsteen v. Town of Stratford*, 35 Atl. 276, 278, 67 Conn. 428; *Springer v. J. H. Somers Fuel Co.*, 46 Atl. 370, 371, 196 Pa. 156.

An injury is a wrong or tort. *Woodruff v. North Bloomfield Gravel Min. Co.* (U. S.) 18 Fed. 753, 781; *Parker v. Griswold*, 17 Conn. 287, 298, 42 Am. Dec. 739.

An "injury" is damage resulting from an unlawful act. *Thornton v. Thornton*, 63 N. C. 211, 212.



Webster defines "injury" to mean, in general, "any wrong or damage done to a man's person, rights, reputation, or goods. *Northern Ry. of France v. Carpentier* (N. Y.) 13 How. Prac. 222, 223.

Injury is any wrong or damage done to another, either in his person, rights, reputation, or property. *Hitch v. Edgercombe County Com'rs*, 44 S. E. 80, 132 N. C. 573 (citing Black).

"The word 'injury' includes every wrong, everything that is not done rightfully." *Ayers v. Lawrence*, 59 N. Y. 192, 197.

"Injury," in its legal sense, means damage resulting from a violation of a legal right. It is this violation of a legal right which renders the act wrongful in the eye of the law and makes it actionable. *Macaulay v. Tierney*, 33 Atl. 1, 2, 19 R. I. 255, 37 L. R. A. 455, 61 Am. St. Rep. 770.

"Injury," as used in a statute providing that a trust deed shall be void which operates to the injury or exclusion of a resident creditor, means the deprivation of some legal right. *Brittle Silver Co. v. Rust*, 51 Pac. 526, 529, 10 Colo. App. 463.

Injuries, in the sense of wrongful invasions of a right, may be considered as of two kinds: (1) Pecuniary and (2) nonpecuniary. Pecuniary injuries are such as can be, and usually are, without difficulty estimated by a money standard. Loss of real or personal property, or of its use, loss of time, and loss of services are examples of those kinds of injuries. Nonpecuniary injuries are those for the measurement of which no money standard is or can be applicable. As the books phrase it, damages in such cases are "at large." Bodily and mental pain and suffering are familiar examples of this class. *Broughel v. Southern New England Tel. Co.*, 48 Atl. 751, 754, 73 Conn. 614, 84 Am. St. Rep. 176.

As used in actions where error in a trial is presumed to be to the injury of a party, the word "injury" means effect upon the result, and hence error without injury is not reversible. *State v. Reddington*, 64 N. W. 170, 171, 7 S. D. 368.

#### Accident synonymous.

In an action for injuries caused by the derailment of a car, the court charged that, in order to bar the plaintiff, the defendant must show that some negligence of the plaintiff contributed to the accident in such a way that, if the plaintiff had not been negligent, the accident would not have happened, and refused to charge that, if plaintiff was guilty of any negligence contributing to the injury for which recovery is sought, he cannot recover. It was argued that the use of the word "accident," instead of the word "injury," was erroneous; the argument be-

ing that the word "accident" referred to the derailment, while the "injury"—that is, the wounding of plaintiff—occurred by the fall of the car to the bottom of the embankment. It was held that the terms, with respect to causation, are practically indistinguishable. If the derailment was not caused by the air brakes being uncoupled, neither was the fall of the car from the bank so caused; so that for the purpose of the case it was proper to treat "accident" and "injury" as synonymous. *Smith v. Erie R. Co.*, 52 Atl. 634, 638, 67 N. J. Law, 636, 59 L. R. A. 302.

#### Damage distinguished.

There is a material distinction between "damages" and "injury." Injury is the wrongful act or tort which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury. The word "injury" denotes the illegal act. The term "damages" means the sum recoverable as amends for the wrong. The words are sometimes used as synonymous terms, but they are in strictness words of widely different meaning. There is more than a mere verbal difference in their meaning, if they describe essentially different things. This the law has always recognized, for it is often declared that no action will lie because the action is "damnum absque injuria." *City of North Vernon v. Voegler*, 2 N. E. 821, 824, 103 Ind. 814.

The term "injury," as the same is used to designate a cause of action for a tort, implies something more than damage, and in order to authorize a recovery it must be proved, not only that damage resulted from the act, but also either that the act of itself was illegal or unlawful, or, if legal, either that it was improperly done or the injury might have been anticipated by the doer of the act, had he acted as a reasonably prudent person. *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 295.

By the use of the word "damaged," in a complaint in an action of trespass alleging that plaintiffs have been damaged by the entry and by other acts committed by defendants, is evidently meant "injured," which means in the law the privation or violation of a right; something, in other words, for which an action will lie in behalf of the insured person; an actionable wrong. Mr. Black says that an injury is any wrong or damage done to another, either in his person, rights, reputation, or property. It seems, therefore, that plaintiffs, and in an informal way, it may be admitted, allege an injury to their property rights sufficient to state a cause of action for trespass. *Hitch v. Edgercombe County Com'rs*, 44 S. E. 80, 132 N. C. 573.

A distinction must be made between "damnum" and "injuria." We commonly

use the words "injury" and "damage" indiscriminately, but in the rule that "ex damno absque injuria non oritur actio" these Latin words are distinct. "Damnum" means only harm, hurt, loss, damage; while "injuria" comes from "in," against, and "jus," right, and means something done against the right of the party, producing damage, and has no reference to the fact or amount of damages. Unless a right is violated, though there be damage, it is "damnum absque injuria." *West Virginia Transp. Co. v. Standard Oil Co.*, 40 S. E. 591, 592, 50 W. Va. 611, 56 L. R. A. 804, 88 Am. St. Rep. 895.

#### Injuries from judicial proceedings.

The word "injury," as used in Code, § 219, providing that an injunction may be issued to restrain the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff, etc., does not include that accomplished by judicial proceedings and forms of law, unless abused. *Wordsworth v. Lyon* (N. Y.) 5 How. Prac. 463 (cited in *McGune v. Palmer*, 28 N. Y. Super. Ct. [5 Rob.] 607, 608); *McGune v. Palmer*, 28 N. Y. Super. Ct. (5 Rob.) 607.

#### Injuries to property.

The Minnesota act incorporating the City of Minneapolis (Sp. Laws 1881, p. 465, c. 8, § 20) provides that no action shall be maintained against the city of Minneapolis on account of any injuries received by means of any defect in the condition of any bridge, street, sidewalk, or thoroughfare, unless such action shall be commenced within one year from the happening of the injury, etc., includes injuries to property as well as injuries to persons. *Nichols v. City of Minneapolis*, 16 N. W. 410, 411, 30 Minn. 545.

A city charter contained a clause empowering the common council to clean the streets and to pass ordinances requiring the same to be kept free from incumbrance or injury. Held, that the word "injury" is a comprehensive word, including any wrong or damage done to that which is good or valuable, and it is this from which the common council was empowered to keep the streets free; and hence they had power to pass an ordinance prohibiting any person using a cart on a paved street from carrying more than a certain number of pounds, unless the tires of the vehicle were of a certain prescribed width. *City of Utica v. Blake-slee* (N. Y.) 46 How. Prac. 165, 167.

#### As physical injuries.

The word "injury," as used in Rev. St. c. 25, § 22, providing that any person who shall receive any injury in his person or property from a defect in a highway, may maintain an action against a town for the damages occasioned thereby, means physi-

cal injury in his person, or in his horse, or other material objects which can be denominated "property," and does not extend to expenses incurred or loss, unless they are incident to such physical injury and constitute one item of the damage caused by it. *Brailley v. Inhabitants of Southborough*, 60 Mass. (6 Cush.) 141, 142.

#### As result from unlawful act.

"Injury," in its legal sense, means damage resulting from an unlawful act, not a lawful one. *State v. Moore*, 39 Atl. 584, 585, 69 N. H. 99; *Bohn Mfg. Co. v. Hollis*, 55 N. W. 1119, 1121, 54 Minn. 223, 21 L. R. A. 337, 40 Am. St. Rep. 819.

"Injury," in its legal sense, means damage resulting from an unlawful act. Associations may be formed, the object of which is to adopt measures that may tend to diminish the gains and profits of another, and yet not be unlawful. A combination of merchants, under an agreement that they will not sell, except for cash, to any debtor of any member of the association who refuses to settle his account or submit it to arbitration, and the carrying out of such agreement, is not a legal injury to such a debtor. *Reynolds v. Plumbers' Material Protective Ass'n*, 63 N. Y. Supp. 303, 309, 30 Misc. Rep. 709.

The word "injury," as used in Acts 1869, No. 4, § 3, providing that, whenever any person in the state of intoxication shall willfully commit any injury upon the person or property of any other individual, any person, who by himself, his clerk, or servant, shall have unlawfully furnished any part of the liquor causing the intoxication, shall be liable to the party injured for all damage occasioned by the injury so done, was used in the sense of unlawful damage or hurt, and plainly anything done in lawful self-defense would lay no foundation for an action under the statute. *Smith v. Wilcox*, 47 Vt. 537, 545.

The word "injury," as used in the by-law of an unincorporated barbers' protective beneficial association, providing that any member may be expelled from the association for conduct tending to the injury of any of its fellow members or of the association, means the unlawful infringement or privation of rights, and therefore a member cannot be expelled on evidence that he caused certain members to be arrested for violation of the Sunday law. *Manning v. Klein*, 1 Pa. Super. Ct. 210, 217.

#### INJURY BY FIRE.

See "Loss by Fire."

#### INJURY IN CONSEQUENCE OF HEAT.

See "Heat."

**INJURY TO ANIMALS.**

Under an act providing that, if any dog shall kill or injure any sheep, the owner of the dog shall be liable for damages, etc., it is held that the word "injure" is broad enough to include an injury by means of a chasing or worrying, although no external hurt was occasioned by it. Among the popular significations of the word "injure" are "to do wrong or harm to; to cause loss or detriment to; to impair; to impair soundness, as of health; to damage and lessen the value of; to make worse." *Job v. Harlan*, 13 Ohio St. 494.

The word "injuring," as used in Act. April 15, 1857, providing that the crime of maliciously killing and injuring horses and other animals shall be punished, etc., should be construed to include willfully and maliciously cutting a horse's mane close to the skin, and his tail as close to the dock as the hair could be cut. The word "injuring" should be construed as meaning lessening the value of, and should not be limited to the meaning of wounding, etc. *Oviatt v. State*, 19 Ohio St. 573, 576.

**INJURY TO BUSINESS.**

An agreement by one in the employ of a milk dealer that, on the final termination of such employment, he would not directly or indirectly solicit the customers, or any of them, on the employer's milk route, to buy milk of him, or do anything whatever to divert the trade or "injure the business of" the employer in the city, does not imply that he should not sell milk, but only that he should not sell to the purchasers of the employer. Selling milk to his employer's old customers, who have bought without any solicitation or interference on his part, is not a breach of the agreement; for such sales do not injure the business of the employer in a legal sense. *Stull v. Westfall* (N. Y.) 25 Hun, 1, 2.

**INJURY TO INHERITANCE.**

Civ. Code, § 826, providing that a person having an estate in fee in remainder or reversion may maintain an action for any "injury done to the inheritance," should be construed to include the diversion of natural water from land. The flow of natural water over land is a continuous source of fertility and benefit, and its withdrawal is followed by consequences which are perpetually injurious to the freehold. *Heilbron v. Last Chance Water Ditch Co.*, 17 Pac. 65, 67, 75 Cal. 117.

Code Civ. Proc. § 1665, providing that a remainderman may maintain an action founded upon an "injury done to the inheritance," notwithstanding any intervening es-

tate, etc., includes the erection of an elevated railroad, whereby the market value of the land, in which the remainderman is interested, has been depreciated. *Thompson v. Manhattan Ry. Co.*, 6 N. Y. Supp. 929, 15 Daly, 438.

**INJURY TO LIMB.**

The term "injury to limb" is equivalent to the phrase "bodily injury." *Bailey v. Bailey*, 97 Mass. 373, 378.

**INJURY TO MEANS OF SUPPORT.**

No "injury to the means of support" of a wife results simply because the husband may become intoxicated, and while in that condition lose time or neglect his business, or becomes injured, or earns less money, or even loses it by neglect of business, and hence is not possessed of as large means as he would have been; and therefore the wife cannot recover for injury to her means of support from one selling liquor to the husband. "The statute authorizing a recovery of damages for injury to the wife's means of support" was not intended as a means of speculation, but as a protection against injury to the wife and children of the drunkard, to preserve the property used by the family from destruction, and to protect the family against immediate or probable want of adequate support; not to enable the affluent, or those well provided for, to sue and recover. *Confrey v. Stark*, 78 Ill. 187, 189.

Laws 1873, c. 646, providing that every person who shall be injured in means of support in consequence of the intoxication of any person shall have a right of action against the person who sold the liquor, etc., should not be construed to include a wife's deprivation of companionship of her husband occasioned by intoxication. The word "injured" implies a wrong, in the legal sense of the word, done by the intoxicated person or done in consequence of the intoxication. *Hayes v. Phelan* (N. Y.) 4 Hun, 733, 737.

**INJURY TO MUNICIPALITY.**

The word "injury," as used in the statute giving a right of action to taxpayers in the case of waste or injury by acts of officers or municipal bodies, comprehends only illegal, wrongful, or dishonest official acts, and was not intended to subject official action of boards, officers, or other municipal bodies acting within the limits of their jurisdiction and discretion, but which some taxpayer might conceive to be unwise, improvident, or based on errors of judgment, to the supervision of judicial tribunals. *Talcott v. City of Buffalo*, 125 N. Y. 280, 286, 26 N. E. 263; *Parfitt v. Kings County Gas & Illuminating Co.*, 33 N. Y. Supp. 1111, 1118, 12 Misc. Rep.

278; *Zeigler v. Chapin*, 126 N. Y. 342, 27 N. E. 471; *Peck v. Belknap*, 130 N. Y. 394, 29 N. E. 977; *Sweet v. City of Syracuse*, 14 N. Y. Supp. 421, 424, 60 Hun, 28; *Terrell v. Strong*, 35 N. Y. Supp. 1000, 1004, 14 Misc. Rep. 258; *Parfitt v. Ferguson*, 38 N. Y. Supp. 466, 471, 3 App. Div. 176; *Basselin v. Pate*, 63 N. Y. Supp. 653, 657, 30 Misc. Rep. 368. Such term includes acts which do not indirectly injure taxpayers, as well as those the direct effect of which is to cause a loss or waste of public property. *Parfitt v. Ferguson*, 38 N. Y. Supp. 466, 471, 3 App. Div. 176.

Within the meaning of the provisions of the Code authorizing an action by a taxpayer to prevent waste of or injury to municipal property, such action is confined to cases where the acts complained of are without power, or where corruption, fraud, or bad faith, amounting to fraud, is charged. *Basselin v. Pate*, 63 N. Y. Supp. 653, 657, 30 Misc. Rep. 368.

The terms "waste" and "injury," as used in the statute authorizing a taxpayer to maintain an action against an officer of a city for waste or injury to its property, do not comprehend individual acts, but only illegal, wrongful, and dishonest acts of public officials. The fact that a private individual is unlawfully injuring the property of the city without the knowledge of the official does not render the official liable to such action. *Sheehy v. McMillan*, 49 N. Y. Supp. 1088, 1090, 26 App. Div. 140.

### INJURY TO THE PERSON.

See, also, "Personal Injury."

See "Action for Injury to Person or Character."

To injure is to do harm; to hurt; to damage; to hurt or wound the person. It indicates a hurting or wounding which does not result fatally. We speak of persons killed and injured, thus making a wide distinction between the two. *Williamson v. State*, 2 Ohio Cir. Ct. R. 292, 1 O. C. D. 492.

In defining manslaughter, the trial court defined heat of passion as "a condition of quick anger or sudden injury engendered by some real or supposed injury." On appeal the words "sudden injury" were held to be misleading and confusing, as they expressed a physical, and not a mental, condition. *State v. Sloan*, 56 Pac. 364, 368, 22 Mont. 293.

Pen. Code, § 177, providing that a person who willfully, "with intent to injure," inflicts on the person of another an injury which seriously disfigures his person, or destroys or disables any member or organ of his body, or seriously diminishes his physical vigor by such injury, should be construed as referring to personal injuries of the same

general class, or to such as might reasonably be expected to be dangerous or result in serious bodily harm, and not to slight injuries or assaults, from which such results are not natural or reasonably to be expected. *State v. Hair*, 34 N. W. 893, 894, 37 Minn. 351.

Revision, p. 314, requiring that the parties, or one of the parties, must be an inhabitant of the state at the time of the injury, desertion, etc., in order to give the courts jurisdiction of a divorce suit, must be construed to mean "grounds of divorce, when applied to cases where the complaint is of impotence, or that the defendant had a former husband or wife living when the marriage took place, or that the marriage was within the prohibited degrees." *A. B. v. C. B.*, 34 N. J. Eq. (7 Stew.) 43, 44.

### INJURY TO PROPERTY.

Bouvier says "injuries to personal property are the unlawful taking and detention thereof from the owners." *Northern Ry. of France v. Carpentier* (N. Y.) 18 How. Prac. 222, 223.

An injury to property is an actionable act, whereby the estate of another is lessened, other than a personal injury or the breach of a contract. Code Civ. Proc. N. Y. 1899, § 3343, subd. 10; *James v. Signell*, 69 N. Y. Supp. 680, 682, 60 App. Div. 75; *Weiller v. Schreiber* (N. Y.) 63 How. Prac. 491, 494.

An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating, or destroying it. Code Civ. Proc. Cal. 1903, § 28; Code Civ. Proc. Mont. 1895, § 8477.

Civ. Code, § 398 (Swan & C. St. p. 1058), declaring that the cause of action shall exist in favor of the owner on the commission of an injury to personal estate, etc., means damage done to some specific property of which the person is the owner. It is not damage arising incidentally or collaterally. *Wolf v. Wall*, 40 Ohio St. 111.

The term "injury," as used in a charter of a water company, providing that if, in the location of the works, an injury should be done to private property, and the parties could not agree on the amount of compensation to be made to the owner, either party might apply to the court to appoint viewers, means any and every damage to which private property can or may be subjected. *Lycoming Gas & Water Co. v. Moyers*, 99 Pa. 618, 619.

The word "injury," as used in *Manuf. Dig. Ark. § 4994*, providing that an action for an injury to real property must be tried in the county in which the subject of the action or some part thereof is situated, should be construed in a technical sense, as meaning

every wrong which in legal contemplation is an injury to real property. This embraces not only injuries committed directly and forcibly, for which an action of trespass was the appropriate remedy under the former practice, but such, also, as nuisances, the obstruction of light or air, diverting water courses, and other similar wrongs, for which the remedy at common law was an action on the case. It is an injury to plaintiff's real property to remove earth therefrom by a railroad company. *Cox v. Little Rock & N. R. Co.*, 18 S. W. 630, 631, 55 Ark. 454.

Land is not injured, within the meaning of the Pennsylvania Constitution, requiring that land taken or injured for public use shall be compensated for, by the mere location of a street on the plans of a city. *Bush v. City of McKeesport*, 30 Atl. 1023, 1024, 166 Pa. 57.

An action to recover for goods, the sale of which was induced by a fraudulent representation that they were to be sold in business, when in fact they were to be pledged for a loan, is embraced within the phrase "injury to personal property," in Code Civ. Proc. § 635, stating the actions in which judgments may be granted. *Weiller v. Schreiber* (N. Y.) 11 Abb. N. C. 175.

#### **Advances made on forged paper.**

Where plaintiff's demand was created by advances made on the faith of forged bills and notes, such demand is a cause of action for an "injury to personal property," within the meaning of that term as used in the Code of Civil Procedure, providing that any act, other than a personal injury, by which the estate of another is lessened or reduced, is an injury to personal property. *Bogart v. Dart* (N. Y.) 25 Hun, 395, 396.

#### **Breaking of gas pipes.**

Under Code Civ. Proc. § 347, subsec. 3, which provided that an attachment might issue in an action for damages for any injury to personal property in consequence of negligence, fraud, or other wrongful act, a gas company is entitled to an attachment in an action for damages caused by the wrongful breaking of its gas pipes which extended through its own land under the streets throughout the city. *Newbern Gaslight Co. v. Lewis Mercer Const. Co.*, 18 S. E. 693, 694, 113 N. C. 549.

#### **Consequential damages.**

The words "injured and destroyed," as used in Const. 1874, art. 16, § 8, providing that corporations exercising the right of eminent domain should be liable for the property "injured or destroyed," were not designed to change, alter, or limit the nature and effects of corporate contracts, but to impose on those having the right of eminent domain a liability for consequential dam-

ages from which they had been previously exempt. They refer to a taking or injury resulting as a consequence of the use of a privilege arising from the right of eminent domain. *Edmundson v. Pittsburg, M. & Y. R. Co.*, 2 Atl. 404, 406, 111 Pa. 316.

Const. 1874, art. 16, § 8, provides that municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction. Held, that the word "injury" should be construed to mean such a legal wrong as would be the subject of an action for damages at common law. The word covers such injuries as are capable of being ascertained at the time of the injury, and does not include injuries subsequently arising from the operation of a railroad, etc., without negligence or lack of skill, such as annoyance from smoke, cinders, noise, etc. *Pennsylvania R. Co. v. Marchant*, 13 Atl. 690, 693, 119 Pa. 541, 4 Am. St. Rep. 659.

The expression "injury to real property," as used in the statute giving a justice of the peace jurisdiction "in actions for damages for injury to real property, or for the taking, detaining, or injuring personal property," is about as comprehensive as could well be devised, and embraces all injuries, whether direct or consequential, to real property, including injury thereto caused by a railroad embankment and backing up of water upon the land. *Chicago & A. R. Co. v. Calkins*, 17 Ill. App. (17 Bradw.) 55, 56.

#### **Conversion.**

Within Const. art. 6, § 7, par. 2, providing that justices of the peace shall have jurisdiction in cases of injuries or damages to personal property which do not exceed one hundred dollars, the words "injuries or damages" were evidently intended to be synonymous, and when applied to property they mean some physical injury to the property itself, some trespass upon it by virtue of which its value has become diminished or destroyed, and in this sense conversion implies no such injury, and hence the justice court has no jurisdiction of the action of trover. *Blocker v. Boswell*, 84 S. E. 289, 290, 109 Ga. 230.

#### **Fall in market price.**

Code, § 635, subd. 3, relating to attachments obtained on the ground of an "injury to personal property" in consequence of fraud, cannot be construed to include a loss to the owners of tea which remained in the possession of the owners while the tea brokers were employed to sell it, which loss re-

sulted from a fall in the market; the delay being occasioned by the refusal of the owners to accept a sale, because the brokers themselves were the purchasers. *Roome v. Jennings*, 19 N. Y. Supp. 825, 61 Super. Ct. (29 Jones & S.) 361.

#### **Fraud or false warranty.**

Rev. Code, c. 7, § 18, authorizing an attachment to be issued on the commission of an "injury to the property of another," etc., does not include a false warranty or a deceit in the sale of personal property. "Property" is sometimes used in a broad sense, as synonymous with "estate"; but the legal signification of the two words is not the same. "Estate" is the broadest term, and includes choses in action. "Property" is confined to things that are tangible. *Webb v. Bowler*, 50 N. C. 362, 365.

Code, § 167, subd. 3, authorizing the joinder of actions for injuries, with or without force, to persons, or property, or either, "must be construed to mean a direct corporeal damage or wrong done to specific property, and not to the mere personal rights or rights of property." It does not include a fraud or deceit in the sale of property. *Cleveland v. Barrows* (N. Y.) 59 Barb. 364, 369 (citing *Tracy v. Leland*, 4 N. Y. Super. Ct. [2 Sandf.] 729; *Northern Ry. of France v. Carpentier* [N. Y.] 13 How. Prac. 222).

#### **Injury to animals.**

The phrase "injuring or destroying any other public or private property," in Code, § 4627, prohibiting the injuring or destroying of any other public or private property, relates only to the injury or destruction of inanimate property, and does not apply to the injuring or killing of animals. *Patton v. State*, 19 S. E. 734, 735, 93 Ga. 111, 24 L. R. A. 732.

#### **Injury to business.**

For the purposes of a civil action an injury to one's business is an "injury to property"; but within the criminal law a threat to injure one's business by inducing his employes, who are on a strike, to persist in their refusal to work for him, is not a threat to do an injury to the property of such person, within the meaning of Pen. Code, §§ 552, 553, which defines extortion as procuring the property of another by means of fear, induced, inter alia, by threats to injure his property. *People v. Barondess*, 16 N. Y. Supp. 436, 437, 61 Hun. 571.

"Injury to property," as used in Pen. Code, § 553, declaring that fear, such as will constitute extortion, may be induced by a threat to do an unlawful injury to property of the individual threatened, should be construed to include a threat of an injury to one's business. *People v. Barondess*, 31 N.

E. 240, 241, 133 N. Y. 649, affirming 16 N. Y. Supp. 436, 441, 61 Hun. 571.

Code Civ. Proc. N. Y. § 549, subd. 2, giving an action against persons who have combined to do an injury to property, includes injury to a party's business and the use of his property. *Old Dominion S. S. Co. v. McKenna* (U. S.) 30 Fed. 48.

Pen. Code, §§ 552, 553, defining extortion as procuring the property of another by means of fear, induced by threats to injure his property, includes an injury to one's business. *People v. Hughes*, 19 N. Y. Supp. 550, 64 Hun. 638.

#### **Loss of property distinguished.**

To say that the phrases "loss of property" and "injury to property," in connection with damages to freight shipped, have the same signification, is to declare them synonymous, when in fact they are not. One means a total destruction or loss of property; the other means a partial loss or destruction; and in case of injury a value may yet remain in the property, equal to or exceeding the stipulated value. *Nelson v. Great Northern R. Co.*, 72 Pac. 642, 648, 28 Mont. 297.

#### **Taking distinguished.**

An injury to and a taking of private property are distinct things. Every taking in law is an injury of some kind, though every injury does not include a taking. Property is taken by an entry upon and occupation of it, as in the ordinary case of location. It is injured by obstructing access, as in *Pennsylvania R. Co. v. Duncan*, 5 Atl. 742, 111 Pa. 352, or drainage, as in *Pennsylvania S. V. R. Co. v. Ziemer*, 17 Atl. 187, 124 Pa. 560. *Garrett v. Lake Roland El. Ry. Co.*, 29 Atl. 830, 832, 79 Md. 277, 24 L. R. A. 396 (citing *Jones v. Erie & W. V. R. Co.*, 25 Atl. 134, 137, 151 Pa. 30).

## **INJUSTICE.**

Under a statute authorizing an appeal from a decision of the judge of probate, after the lapse of the statutory time for perfecting an appeal, in case failure to appeal was the result of mistake, accident, or misfortune, and injustice was done by the decision, injustice is done when it appears that there are important questions at issue which petitioner in good faith desires and intends to try, and some evidence is offered tending to sustain the reasons of the appeal. *Holton v. Olcott*, 58 N. H. 598.

Under a statute providing that if it appear that a petitioner for leave to appeal has not unreasonably neglected to appeal, and that injustice has been done by the decision of the judge, such appeal shall be allowed.

etc., it is held that where important questions of law and fact are involved in a proceeding which a party in interest intends to litigate and has the right to litigate by appeal, and it appears that without the petitioner's neglect, but absolutely through mistake, accident, or misfortune, he is deprived of that right, injustice has been done within the meaning of the statute. *In re Moulton*, 50 N. H. 532.

"Fraud" is deception practiced by the party. "Injustice" is the fault or error of the court. They are not equivalent words in substance, or in a statute authorizing a new trial on a showing of fraud or injustice, and any attempt to give them that construction is futile. Fraud is always the result of contrivance and deception. Injustice may be done by the negligence, mistake, or omission of the court itself." *Silvey v. United States* (U. S.) 7 Ct. Cl. 305, 324.

## INLAND.

Within a country, state, or territory; within the same country. In old English law, "inland" was used for the demesne (q. v.) of the manor, that part which lay next or most convenient for the lord's mansion house, as within the view thereof, and which, therefore, he kept in his own hands for support of his family and for hospitality; in distinction from "outland," or "utland," which was the portion let to tenants. *Black, Law Dict.*

## INLAND BILL OF EXCHANGE.

The term "inland bill of exchange" is purely technical and borrowed from the English Law. *Kyd*, in his treatise (page 8), describes inland bills as those which pass between persons residing in the same country. *Evans*, p. 2, states an inland bill to be one where the drawer and the drawee reside in the same kingdom. *Lonsdale v. Brown* (U. S.) 15 Fed. Cas. 855, 857.

*Sir William Blackstone*, in his *Commentaries* (volume 2, p. 467), distinguishes foreign from inland bills by defining the former as bills drawn by a merchant residing abroad upon his correspondent in England, or vice versa, and the latter as those drawn by one person on another, when both drawer and drawee reside within the same kingdom. Bills of exchange drawn in one state of the Union on persons living in another state partake of the character of foreign bills. *Buckner v. Finley*, 27 U. S. (2 Pet.) 584, 589.

An inland bill is one made in the United States and drawn on a person within the United States, though not in the same state with the drawer. *Miller v. Hackley* (N. Y.) 5 Johns. 375, 384, 4 Am. Dec. 372.

A bill of exchange, made by parties residing in the state and dated at a place

therein, although in fact drawn outside the state, is correctly designated as an inland, and not a foreign, bill of exchange. *Strawbridge v. Robinson*, 10 Ill. (5 Gilman) 470, 472, 50 Am. Dec. 422.

An inland bill of exchange is one drawn and payable with the state. *Civ. Code Cal.* 1903, § 3224; *Rev. St. Wyo.* 1899, § 2423; *Rev. St. Utah* 1898, § 1643; *Rev. Codes N. D.* 1899, § 4946; *Civ. Code S. D.* 1903, § 2261; *Rev. St. Okl.* 1903, § 3685.

An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. *Ann. Codes & St. Or.* 1901, § 4531.

An inland bill of exchange is a bill which is, or on its face appears to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill. *Rev. Codes N. D.* 1899, § 1054 (citing *Civ. Code, Neg. Inst. Law*, § 128, p. 1054).

## INLAND CARRIERS.

See "Marine Carrier."

## INLAND NAVIGATION.

"Inland navigation," as used in Act Cong. March 3, 1851 (9 Stat. 635), limiting the liability of shipowners, the seventh section of which provides that this act shall not apply to any vessel used in rivers or inland navigation, does not include navigation on the Great Lakes, but would only include navigation on lakes which are wholly within a state. *Moore v. American Transportation Co.*, 65 U. S. (24 How.) 1, 38, 16 L. Ed. 674; *American Transp. Co. v. Moore*, 5 Mich. 368, 400.

"Inland navigation" within the meaning of *Rev. St.* § 4289 [U. S. Comp. St. 1901, p. 2945], which provides that the act limiting shipowners' liability shall not apply to river or inland navigation, refers to navigation within the body of the country, as distinguished from navigation in the coast waters or in the open ocean. The statute applies to navigation in the rivers, canals, minor lakes, and streams not lying upon the border of the country. In *Moore v. American Transp. Co.*, 65 U. S. (24 How.) 1, 36, 37, 16 L. Ed. 674, the contention that the term "inland navigation" was used in contradistinction from "ocean navigation" merely, and embraced all vessels navigating waters within headlands and after they had passed the ocean, was in that case distinctly rejected, and the words "inland navigation" held to embrace all internal waters. The term does not include the East river, which belongs to the coast waters of the country, as distin-

guished from "inland navigation." *The Garden City* (U. S.) 26 Fed. 766, 773.

The term "inland navigation," in 9 Stat. 635, limiting the liability of shipowners, but providing that the act shall not apply to rivers or inland navigation, includes the navigation of the Upper Mississippi. The term is not confined to waters exclusively within the limits of some one state. *The War Eagle* (U. S.) 29 Fed. Cas. 225, 226.

"Inland navigation," as used in Rev. St. U. S. § 4289 [U. S. Comp. St. 1901, p. 2945], providing that certain limitations of the liability of owners of vessels contained in the title shall all apply to the owners of any vessel used in river or inland navigation, includes navigation upon a sound of limited area lying entirely within the state. *Woodhouse v. Cain*, 95 N. C. 113, 114.

### INLAND RIVERS.

The term "inland rivers" is used to designate rivers into which the tide does not ebb or flow. *Adams v. Pease*, 2 Conn. 481, 484.

### INLAND SEA.

One having a connection with the ocean at each end and running between a long extent of land on two sides of it. *The Martha Ann* (U. S.) 16 Fed. Cas. 868, 870.

### INLAND WATERS.

The term "inland waters," in the federal statute declaring that no property, seized or taken upon any of the inland waters of the United States by the naval forces thereof, shall be regarded as maritime prize, was evidently intended to apply to all waters of the United States upon which a naval force could go, other than bays and harbors on the sea coast. In most instances, property of the enemy on them could be taken, if at all, by an armed force without the aid of vessels of war. The James river is an inland water in any sense that can be given to the term "inland." It lies within the body of counties in Virginia. For miles below Richmond a person can see from one of its banks what is done on the other. Rivers across which one can thus see are inland waters. It matters not that the tide may ebb and flow for miles above their mouths. That fact does not make them any part of the sea or bay into which they may flow, though they may be arms of both. *United States v. Steam Vessels of War*, 1 Sup. Ct. 539, 543, 106 U. S. 607, 27 L. Ed. 286.

Act Cong. July 2, 1864, § 7, providing that no property seized or taken on any of the inland waters of the United States by the naval forces thereof shall be regarded

as maritime prize, should be construed to include the Roanoke river about 130 miles above its mouth. The river is wholly inland, though it discharges its waters into Albemarle Sound, and though it is accessible directly from an ocean. But, in speaking of "inland waters" Congress must have intended waters, within land indeed, yet waters where a naval force can go and naval captures could be made, and it is obvious that other waters than those of the Great Lakes were contemplated and designed to be included. It makes no distinction between rivers that run directly into the sea and those that flow into others that discharge into the sea. Both classes of rivers are "inland waters." *The Cotton Plant*, 77 U. S. (10 Wall.) 577, 581, 19 L. Ed. 983.

Laws 1886, c. 141, regulating the method of fishing in inland waters in Jefferson county, applies to a lake, the bed of which belongs to private persons, but is connected with other waters, so that fish may pass from one to the other. *People v. Duxtater*, 27 N. Y. Supp. 481, 482, 75 Hun, 472.

A policy of marine insurance, insuring the vessel to navigate only in inland waters of the United States, means such waters as canals, lakes, rivers, water courses, inlets, bays, etc., and arms of the sea between projections of land, and will not include the open waters of the Atlantic. *Cogswell v. Chubb*, 86 N. Y. Supp. 1076, 1077, 1 App. Div. 93.

The words "inland waters," as used in an act adopting special rules for the navigation of harbors, rivers, and inland waters of the United States, etc., shall not be held to include the Great Lakes and their connecting and tributary waters as far east as Montreal. U. S. Comp. St. 1901, p. 2900.

### INLET.

Within Laws 1846, p. 279, authorizing a corporation to erect a bridge over a certain creek and other navigable streams or inlets, an inlet is to be construed as meaning "the indentation in the shore at the mouth or outlet of a navigable stream." *Tillotson v. Hudson River R. Co.*, 9 N. Y. (5 Seld.) 575, 580.

### INMATE.

Where an applicant for life insurance states that he has never been an inmate of any infirmary, sanitarium, institution, asylum, or hospital, and his application provides that his answers to the questions therein shall be treated as warranties, the warranty as to his not having been an inmate of an asylum, etc., is broken, where it appears that he was an inmate of a private asylum, as a paying patient, under the care



of a private physician, for the treatment of a disease. The word "inmate," as used in such application, is used in its ordinary sense, as defined by the dictionaries, and the presumption is against its having any different or technical use. *Farrell v. Security Mut. Life Ins. Co.* (U. S.) 125 Fed. 684, 688, 60 C. C. A. 374.

## INN.

### See "Common Inn."

An inn is defined to be, in its legal sense, a house where a traveler is furnished with everything he has occasion for while on his way. *Hall v. State* (Del.) 4 Har. 132, 146; *Pinkerton v. Woodward*, 33 Cal. 557, 596, 91 Am. Dec. 657; *Dickerson v. Rogers*, 23 Tenn. (4 Humph.) 179, 183, 40 Am. Dec. 642; *Ingalsbee v. Wood* (N. Y.) 36 Barb. 452, 462; *People v. Jones* (N. Y.) 54 Barb. 311, 316; *Walling v. Potter*, 35 Conn. 183, 185; *Thompson v. Lacy*, 3 Barn. & Ald. 283, 287; *Carter v. Hobbs*, 12 Mich. 52, 56, 83 Am. Dec. 762; *Charge to Grand Jury* (U. S.) 30 Fed. Cas. 999; *Wilkins v. Earle*, 26 N. Y. Super. Ct. (3 Rob.) 352, 365; *People v. Jones* (N. Y.) 1 Cow. Cr. R. 381, 384.

An inn is a public house of entertainment for all who choose to visit it. *Pullman Palace Car v. Lowe*, 44 N. W. 226, 227, 28 Neb. 239, 6 L. R. A. 809, 26 Am. St. Rep. 325; *Pinkerton v. Woodward*, 33 Cal. 557, 596, 91 Am. Dec. 657; *Walling v. Potter*, 35 Conn. 183, 185.

An inn is a house kept open publicly for the lodging and entertainment of travelers in general for a reasonable compensation. *Voss v. Wagner Palace Car Co.*, 43 N. E. 20, 28, 18 Ind. App. 271; *Ingalsbee v. Wood* (N. Y.) 36 Barb. 452, 462 (citing Hill, Elem. Law, 101; Jac. Law Dict. tit. "Inn").

An inn is a place for the general entertainment of all travelers and strangers who apply, paying suitable compensation. *Comer v. State*, 10 S. W. 106, 107, 26 Tex. App. 509.

An inn is a house, the owner of which holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received. *Bonner v. Welborn*, 7 Ga. 296, 334, 337.

"An inn is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation. To constitute an inn the keeper must hold himself out as ready to receive all who may choose to resort thither and pay an adequate price for entertainment." *Fay v. Pacific Imp. Co.*, 26 Pac. 1099, 1100, 93 Cal. 253.

An inn is defined as a house for the lodging of travelers. *People v. Jones* (N. Y.) 54 Barb. 311; *Lewis v. Hitchcock* (U. S.) 10 Fed. 4. Inns are houses for the entertainment of travelers—"wayfarers," as they are called. *Caylis' Case*, 8 Coke, 32. So it has been held that common inns are instituted for passengers and wayfaring men, and therefore if a neighbor, who is no traveler, lodges there, and his goods be stolen, he shall not have an action. *Meacham v. Galloway*, 52 S. W. 859, 861, 102 Tenn. 415, 46 L. R. A. 319, 73 Am. St. Rep. 886 (citing *Carter v. Hobbs*, 12 Mich. 52, 83 Am. Dec. 762).

"An inn is a house where all who conduct themselves properly and who are able and ready to pay for their entertainment are received, if there is accommodation for them, and who, without any stipulated engagement as to the duration of their stay or as to the rate of compensation, are, while there, supplied at a reasonable charge with their meals, their lodging, and such services and attention as are necessarily incident to the use of the house as a temporary home. This is exactly what is understood in this country by a hotel." *Cromwell v. Stephens* (N. Y.) 2 Daly, 15, 24.

An inn is defined to be a house for the lodging and entertainment of travelers, often a tavern where liquors are furnished for travelers and others. *Werner v. Washington* (U. S.) 29 Fed. Cas. 705, 707.

### Boarding house distinguished.

The distinction between a boarding house and an inn is this: In a boarding house the guest is under an express contract at a certain rate for a certain length of time; but in an inn there is no express engagement. The guest, being on his way, is entertained from day to day, according to his business, on an implied contract. *Willard v. Reinhardt* (N. Y.) 2 E. D. Smith, 148, 149; *Cromwell v. Stephens* (N. Y.) 3 Abb. Prac. (N. S.) 26, 35; *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239, 245, 44 N. W. 226, 6 L. R. A. 809, 26 Am. St. Rep. 325; *Foster v. State*, 84 Ala. 451, 452, 4 South. 833.

The word "inn" has a technical legal signification, and does not include a mere private boarding house. *Civil Rights Cases*, 3 Sup. Ct. 18, 42, 109 U. S. 3, 27 L. Ed. 835.

An inn is a house for the lodging and entertainment of travelers or wayfarers; a tavern; a public house or hotel. As distinguished from a private boarding house, an inn is a house for the entertainment of all travelers of good conduct and means of payment as guests for a brief period, not as lodgers or boarders by contract. *Fruchey v. Eagleson*, 43 N. E. 146, 147, 15 Ind. App. 88.

An inn is a public place of entertainment for all travelers who choose to visit it. It is

distinguished from a private lodging or boarding house in this: that the keeper of the latter is at liberty to choose his guests, while the innkeeper is obliged to entertain and furnish all travelers of good conduct and means of payment with everything which they have occasion for as such travelers on their way. *Pinkerton v. Woodward*, 83 Cal. 557, 583, 91 Am. Dec. 657; *Beall v. Beck* (U. S.) 2 Fed. Cas. 1111, 1116.

An inn was always, and may now when unlicensed, be distinguished from a boarding house, the guest of which is under an express contract at a certain rate and for a specified time; the right of selecting the guest or boarder, and fixing full terms, being the chief characteristic of the boarding house as distinguished from an inn, except as to inns specially licensed, where general contracts with guests are expressly authorized. There is nothing inconsistent or unusual, however, in a house of public entertainment being simultaneously a boarding house and an inn. In respect to those who occupy rooms and are entertained under special contract it may be a boarding house, and in respect to transient persons, who without a stipulated contract remain from day to day, it is an inn or hotel. *Foster v. State*, 84 Ala. 451, 452, 4 South. 833.

An inn is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation; a hotel. In *Wintermute v. Clark*, 7 N. Y. Super. Ct. (5 Sandf.) 247, an inn is defined as "a public house of entertainment for all who choose to visit it." The fact that the house is open for the public, and that those who patronize it come to it on the invitation which is extended to the general public, and without any previous agreement as to the duration of their stay, marks the important distinction between a hotel, or inn, and a boarding house. This difference is thus stated in *Schouler on Bailments*: "An inn is a house where the keeper holds himself out as ready to receive all who may choose to resort thither and pay an adequate price for the entertainment, while the keeper of a boarding house reserves the choice of comers and the terms of accommodation, contracting specially with each customer and most commonly arranging for a long period and a definite abode." *Fay v. Pacific Imp. Co.*, 26 Pac. 1099, 1100, 93 Cal. 253.

#### **Eating house.**

See "Eating House."

#### **European hotel.**

The term "inn" may be used to characterize a European hotel. *Bullock v. Adair*, 63 Ill. App. 30.

The term "inn" includes a public house, which the proprietor designates as a hotel,

and at which guests are provided with lodgings for uncertain periods and under no express agreement, and which only differs from ordinary hotels in having a refectory on the premises, where guests are at liberty to take their meals, if they wish, and to pay for them then and there. *Krohn v. Sweeney* (N. Y.) 2 Daly, 200, 202.

#### **Grocery.**

1 N. R. L. p. 178, § 8, in prohibiting the keeping of a shuffle board, etc., in an inn or tavern, includes a grocery licensed in the city of New York. In *re Cuscadden* (N. Y.) 2 City H. Rec. 53.

#### **Hotel and tavern synonymous.**

In Act 1857, § 8, requiring every keeper of an inn, tavern, or hotel to keep at least three beds and the necessary bedding for the accommodation of travelers, the terms "inn," "tavern," and "hotel" are used synonymously to designate what is ordinarily and popularly known as an inn, or tavern, or place for the entertainment of travelers while on their way, and where all their wants can be supplied. *People v. Jones* (N. Y.) 1 Cow. Or. R. 381, 384.

The terms "inn" and "tavern," as used in the statute regulating taverns, are synonymous. The legal definition of an inn is the same as what is understood in this country by a hotel. An inn or hotel is a house where all who conduct themselves properly and who are able and ready to pay for their entertainment are received, if there is accommodation for them, or who, without any stipulated engagement as to the duration of their stay or as to the rate of compensation, are, while there, supplied at a reasonable charge with their meals, their lodging, and such services and attention as are necessarily incident to the use of the house as a temporary abode. *Cromwell v. Stephens* (N. Y.) 3 Abb. Prac. (N. S.) 26. This is the same definition applied to the term "hotel" by the liquor tax law. In *re Brewster*, 80 N. Y. Supp. 666, 667, 39 Misc. Rep. 639.

The term includes a hotel in a city which receives transient persons as guests. *Taylor v. Monnot*, 11 N. Y. Super. Ct. (4 Duer) 116, 117 (citing *Wintermute v. Clark*, 7 N. Y. Super. Ct. [5 Sandf.] 242).

In Code 1886, § 4052, which prohibits the playing of cards at a tavern, inn, or public place, the term "inn" means a house of entertainment for travelers, being synonymous in meaning with "hotel" or "tavern." It includes a house at which transient guests, as well as regular boarders, are entertained, though the place is not licensed; and a room therein, the only entrance to which is through the house, and which is let by the proprietress to a tenant, who cooks and eats, as well as sleeps, there, is part of the inn within

the meaning of the statute. *Foster v. State*, 4 South. 833, 84 Ala. 451.

#### **Lodging house.**

A building which is let for lodgings only, under a previous contract, with every person who comes, but does not afford entertainment for the public at large indiscriminately, does not come within the meaning of the term. *Bonner v. Welborn*, 7 Ga. 296, 306.

The terms "inn," "tavern," or "hotel" do not properly designate a mere lodging house, although the keeper thereof may send out and procure cooked food for his guests. A house which does not contain the means of preparing food for the table in the ordinary way has not the necessary accommodation to entertain travelers, and is not an inn, within the meaning of Act 1857 in reference to the licensing of innkeepers. *Kelly v. Excise Com'rs of New York* (N. Y.) 54 How. Prac. 327, 331.

#### **Passenger steamer.**

A steamer carrying passengers upon the water, and furnishing them with rooms and entertainment, will be construed to be an "inn," within the rules of law relating to the duties of the proprietors of inns to their guests. *Adams v. New Jersey S. S. Co.*, 45 N. E. 369, 151 N. Y. 163, 84 L. R. A. 682, 56 Am. St. Rep. 616.

#### **Saloon or restaurant.**

"A restaurant where meals are furnished is not an inn or tavern." *People v. Jones*, 54 Barb. 311, 317 (quoting *Wintermute v. Clark* [N. Y.] 7 N. Y. Super. Ct. [5 Sandf.] 242; *Carpenter v. Taylor* [N. Y.] 1 Hilt. 193; *Cromwell v. Stephens* (N. Y.) 3 Abb. Prac. (N. S.) 26, 35.

An inn is a place resorted to by travelers for lodging and accommodation; a place provided for the lodging and entertainment of travelers. The term does not include a saloon to which a person repaired temporarily to obtain a meal; nor can it include restaurants, since mere restaurants or eating houses are wanting in some of the requisites necessary to constitute them inns, as no lodging places are provided therein. *Carpenter v. Taylor* (N. Y.) 1 Hilt. 193, 195.

"Inn" and "tavern" are synonymous. They are both houses of public entertainment. Every inn is not an alehouse, nor every alehouse an inn. If an inn uses common selling ale it is then also an alehouse, and if an alehouse lodges and entertains travelers it is also an inn. At common law any person may erect an inn for the public accommodation without a license, as the keeping of it is not a franchise, but a lawful trade, open to every citizen. No license is necessary to authorize the business of keeping an inn.

*Overseers of Poor of Town of Crown Point v. Werner* (N. Y.) 3 Hill, 150, 156.

An inn is a place where the guests may be furnished with both food and lodging. The term does not include a restaurant, in which rooms are not furnished for the guest. A free lunch at a bar, or an occasional bringing of meals from a neighboring restaurant, will not transform a drinking saloon into a hotel or inn. *Kelly v. Excise Com'rs of New York* (N. Y.) 54 How. Prac. 327, 332.

An inn is a place where provision is made for the essential needs of a traveler on his journey, including lodging and food; a place for the lodging and entertainment of travelers. A coffee house, or mere eating house, does not come within the meaning of the term. The two elements of an inn—that is, the provision of lodging and food—may doubtless be present in very disproportionate degrees, as the needs of the situation require; but both must in some degree be present in order to constitute an inn. *Lewis v. Hitchcock* (U. S.) 10 Fed. 4, 6 (citing *Story*, *Balim.* § 475).

A coffee house is not an inn, within the meaning of a policy of insurance against fire, enumerating the trade of an innkeeper, with others, as extrahazardous and not covered by the policy. *Pitt v. Laming*, 4 Camp 73, 76; *New York Equitable Ins. Co. v. Langdon* (N. Y.) 6 Wend. 623, 627.

#### **Tavern without stables.**

An inn includes a house of public entertainment in London, where beds, provisions, etc., were furnished to all persons paying for the same, but which was merely called a tavern and coffee house, and was not frequented by stagecoaches and wagons from the country, and had no stables belonging to it. *Thompson v. Lacy*, 3 Barn. & Ald. 283, 287.

At an inn of the greatest completeness entertainment is furnished for the traveler's horses, as well as for himself; but that is not essential to give the house the character of an inn. *Pinkerton v. Woodward*, 83 Cal. 557, 596, 91 Am. Dec. 657.

#### **INNKEEPER.**

An innkeeper is one who keeps a house wherein he furnishes beds and provisions to persons in certain stations of life who may think fit to apply for them. *Thompson v. Lacy*, 3 Barn. & Ald. 283, 287.

"An innkeeper is defined to be the keeper of a common inn for the entertainment of travelers and passengers." *Jeffords v. Crump* (Pa.) 12 Phila. 500, 501 (citing *Story*, *Balim.* § 475).

"A common innkeeper is defined to be a person who makes it his business to enter-

tain travelers and passengers, and provide lodging and necessaries for them and their horses and attendants." *Kisten v. Hildebrand*, 48 Ky. (9 B. Mon.) 72, 74, 48 Am. Dec. 416 (quoting *Bac. Abr.*, Tit. "Inns and Innkeepers," B.); *Howth v. Franklin*, 20 Tex. 798, 801, 73 Am. Dec. 218; *Southwood v. Myers*, 66 Ky. (3 Bush) 681, 684; *Pullman Palace Car Co. v. Lowe*, 44 N. W. 226, 227, 28 Neb. 239, 6 L. R. A. 809, 26 Am. St. Rep. 325; *Bonner v. Welborn*, 7 Ga. 296, 306; *Ingalsbee v. Wood* (N. Y.) 36 Barb. 452, 461; *Commonwealth v. Shortridge*, 26 Ky. (3 J. J. Marsh.) 638, 640.

An innkeeper is a person who keeps a house publicly, openly, and notoriously for the entertainment and accommodation of travelers and others for a reward. In short, it is, in the quaint and impressive language commonly made use of, providing "refreshment and entertainment for man and beast." *State v. Stone*, 6 Vt. 295, 298.

The term "innkeeper" is synonymous with tavern keeper. *Commonwealth v. Shortridge*, 26 Ky. (3 J. J. Marsh.) 638, 640.

"One who keeps a house for the entertainment of all who choose to visit it, and extends a general invitation to the public to become guests, is an innkeeper and liable as such, though the house is situated on inclosed grounds." *Fay v. Pacific Imp. Co.*, 28 Pac. 943, 93 Cal. 253.

An innkeeper is one who keeps an inn. "A man may be an innkeeper, although he keeps an inn imperfectly, or combines this employment with others, if he is prepared and holds himself out to the public as ready to entertain travelers, strangers, and transient guests with their teams and carriages, after the manner usual with innkeepers, although he may sometimes make special bargains with his customers, may not keep his house open in the night, and may not keep the stable at which he puts up the horses of those who stop with him at his house." *Commonwealth v. Wetherbee*, 101 Mass. 214, 217.

In order to charge a person as innkeeper it is not necessary to prove that it was only for the reception of travelers that his house was kept open, but is sufficient to prove that all who came were received as guests, without any previous agreement as to the duration of their stay or the terms of their entertainment. *Wintermute v. Clark*, 7 N. Y. Super. Ct. (5 Sandf.) 242, 246.

An innkeeper at common law has been said to be the keeper of a common inn for the lodging and entertainment of travelers and passengers, their horses, and their attendants for a reasonable compensation. The persons undertaking this public employment were bound to take in and receive all travelers and wayfaring persons, and to entertain them for a reasonable compensation, if by any

possibility they could be accommodated, and the innkeeper was bound to guard the goods of his guests with proper diligence. The common-law rule has been generally followed by the courts in this country, save so far as it has been modified by statute. The duties, rights, and responsibilities of an innkeeper are in most respects kindred to those of a common carrier, and in order to enforce the strict common-law liability of an innkeeper the technical relation of guest and innkeeper must be established. It seems to be apparent, from the nature of the duties and obligations of the keeper of a common and public inn, that he is not in his capacity of innkeeper bound to receive and furnish accommodations for persons desirous of exposing their commodities for sale, or bound to permit his establishment to be made a depot for the propagation of horses. *Mowers v. Fethers*, 61 N. Y. 34, 37, 19 Am. Rep. 244.

Those are called "innkeepers" who keep a tavern or hotel and make a business of lodging travelers. *Civ. Code La.* 1900, art. 3232.

#### Boarding house keeper.

The keeper of a mere private boarding house is not an innkeeper, and is not subject to the responsibility or entitled to the privileges of a common innkeeper. "To constitute one an innkeeper, within the legal force of that term, he must keep a house of entertainment or lodging for all travelers or wayfarers who might choose to accept the same, being of good character or conduct." *Redf. Carr.* § 575. Says Judge Story: "An innkeeper may be defined to be the keeper of a common inn for the lodging and entertainment of travelers and passengers, their horses and attendants. An innkeeper is bound to take in all travelers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation, and he must guard their goods with proper diligence. If an innkeeper improperly refuses to receive or provide for a guest, he is liable to be indicted therefor." *Civil Rights Cases*, 3 Sup. Ct. 18, 42, 109 U. S. 3, 27 L. Ed. 835 (citing *Story*, *Bailm.* §§ 475, 476).

#### Club caterer.

One may be an innkeeper without being a club caterer, or he may be a club caterer without being an innkeeper, or he may be both; but, if he is, the two employments are so far separate and distinct in respect of duties and liabilities as not to make him responsible in the one capacity for liabilities incurred in the other. *Amey v. Winchester*, 39 Atl. 487, 488, 68 N. H. 447, 39 L. R. A. 760, 73 Am. St. Rep. 614.

#### Grocer.

The statute which prohibits innkeepers from selling to any one person on credit

spirituous liquors to a greater amount than \$5 does not apply to retail grocers. *Britain v. Bethany*, 81 Miss. 831, 832.

**Keeper of horses.**

An innkeeper is a person who makes it his business to entertain travelers and passengers, and to provide lodging and necessities for them and their horses and attendants. The meaning of the word, however, has been somewhat broadened by the modern growth and development of the business, so that it is held that a man may be an innkeeper, though he have no provision for horses. *Reed v. Teneyck*, 44 S. W. 356, 108 Ky. 65.

**License or sign as affecting.**

In common understanding "innkeeper" and "tavern keeper" are synonymous, as "inn" and "tavern" are both houses of public entertainment. A person who makes it his business to entertain travelers and passengers, and provide lodgings and necessities for them, their horses and attendants, is a common innkeeper, and it is in no way material whether he had any sign before his door or not. Though it be the entertainment of passengers that makes a man an innkeeper, yet if, having put up a sign over his door, he afterwards pulls it down, he thereby discharges himself of the burden of an innkeeper; but if, after he takes it down, he continues to entertain travelers, it is as much a common inn as before. At common law any person may erect an inn for the public accommodation without a license, as the keeping of it is not a franchise, but a lawful trade, open to every citizen. *Overseers of Poor of Town of Crown Point v. Warner* (N. Y.) 3 Hill, 150, 156.

An innkeeper is one who keeps a house where the traveler is furnished with everything which he has occasion for while on his way. It is not necessary that a party should put up a sign as keeper of an inn. It is sufficient if in fact he keeps one. *Dickerson v. Rogers*, 23 Tenn. (4 Humph.) 179, 182, 40 Am. Dec. 642.

**Lodging house keeper.**

The term "innkeeper" does not include one who rents out the upper rooms of a building to lodgers whom he does not supply with meals, and rents the basement of the building to another person, who keeps an independent restaurant therein. *Cochrane v. Schryver* (N. Y.) 12 Daly, 174.

The term "innkeeper," as used in Act 1857, which authorizes the granting of licenses to sell spirituous liquors to innkeepers, does not include a lodging house keeper, who makes no provision for supplying lodgers with meals, but occasionally sends out and

procures cooked food for his guests. *Kelly v. Excise Com'rs of New York* (N. Y.) 54 How. Prac. 827, 832.

**Occasional entertainment.**

An innkeeper is one who keeps a common inn; that is, an inn for travelers generally, and not merely for a short season of the year, or for select persons, who are lodgers. *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, 363, 20 Am. Rep. 232.

One who entertains strangers occasionally, although he receives compensation for it, is not an innkeeper. *Charge to Grand Jury* (U. S.) 30 Fed. Cas. 999; *State v. Mathews*, 19 N. C. 424, 426.

To constitute a person a common innkeeper it is not sufficient to show that he occasionally entertained travelers. To be subjected to the responsibilities attaching to innkeepers, a person must make tavern keeping to some extent a regular business—a means of livelihood. He should hold himself out to the world as an innkeeper. It is not necessary that he should have a sign or license, provided that he has in any other manner authorized the general understanding that his was a public house where strangers had a right to require accommodation. The person who occasionally entertains others for a reasonable compensation is not subject to the extraordinary responsibilities of an innkeeper. *Lyon v. Smith* (Iowa) *Morris*, 184, 186.

**Restaurant keeper.**

An innkeeper is a person who receives and entertains as guests those who choose to visit his house, and it would not include one who merely keeps a restaurant where meals are furnished. *People v. Jones* (N. Y.) 54 Barb. 311, 316.

The word "innkeeper," as used in Act 1857, which authorizes the granting of licenses to innkeepers to sell spirituous liquors, does not include the keeper of a restaurant, who has no beds for the accommodation of travelers. *Kelly v. Excise Com'rs of New York* (N. Y.) 54 How. Prac. 327, 332.

**Sleeping car company.**

A sleeping car company is not an innkeeper. *Welding v. Wagner* (N. Y.) 1 City Ct. R. 66.

The term "innkeeper" cannot be applied to sleeping car companies, and therefore the high degree of care required of innkeepers cannot be required of such companies. *Blum v. Southern Pullman Palace Car Co.* (U. S.) 3 Fed. Cas. 755, 756.

**INNOCENCE.**

The absence of guilt. The law presumes in favor of innocence. *Black, Law Dict.*

**INNOCENT AGENT.**

Bishop defines an "innocent agent" as one who does the forbidden thing, moved thereto by another person, yet incurs no guilt, because not endowed with sufficient mental capacity or not made acquainted with the necessary facts. *Smith v. State*, 17 S. W. 552, 557, 21 Tex. App. 107.

An "innocent agent," in a sense that one may assist in the perpetration of a crime and may not be an accomplice, is one who does an unlawful act at the solicitation or request of another, but who, from defect of understanding or ignorance of the inculpatory facts, incurs no legal guilt. A woman of mature years, in full possession of her faculties and of ordinary intelligence, who fraudulently undertook to assist a person in corruptly influencing her husband as to his verdict, and who must have known that she was doing wrong, is not an innocent agent, but an accomplice. *State v. Carr*, 42 Pac. 215, 216, 28 Or. 389.

An innocent agent is one who is ignorant of the unlawful intent of his principal, and is merely the instrument of the guilty party in committing the offense. In such case the acts of the innocent agent are the acts of the principal, and hence, if A. should take cattle, honestly believing them to belong to B., without knowledge of the intent of B. to steal them, A. would not be guilty of larceny, but B. would be. *Smith v. State*, 17 S. W. 552, 557, 21 Tex. App. 107.

**INNOCENT POSSESSION.**

The term "innocent possession" is not convertible in legal terminology with the term "lawful possession." Intent does not enter into whether an act is unlawful or tortious, though it does as to whether it is innocent or criminal. A defendant in conversion, relying on innocent possession of the property in question, must set up such fact in a defense, as a general denial only raises the issue of the legality of the possession. *Milligan v. Brooklyn Warehouse & Storage Co.*, 68 N. Y. Supp. 744, 749, 34 Misc. Rep. 55.

**INNOCENT PURCHASER.**

An innocent purchaser is one who by an honest contract or agreement purchases property or acquires an interest therein, without knowledge or means of knowledge sufficient to charge him in law with knowledge of any infirmity in law in the title of the seller. *Hanchett v. Kimbark (Ill.)* 2 N. E. 512, 517.

To be an innocent purchaser the vendee must in good faith pay a valuable consideration without notice of outstanding legal or equitable rights. An agreement to take a strict quitclaim deed has the effect to give

him notice; and where the consideration was grossly inadequate the purchaser cannot be held to be an innocent purchaser. *Tate v. Kramer*, 23 S. W. 255, 257, 1 Tex. Civ. App. 427.

A purchaser of lands, at a sale under a trust deed with notice of a prior vendor's lien on the lands, does not take the land as an innocent purchaser, relieved of such lien, though the trustee in the deed of trust had no knowledge or notice of such lien. Such trustee gave no consideration for the deed and advanced nothing on the faith of it. *Gerson v. Pool*, 31 Ark. 85, 90.

The court, in *Carnahan v. Yerkes*, 87 Ind. 62, 67, says that "an execution creditor, who bids off property at a sale on his own execution and applies the bids to the payment of his own judgment, is not regarded as a bona fide or innocent purchaser." The statement is incomplete, because silent as to notice. Applied to a judgment creditor purchaser with notice of the prior equity, it is right; to one without notice, wrong. The facts in the case disclose that the judgment creditor purchaser had notice prior to the execution sale of the senior rights of his adversary. The quotation must be limited, or regarded as dictum. A judgment creditor, purchasing in good faith at a proper execution sale on his own valid judgment, is a bona fide or innocent purchaser for value, and takes free from secret equities. *Pugh v. Highley*, 53 N. E. 171, 173, 152 Ind. 252, 44 L. R. A. 392, 71 Am. St. Rep. 327.

**Of note.**

The term "innocent purchasers," in Gen. St. 1894, § 2214, declaring all usurious notes, contracts, and securities void, but which provides that nothing in the act shall be construed to prevent the purchase of negotiable mercantile paper, usurious or otherwise, for valuable consideration, by an innocent purchaser, means a bona fide indorsee or bearer, within the law merchant. *Robinson v. Smith*, 64 N. W. 90, 91, 62 Minn. 62; *Fredin v. Richards*, 68 N. W. 1031, 1032, 61 Minn. 490.

To constitute an innocent purchaser of negotiable paper, within the meaning of Gen. St. 1894, § 2214, a person must have acquired the paper in due course of business, or, as sometimes expressed, according to the usages and commercial transactions in commercial paper. Thus, where members of an existing firm formed a partnership with another party, and all of the assets, including some negotiable notes, of the original partnership were transferred to the new firm, the new firm were not purchasers of the notes in due course of business. *Stephens v. Olson*, 64 N. W. 898, 899, 62 Minn. 295.

Where the payee of a note pledged it as collateral security to his own debt with

the bank, and at the maturity of the note agreed with the maker to an extension of time upon the maker paying usurious interest, and received a new note, which did not disclose the usurious contract, which he delivered to the bank, and received in exchange therefor the old note and surrendered it to the maker, the bank having no knowledge or notice that the new note was to be taken, or of the contract that had been made, further than appeared upon the face of the note received by it, it was an innocent purchaser of the note, and the defense of usury could not be maintained against it. *First Nat. Bank of Rochester v. Bentley*, 6 N. W. 422, 423, 27 Minn. 87.

### INNOCENT WOMAN.

The term "innocent woman," as used in Code, § 1113, making any person guilty of a misdemeanor who shall attempt wantonly and maliciously to destroy the reputation of an innocent woman by words amounting to a charge of incontinency, does not necessarily mean a woman who has never had illicit intercourse with a man, but includes a woman who has had such intercourse, but has since repented and become virtuous. *State v. Grigg*, 10 S. E. 684, 685, 104 N. C. 882.

Within the meaning of Code, § 1113, a woman is "innocent," unless she has had sexual intercourse with a man, and on a prosecution under such section an instruction that, "if the prosecutrix had surrendered her person to C. for the purpose of committing fornication with him, she would not be an innocent woman, though the act was not completed, in consequence of the coming upon them of other parties," was properly refused. *State v. Hinson*, 9 S. E. 552, 553, 103 N. C. 374.

An innocent woman is one whose character is unsullied; that is, undefiled, not stained with moral turpitude. *State v. Davis*, 92 N. C. 764, 765.

An innocent woman is one who has never had sexual commerce with man. *State v. Malloy*, 20 S. E. 461, 462, 115 N. C. 737; *State v. Brown*, 6 S. E. 568, 570, 100 N. C. 519.

An innocent woman is one who has never had illicit intercourse with any man, and who is chaste, or pure; and it is not necessary that she have a mind free from lustful and lascivious desires. *State v. Crowell*, 21 S. E. 502, 503, 116 N. C. 1052.

### INNUENDO.

The office of the innuendo is merely to interpret the meaning of the language used. Indeed, the word "meaning" is a synonym of the word "innuendo," and so is the

phrase "that is to say." *Grand v. Dreyfus*, 54 Pac. 889, 890, 122 Cal. 58.

An innuendo is an explanation of the meaning of the words published or spoken, by a reference to facts previously ascertained by averment or otherwise. *Fry v. Bennett*, 7 N. Y. Super. Ct. (5 Sandf.) 54, 65.

The purpose of an innuendo is to define the defamatory meaning which the plaintiff attaches to the words, and to show how they came to have that meaning and how they relate to the plaintiff. *Naulty v. Bulletin Co.*, 55 Atl. 862, 864, 206 Pa. 128.

An innuendo is not an averment, but only matter of explanation. It means nothing more than the words "id est," "scilicet," or "meaning," or "aforesaid," as explanatory of a subject-matter sufficiently expressed before. It cannot extend the sense of the expressions in the alleged libel beyond their own meaning. *Wallace v. Homestead Co.*, 90 N. W. 835, 840, 117 Iowa, 348; *Cheetham v. Tillotson* (N. Y.) 5 Johns. 430, 432, 433. As "such an one," meaning the defendant, or "such a subject," meaning the subject in question. But as an innuendo is only used as a word of explanation, it cannot extend the sense of the expressions in the libel beyond their own meaning, unless something is put on the record for it to explain. The innuendo can only explain the words of the libel, and can add nothing to them. *Cheetham v. Tillotson* (N. Y.) 5 Johns. 430, 433; *Stow v. Converse*, 4 Conn. 17, 35.

"Innuendo" is an averment of the meaning of alleged libelous words. *Collins v. Dispatch Pub. Co.*, 25 Atl. 546, 547, 152 Pa. 187, 34 Am. St. Rep. 636, 31 Wkly. Notes Cas. 316.

The office of an innuendo in the law of libel or slander is to explain matter sufficiently expressed before. *Bornman v. Boyer* (Pa.) 3 Bin. 515, 519, 5 Am. Dec. 380; *Cooper v. Greeley* (N. Y.) 1 Denio, 347, 361.

"Innuendo" is that part of a pleading in an action for libel which explains the words spoken or written and annexes to them their proper meaning. *Quinn v. Prudential Ins. Co.*, 90 N. W. 349, 350, 116 Iowa, 522 (citing *Bloss v. Tobey*, 19 Mass. [2 Pick.] 320; *Bathrick v. Detroit P. & T. Co.*, 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63); *Henicke v. Griffith*, 29 Kan. 516, 519; *Gibson v. Sun Printing & Publishing Ass'n*, 76 N. Y. Supp. 197, 199, 71 App. Div. 566; *Barnes v. State*, 41 Atl. 781, 782, 88 Md. 347. And in determining whether such words are susceptible of that meaning the court will not construe them "in mitiori sensu," or otherwise than according to their fair signification. Undoubtedly an innuendo cannot extend or enlarge the matter set forth

in an alleged libel, and it becomes a matter of construction for the court to determine whether the words used are susceptible of the application, explanation, or interpretation which the pleader has given to them in the innuendo. If they are susceptible of the meaning ascribed to them, without distorting them or without straining their natural meaning and import, then they may be regarded as libelous per se; but it must be left to the jury to say whether or not they were understood and intended in the sense ascribed to them in the innuendo. *Gibson v. Sun Printing & Publishing Ass'n*, 76 N. Y. Supp. 197, 199, 71 App. Div. 566; *Beardsley v. Tappan* (U. S.) 2 Fed. Cas. 1181, 1182.

**Alleging unnecessary matter.**

When the new matter stated in an innuendo is not necessary to support the action, it may be rejected as surplusage. *Cooper v. Greeley* (N. Y.) 1 Denio, 347, 361; *Thomas v. Crosswell* (N. Y.) 7 Johns. 264, 271, 5 Am. Dec. 269.

The office of an innuendo is to aver the meaning of the language published; but if the common understanding of mankind takes hold of the published words, and at once, without difficulty or doubt, applies a libelous meaning to them, an innuendo is not needed, and, if used, may be treated as useless surplusage. *Wood v. Boyle*, 35 Atl. 853, 854, 177 Pa. 620, 55 Am. St. Rep. 747; *Continental Nat. Bank v. Bowdre*, 23 S. W. 131, 134, 92 Tenn. 723; *Benton v. State*, 86 Atl. 1041, 1043, 59 N. J. Law, 551. See, also, *Grand v. Dreyfus*, 54 Pac. 389, 390, 122 Cal. 58.

The term "innuendo" is used in the law of slander and libel to designate the averment in the plaintiff's statement of claim of the construction which he puts upon the alleged libelous words, and "which he will endeavor to induce the jury to adopt." "Where a defamatory meaning is apparent on the face of the libel itself, no innuendo is necessary, though even there the pleader occasionally inserts one to heighten the effect of the words; but where the words prima facie are not actionable an innuendo is essential to that action. It is essential to bring out the latent injurious meaning of the defendant's words, and such innuendo must distinctly aver that the words bear a specific actionable meaning." *Johnston v. Morrison* (Ariz.) 21 Pac. 465.

**Averring facts.**

An innuendo does not aver a fact, nor can it change the natural meaning of language; its office being to explain, and not to extend or enlarge, the meaning of the words. *Stutsman v. Stutsman* (Ind.) 66 N. E. 773, 774 (citing *Rock v. McClarnon*, 95 Ind. 415; *Seller v. Jenkins*, 97 Ind. 430).

An innuendo, so far from being an averment of facts upon which an issue can be taken, is not an averment of facts at all. It is merely an inference of reasoning from certain premises, and although, when improperly framed, it may in some cases tend to justify a demurrer, in none is its truth or falsehood a question for the consideration of a jury. *Fry v. Bennett*, 7 N. Y. Super. Ct. (5 Sandf.) 54, 65.

An innuendo is an explanatory averment of the meaning. It charges no fact, and it does not permit of being sustained by evidence. The pleader having, in the colloquium and elsewhere, stated all the extrinsic and all the other facts desired, introduces into his recitation of the libelous words, when necessary, the expression, "meaning," etc., and this is called an "innuendo." *Dickson v. State*, 80 S. W. 807, 808, 34 Tex. Cr. R. 1, 53 Am. St. Rep. 694.

It is not the subject of proof, and only adds such explanatory matter in relation to the words uttered as may have been understood by the hearers at the time. *Andrews v. Woodmansee* (N. Y.) 15 Wend. 232, 235.

**Connecting colloquia and particular words laid.**

The office of an innuendo is usually to connect the matter introduced by the averments and the colloquia with the particular words laid, showing identity, and drawing what is then the legal inference from the whole declaration—that such was, under the circumstances set out, the meaning of the words used. *State v. Grinstead*, 61 Pac. 976, 979, 10 Kan. App. 78 (citing *Carter v. Andrews*, 33 Mass. [16 Pick.] 1, 6; *State v. Elliot*, 61 Pac. 981, 10 Kan. App. 69).

An innuendo, in a declaration for slander, is that language which connects words not in themselves actionable with some precedent fact, formally averred, which explains their meaning. *Watts v. Greenlee*, 13 N. C. 115, 118.

**Enlarging or extending meaning of words.**

The office of an innuendo is to aver the meaning of the language published. The use of it can never change the import of the words, nor add to nor enlarge their sense. *Continental Nat. Bank v. Bowdre*, 23 S. W. 131, 134, 92 Tenn. 723; *Gaither v. Advertiser Co.*, 14 South. 788, 789, 102 Ala. 458; *Vaughan v. Havens* (N. Y.) 8 Johns. 109; *Evans v. Tibbins* (Pa.) 2 Phila. 210; *Cole v. Neustadter*, 29 Pac. 550, 553, 22 Or. 191; *Tappan v. Wilson*, 7 Ohio (7 Ham.) 190, 191, 194, pt. 1.

An innuendo cannot add to, enlarge, extend, or change the sense of the words in question, and the matter to which they refer must always appear from the antecedent



parts of the declaration. *Stitzell v. Reynolds*, 59 Pa. (9 P. F. Smith) 488, 492.

"An innuendo does not enlarge the matter set forth in the other portions of the complaint. It is only explanatory of the matter charged, and does not extend the sense of the words beyond their natural import, unless accompanied by a distinct averment or colloquium, or other introductory allegation to which it may properly have reference." *Caldwell v. Raymond* (N. Y.) 2 Abb. Prac. 193, 195.

An innuendo, in the law of pleading relative to libel cases, refers to allegations merely explanatory of what is already set forth. It does not add to, enlarge, or change the sense of the words charged. It is used merely to set forth the meaning of words used by defendant, and to convey the meaning in the sense in which the plaintiff alleges that defendant used them. It is an averment of the meaning of the alleged libelous words, and it cannot enlarge nor point the effect of the language beyond its natural and common meaning in the usual acceptation of the words. *Jones v. Roberts*, 50 Atl. 1071, 1072, 73 Vt. 201.

"It cannot enlarge and point to the effect of language beyond its natural and common meaning in its usual acceptation, unless connected with proper introductory averments." *Dixon v. State*, 1 South. 69, 71, 81 Ala. 61 (quoting *Bouv. Law Dict.*); *Grand v. Dreyfus*, 54 Pac. 389, 390, 122 Cal. 58.

An innuendo is explanatory of the subject-matter sufficiently expressed; but it is explanatory only, for it cannot extend the use of the words beyond their own meaning, unless something is put upon the record for it to explain. *Sturtevant v. Root*, 27 N. H. (7 Fost.) 69, 73; *Hogan v. Wilmoth* (Va.) 16 Grat. 80, 83; *Bartow v. Brands*, 15 N. J. Law (3 J. S. Green) 248, 249; *Van Vetchen v. Hopkins* (N. Y.) 5 Johns. 211, 220, 4 Am. Dec. 339 (cited and approved in *Bradley v. Cramer*, 18 N. W. 268, 270, 59 Wis. 309, 48 Am. Rep. 511). See, also, *Ludlum v. McCuen*, 17 N. J. Law (2 Har.) 12, 15; *Barnes v. State*, 41 Atl. 781, 782, 88 Md. 347.

But an innuendo may not introduce new matter or enlarge the natural meaning of words. It must not put upon the defendant's words a construction they will not bear. *Dun v. Maier*, 82 Fed. 169, 172, 27 C. C. A. 100; *Beardsley v. Tappan* (U. S.) 2 Fed. Cas. 1181, 1182; *Price v. Conway*, 19 Atl. 687, 134 Pa. 340, 8 L. R. A. 193, 19 Am. St. Rep. 704; *Gaither v. Advertiser Co.*, 14 South. 788, 789, 102 Ala. 458; *Hackett v. Providence Telegram Pub. Co.*, 29 Atl. 143, 18 R. I. 589; *Barnes v. State*, 41 Atl. 781, 782, 88 Md. 347; *Vickers v. Stoneman*, 41 N. W. 495, 73 Mich. 419.

"An innuendo is an averment that such a one means such a particular person, or

that such a thing means such a particular thing, and with the introductory matter it forms a connected proposition, by which the cognizance of the charge will be submitted to the jury and the cause of action appear to the court." *Cooper v. Greeley* (N. Y.) 1 Denio, 347, 361.

An innuendo cannot alter or extend the fair meaning of words. *McClurg v. Ross* (Pa.) 5 Bin. 218, 220.

"The office of an innuendo is to contain and design the person who was named in certain before. 'It cannot alter the matter or sense of the words themselves.' It cannot extend the words by an imagination of an intent not apparent by any precedent words to which the innuendo could refer. 'In effect it stands in lieu of a *prædictum*.'" *Pelton v. Ward* (N. Y.) 3 Caines, 73, 76, 2 Am. Dec. 251.

The office of an innuendo, in the law of pleading in libel and slander cases, "is to aver the meaning of the language published. An innuendo means nothing more than giving point or meaning as explanatory of a matter sufficiently expressed before. It may serve for an explanation, to point a meaning where there is precedent matter expressed, or necessarily understood or known, but never to establish a new charge. It may apply what is already expressed, but cannot add to, nor enlarge, nor change the sense of, the previous words. If the words before the innuendo do not sound in slander, no meaning produced by the innuendo will make the action maintainable; for it is not the nature of an innuendo to beget an action. An innuendo helps nothing, unless the words precedent have a violent presumption of the innuendo. The business of an innuendo is by a reference to preceding matter to fix more precisely the meaning. The office of an innuendo is to explain, not to extend, what has gone before, and it cannot enlarge the meaning of words, unless it be connected with some matter of fact expressly averred. The innuendo is only a link to attach together facts already known to the courts." *Squires v. State*, 45 S. W. 147, 149, 39 Tex. Cr. R. 96, 73 Am. St. Rep. 904.

The innuendo is merely explanatory of something already expressed. It cannot give a criminal meaning to innocent words, or add to, extend, or change the sense of the words previously stated; but it may give a technical meaning to a slanderous charge from the obvious import of the words spoken, taken in connection with the colloquium. *Coburn v. Harwood* (Ala.) Minor, 93, 94, 12 Am. Dec. 87.

#### Explaining ambiguous words.

An innuendo may be defined to be an averment in explanation of the defendant's meaning, by reference to antecedent matter. *Hays v. Brierly* (Pa.) 4 Watts, 392, 393.

The office of an innuendo in the pleadings of libel and slander is to define the defamatory meaning which the plaintiff attaches to the words, if they are equivocal. *Hackett v. Providence Telegram Pub. Co.*, 29 Atl. 143, 18 R. I. 589.

The innuendo is intended to define the defamatory meaning which the plaintiff passes upon the word used. Where language is ambiguous, and is as susceptible of a harmless as of an injurious meaning, it is the function of an innuendo to point out the meaning which the plaintiff claims to be the true meaning, and the meaning upon which he relies to sustain his action. This applies, whether the ambiguity be patent or latent, and whether or not there are facts alleged as an inducement. *Callahan v. Ingram*, 26 S. W. 1020, 1022, 122 Mo. 355, 43 Am. St. Rep. 583.

An innuendo cannot render certain words which would otherwise be uncertain. *Coburn v. Harwood (Ala.)* 1 Minor, 93, 94, 12 Am. Dec. 37; *Gaither v. Advertiser Co.*, 14 South. 788, 789, 102 Ala. 458.

The office of an innuendo in an indictment for libel is to express and render certain the meaning of equivocal and uncertain language, or bring out some latent meaning in words necessary to fix their defamatory character, or to explain to whom the defamatory language refers, where that is left uncertain. *Benton v. State*, 36 Atl. 1041, 1043, 59 N. J. Law, 551.

#### Introducing new matter.

An innuendo must not introduce new matter. *Donahoe v. Star Pub. Co. (Del.)* 53 Atl. 567, 568.

An innuendo is only explanatory of some matter already expressed. It serves to point out when there is precedent matter, but never for a new charge. *Emery v. Prescott*, 54 Me. 389, 391.

It is laid down in *Starkie, Slander*, p. 421, that the most important rule relating to this species of averment is that its office is merely to explain by pointing out the allusions, and that it can in no case be allowed to introduce new matter. And the reason for this is a most substantial one; for, were it otherwise, there would be no sufficient and distinct averment of the existence of those facts which in point of law are essential to render the words acceptable. Hence an innuendo cannot extend the sense of words beyond their own meaning, unless something be put upon the record for it to explain. *Vickers v. Stoneman*, 41 N. W. 495, 73 Mich. 419; *Barnes v. State*, 41 Atl. 781, 782, 88 Md. 347.

An innuendo is an averment used to give point and direction to ambiguous language,

but not to supply omitted words. *Dixon v. State*, 1 South. 69, 71, 81 Ala. 61.

#### Pointing out application.

The innuendo is that part of a complaint for slander or libel which "is used to give the words alleged the construction which they should bear in reference to the extrinsic fact, or to explain their particular meaning in relation to the facts." *Harrison v. Manship*, 22 N. E. 87, 120 Ind. 43.

It is not the office of an innuendo to enlarge the meaning of the words employed in the publication, but merely to point out their application to facts previously alleged. *Ganvreau v. Superior Pub. Co.*, 22 N. W. 726, 728, 62 Wis. 403; *Bradley v. Kramer*, 18 N. W. 268, 269, 59 Wis. 309, 48 Am. Rep. 511; *Andrews v. Woodmansee (N. Y.)* 15 Wend. 232, 235; *Cooper v. Greeley*, 1 Denio, 347, 361.

In *Sabin v. Angell*, 46 Vt. 740, the holding was that it may be fairly said that an innuendo is used to point out the meaning of words used, in view of the occasion and circumstances and such extraneous matter as appears from the declaration. It operates in an action, with the colloquium, to point out the true meaning intended by the use of the words. *Sheridan v. Sheridan*, 5 Atl. 494, 495, 58 Vt. 504.

#### Pointing out person or thing.

An innuendo, in a complaint for libel or slander, cannot add to, enlarge, extend, or change the sense of the previous words, and the matter to which it alludes must appear from the antecedent parts of the declaration. *Thomas v. Crosswell (N. Y.)* 7 Johns. 264, 271, 5 Am. Dec. 269.

In pleading in libel, the office of an innuendo is to define the defamatory meaning which the plaintiff sets on the words, and show how they came to have that defamatory meaning, and how they relate to the plaintiff. *Buckstaff v. Viall*, 54 N. W. 111, 113, 84 Wis. 129; *Dun v. Maier (U. S.)* 82 Fed. 169, 172, 27 C. C. A. 100; *Price v. Conway*, 19 Atl. 687, 134 Pa. 340, 8 L. R. A. 193, 19 Am. St. Rep. 704.

#### Taking place of colloquium.

An innuendo does not obviate the necessity of prefatory allegations of such extrinsic facts as are often necessary to be considered, in connection with the language of the publication, in order to ascertain its sense and meaning, and which must be set forth. An innuendo has no other use than simply to ascertain the application of previous expressions to particular persons and things. *State v. Atkins*, 42 Vt. 252, 256.

An innuendo can only explain, but not enlarge, the meaning of the words without the aid of a colloquium. Therefore the want

of a colloquium is not cured by an innuendo. *McLaughry v. Wetmore* (N. Y.) 6 Johns. 82, 83, 5 Am. Dec. 194.

The office of an innuendo is to deduce inferences from premises already stated, not to state the premises themselves. An innuendo is not an issuable averment. Facts extrinsic to the article, and essential to a reasonable identification of the plaintiff with the person referred to, must be set out in the inducement. *Duvivier v. French* (U. S.) 104 Fed. 278, 281, 43 C. C. A. 529.

Ordinarily the only office of an innuendo is to refer the libelous words to the facts so set forth; but in Texas the innuendo is enlarged to explain the meaning of the language spoken, and the inducement or colloquium is dispensed with. *Dickson v. State*, 28 S. W. 815, 34 Tex. Cr. R. 1, 53 Am. St. Rep. 694.

## INOFFICIOUS.

The name "inofficious testament" was used in the Roman law to designate a testament in which no mention was made of the heir. *Clayton v. Clayton* (Pa.) 3 Bin. 476, 483.

The civil law defines an "inofficious and undutiful will" to be such as substantially departs from the disposition of the estate as it would be distributed in case of intestacy; but it is said that such a definition is entirely inconsistent with the law of wills as recognized and established in this country, for the authority to make a will implies the power to discriminate between or disinherit next of kin. *Stein v. Wilzinski* (N. Y.) 4 Redf. Sur. 441, 450.

"Inofficious" is the equivalent of "unnatural." The term is predicable of such instruments as ignore the moral claims upon the testator which the ties of kinship suggest. When there is a glaring disregard by a testator of a child, especially if such child is helpless, by reason of infancy or disease, in favor of a stranger, a court, while saying that a man can do as he pleases with his property, will be alert in seeking for the presence of some influence which must have warped the judgment and controlled the will of the testator. The testamentary act is so unlike the product of a healthy and independent mind that the act alone is strongly evidential of the existence of some extrinsic undue influence. The probative force of such a testamentary act rises and falls in the degree of its unusuality and unreasonableness, and therefore the character and degree of probative force of extrinsic testimony required to prove undue influence must increase in the proportion that the unreasonableness of the testamentary act diminishes. *In re Willford's Will* (N. J.) 51 Atl. 501, 502.

Those dispositions which fathers and mothers and other ascendants make of their property to the prejudice of their descendants, beyond the proportion reserved to them by law, are called "inofficious." Civ. Code La. 1900, art. 3556, subd. 16.

## INQUEST.

While in its broadest sense an inquest may include any judicial inquiry, its use is generally confined to an inquiry by jury. 2 Burrill, Law Dict. 81; Cent. Dict. The coroner's inquest has from the earliest period in the history of our law been held with a jury. Though the amendment of 1887 of Cr. Code, § 773, directing a summoning of a jury if the death or wound be of a criminal nature, doubtless authorized an inquiry to some extent by the coroner into the circumstances of death before he determined to summon a jury—that is to say, that he should determine that the case was a reasonable one for holding an inquest before he should summon a jury—such preliminary investigation does not constitute an inquest itself, but is only to determine whether there shall be an inquest. The result of an inquest is a judicial determination of the manner in which deceased came to his death, and, if the death be occasioned by criminal means, who is guilty thereof, and the coroner makes no such determination in his preliminary inquiry. The term, as used in a resolution of a board of supervisors that a coroner be allowed a certain sum for each inquest, was construed to mean an inquest in which a jury was summoned. *People v. Coombs*, 55 N. Y. Supp. 276, 284, 36 App. Div. 284.

Pen. Code, § 1112, provided that for summoning an inquest on a dead body and returning an inquisition the coroner shall be entitled to a fee of \$10. It was held that by "summoning an inquest," as here used, is meant summoning a jury, as the term "inquest" is sometimes used to signify the jury itself before whom the question is brought, as also a grand jury is called a "grand inquest"; and hence a coroner was not entitled to fee for summoning jurors in inquest, in addition to his fee for the inquest. *Davis v. Bibb County*, 42 S. E. 403, 405, 116 Ga. 23.

Though there are some authorities tending to sustain the position that the word "inquest" implies an examination by the jury, as applied to proceedings in a cause at circuit, it in reality means nothing but a trial of an issue of fact, where the plaintiff alone introduces testimony, and does not necessitate a jury. It is within the statutory definition of the word "trial," as being "a judicial examination of the issues between the parties, whether they be issues of law or issues of fact." Code, § 250. *Haines v. Davis* (N. Y.) 6 How. Prac. 118, 119.

**INQUEST OF LUNACY.**

The primary object of an inquest of lunacy is not to benefit any particular individual, but to see whether the fact of mental incapacity exists, so that the public, through the courts, can take control. The proceeding originally was a writ upon a supposed forfeiture to the crown, and was in behalf of the king as the political father of his people. The method of procedure thereunder is described by an early writer as follows: "And therefore, when the king is informed that one who hath lands and tenements is an idiot, the king may award his writ to the escheator or sheriff of the county where such idiot is, to inquire thereof." It was used to establish the fact upon which the king's rights depended, as in the case of an alien, who could hold land until his alienage was authoritatively established by a public officer on an inquest. *Hughes v. Jones*, 22 N. E. 446, 448, 116 N. Y. 67, 5 L. R. A. 637, 15 Am. St. Rep. 386.

**INQUEST OF OFFICE.**

An inquest of office is an inquiry made by the king's officer, his sheriff, coroner, or escheator, virtue officii, or by writ to them sent for that purpose, or by a commissioner specially appointed, concerning any matter that entitles the king to the possession of lands, tenements, goods, or chattels. This is done by a jury of no determinate number, being either 12, or less, or more. These inquests of office were devised by law as an authentic means to give a king his right by solemn matter of record, without which he in general can neither take nor part from anything. *Atlantic & P. R. Co. v. Mingus*, 165 U. S. 413, 431, 17 Sup. Ct. 348, 352, 41 L. Ed. 770 (citing 3 Bl. Comm. 258, 259); *Baker v. Shy*, 56 Tenn. (9 Heisk.) 85, 89.

**INQUIRY.**

See "Due Inquiry"; "Writ of Inquiry."

**INQUISITION.**

Code Md. art. 45, § 2, providing that, when the husband has been found insane upon inquisition, and the finding remains unreversed and in force, the wife may convey her property as if she were a feme sole, includes an ascertainment of such husband's insanity by the special verdict of a jury in a criminal case. *Hadaway v. Smith*, 18 Atl. 589, 590, 71 Md. 319.

**INSANE—INSANITY.**

See "Emotional Insanity"; "General Insanity"; "Habitual Insanity"; "Legal Insanity"; "Moral Insanity"; "Partial Insanity"; "Recurrent In-

sanity"; "Settled Insanity"; "Temporary Insanity."

See, also, "Hallucination"; "Lunacy"; "Melancholia"; "Sane."

An insane person is one unsound in mind or intellect; mad; deranged. *Crosswell v. People*, 13 Mich. 427, 435, 87 Am. Dec. 774.

"Insanity—'in,' not, and 'sound,' sound or sane—is the lack of, or the opposite of, 'sanity,' or, as technically and philologically defined, 'the state of being unsound in mind, derangement of intellect, madness.'" *Meyers v. Commonwealth*, 3 Wkly. Notes Cas. 506, 508, 83 Pa. 131, 136.

Psychologists have vainly attempted to define "insanity." The vulgar notion is that it consists in an entire depravity of reason and consciousness, but observation has shown that the insane often possess both of those mental qualities. Locke defined a "madman" to be one who reasoned correctly from false premises, but that would embrace a very large class who are commonly supposed to be sane. *Francke v. Francke*, 29 La. Ann. 302, 303.

"Dr. Haslam has said that 'false belief is the essence of insanity.' Lord Erskine's test was 'a delusive image,' which he calls 'the inseparable companion of real insanity.' Dr. Andrew Combe says: 'It is the prolonged departure, without any adequate external cause, from the state of feeling and modes of thinking usual to the individual when in health, that is the true feature of disorder in mind.'" *Commonwealth v. Haskell* (Pa.) 2 Brewst. 491, 496.

Insanity is the absence of that reason which includes responsibility. *Boswell v. Commonwealth* (Va.) 20 Grat. 860, 873.

Insanity is the absence of reason, thought, and comprehension. *Somers v. Pumphrey*, 24 Ind. 231, 245.

Insanity, as a ground for avoiding an act, does not mean a total deprivation of reason, but only an inability, from defect of perception, memory, and judgment, to do the act in question. *Frazer v. Frazer*, 2 Del. Ch. 260, 263.

Etymologically "insanity" signifies unsoundness. Lexically it signifies unsoundness of mind or derangement of the intellect. In law every mind is sound that can reason and will intelligently in the particular transaction being considered, and every mind is unsound or insane that cannot so reason or will. The law investigates no further. Whether this last-named mental condition be congenital, or the result of arrested mental development, or of religious excitement, or of physical disease, or of dissipation, or of old age, or of unknown causes; whether it be casual, temporary, or permanent; whether

it be personal or hereditary; whether it be manifested in the mildest dementia or mania—is expressed in law by the same word, "insanity." When this word occurs, unexplained or unlimited, in any statute, contract, or other legal literature, it signifies any derangement of the mind that deprives it of the power to reason or will intelligently. *Johnson v. Maine & N. B. Ins. Co.*, 22 Atl. 107, 108, 83 Me. 182.

Insanity, such as will exempt a party taking his own life from the consequences of the act, does not include every degree of insanity, but must be a mental disorder amounting to a loss of reason. A person may, from anger, jealousy, shame, pride, dread of exposure, fear of coming to poverty, or the desire to escape from the ills of life, be considered in a certain sense insane. But these alone are not enough to exempt him from the consequences of self-destruction, where he committed the act deliberately and intelligently. An error of judgment as to the commission of the act is not sufficient to exempt the party; for we may say that all men, perhaps, who decide to take their own lives, commit an error of judgment. *Moore v. Connecticut Mut. Life Ins. Co. (U. S.)* 17 Fed. Cas. 872, 873.

To constitute "insanity," or unsoundness of mind, such as to authorize the appointment of a conservator of the property of the afflicted person, there must be such a deprivation of reason that the subject is no longer capable of understanding and acting with discretion in the ordinary affairs of life. It is a want of sufficient mental capacity to transact ordinary business; to take care of and manage his or her property. There are numerous legal proceedings where insanity or mental incapacity may be shown, and the rule for establishing the degree of insanity must of necessity vary, depending, as it must, on the object or purpose for which the insanity is to be proved. In one case the purpose may be to prove insanity as a defense to a criminal charge; in another case the purpose may be to defeat the execution of a will; in another case the question may be whether the person shall be deprived of his liberty and confined in an asylum; and still in another case the question may be whether a conservator shall be appointed to take charge of the estate of the insane person. What might be regarded as insanity or mental incapacity in the one case would not necessarily be insanity in another. No definite rule can be laid down which will apply to all cases alike." *Snyder v. Snyder*, 31 N. E. 303, 306, 142 Ill. 80.

"There is no distinction between the terms 'insanity' and 'unsoundness of mind.' \* \* \* The primary definition of insanity, according to the Century Dictionary, is un-

soundness of mind." A person who is incapable of continuous or connected thought, produced by cerebral embolism, is unsound in mind, and therefore insane. *Cundall v. Haswell*, 51 Atl. 426, 428, 23 R. I. 508.

#### All degrees and kinds of insanity.

"Insanity" is the generic term for all unsound and deranged conditions of the mind. *Burnham v. Mitchell*, 84 Wis. 117, 136.

The word "insane" or "insanity" ordinarily implies every degree of unsoundness of the mind. *Seitzinger v. Modern Woodmen of America*, 68 N. E. 478, 481, 204 Ill. 58; *De Gogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 232, 237.

"Insane" means, according to its etymology, "nonsane," or "unsound," and is equivalent, as is said by Lord Hardwicke, to "non compos," which, according to Coke, includes all kinds of mental unsoundness recognized by the law, and therefore includes the extreme case of an entire want of understanding. *Jacks v. Estee*, 73 Pac. 247, 249, 139 Cal. 507.

"Insane," as used in a life insurance policy, providing that if the assured shall, "whether sane or insane, die by his own hand" within two years from the date of the policy, the policy should be null and void, implies every degree of unsoundness of mind, and the liability of the insurer is not affected by the degree of insanity. *Spruill v. Northwestern Mut. Life Ins. Co.*, 27 S. E. 39, 40, 120 N. C. 141.

The word "insanity" is not a legal term. In law books and in judicial opinions it is used in its popular sense, and signifies an unsoundness of mind and derangement of the intellect. It may be complete or partial. *State v. Leehman*, 49 N. W. 3, 5, 2 S. D. 171.

The term "insanity" includes every species of organic mental derangement, whether of a mild or violent form, and excludes every other condition of mind as regards their mental condition. In this respect there are but two classes of people—the sane and the insane. *Warner v. State*, 16 N. E. 189, 191, 114 Ind. 137.

Inasmuch as Rev. St. §§ 1764, 1765, having reference to insanity as a defense in prosecutions for crime, uses the phrase "insanity" and "unsound mind" as convertible terms, the term "insanity," under the statutes, includes every species of organic mental derangement, whether of a mild or violent form. *Sage v. State*, 91 Ind. 141, 145.

The words "insane person," a generic term, expressly by statute include every one who is: (1) An idiot, being a person destitute of ordinary intellectual powers from any cause and dating from any time,

but in common use a person without understanding from birth. (2) Lunatic, a person of any form of unsoundness of mind other than idioecy; mental derangement, with intermittent—strictly, periodically intermittent—lucid intervals. (3) Non compos, which embraces idiot and lunatic. (4) Deranged, which embraces all except the natural born idiot. *Hiett v. Shull*, 15 S. E. 146, 147, 36 W. Va. 563.

"Early in the history of English jurisprudence the courts did not make a distinction between different degrees of insanity. Insanity was regarded as a fixed term in law, having a certain meaning. If a man was insane on one subject, he was supposed to be insane on all subjects and for all purposes. In *Ex parte Barnsley*, 3 Atk. 172, Chancellor Hardwicke says: 'Being "non compos" and "of unsound mind" are certain terms in law, and import a total deprivation of sense. "Weakness" does not carry this idea along with it, but courts of law understand what is meant by "non compos" or "insane," as they are words of a determinate significance.' Perhaps one of the leading cases announcing this doctrine is the case of *Waring v. Waring* (1848) 6 Moore, P. O. 341. In that case it is said: 'If the mind is unsound on one subject, provided that unsoundness is at all times existing upon that subject, it is erroneous to suppose such a mind is really sound on other subjects. It is only sound in appearance; for, if the subject of the delusion be presented to it, the unsoundness would be presented by such a person believing in the suggestions of fancy, as if they were realities. An act, therefore, done by such a person, however apparently rational that act may appear to be, is void, as it is the act of a morbid or unsound mind.' " According to the modern doctrine insanity is either total or partial. A total deprivation of sense, without lucid intervals, presents few legal difficulties. Such an unfortunate may be presumed never to be on an equality with the sane. The law, therefore, distinctly recognizes that species of insanity where the subject is deprived of his reason but a portion of the time, or deprived of his reason, either temporarily or permanently, only on certain subjects. Instances of this character are not rare. They constitute the major portion, if not all, the reported cases. "One of the leading cases announcing the modern doctrine is *Smee v. Smee*, 5 Prob. Div. 84, where it is said: 'A man may be capable of transacting business of a complicated and important kind, and involving the exercise of considerable powers of intellect, and yet be subject to delusions, so as to unfit him to make a will; but, if the delusions under which a man labors are such that they could not reasonably be supposed to have affected the dispositions made by his will, the will would be valid.' \* \* \* In suits

to avoid contracts and conveyances on the ground of insanity, it is settled law that the insanity must have entered into and induced the contract or conveyance; in other words, that it was not the act of the free and untrammelled mind, and that on account of the diseased condition of the mind the person entered into a contract or made a conveyance which he would not have made, had he been in the possession of his reason. *Dewey v. Allgire*, 55 N. W. 276, 37 Neb. 8, 40 Am. St. Rep. 468; *Staples v. Wellington*, 58 Me. 453, 454; *Concord v. Rumney*, 45 N. H. 423, 427; *Dean v. American Mut. Life Ins. Co.*, 86 Mass. (4 Allen) 96; *Dennett v. Dennett*, 44 N. H. 531, 537, 84 Am. Dec. 97; *Hovey v. Hobson*, 55 Me. 256, 261; *Same v. Chase*, 52 Me. 304, 83 Am. Dec. 514; *Crowther v. Rowlandson*, 27 Cal. 276; *Titcomb v. Vantyle*, 84 Ill. 371." An examination of the reported cases shows that the issue of insanity most frequently occurs in judicial proceedings as follows: First, in direct proceedings to procure the commitment of persons alleged to be insane; second, in suits affecting the validity of wills, where it is sought to show that the testator was not of disposing capacity; third, in criminal proceedings, where the defense pleaded is insanity and irresponsibility; fourth, in suits to avoid contracts because of insanity; and, fifth, in proceedings otherwise barred, where the plea is that he against whom the statute of limitations is pleaded comes within the enumerated exceptions because of insanity. *Clarke v. Irwin*, 88 N. W. 783, 786, 63 Neb. 539.

The words "insane person," when used in a statute, include idiots, lunatics, and distracted persons. *Gen. St. Kan. 1901*, § 7342, subd. 6.

The words "insane person," when used in a statute, shall be construed to include every idiot, non compos, lunatic, and distracted person. *Comp. Laws Mich. 1897*, § 50, subd. 7; *Rev. St. Wis. 1898*, § 4971; *Pub. St. R. I. 1882*, p. 77, c. 24, § 6; *Mills' Ann. St. Colo. 1891*, § 4185, cl. 3; *Gen. St. Minn. 1894*, § 255, subd. 6; *V. S. 1894*, 7; *Ann. Codes & St. Or. 1901*, § 5290; *Code Iowa 1897*, § 48, subd. 6; *Rev. St. Utah 1898*, § 2498.

The words "insane person," when used in a statute, shall include every idiot, non compos, lunatic, insane, or distracted person. *Rev. Laws Mass. 1902*, p. 88, c. 8, § 5, subd. 6; *Pub. St. N. H. 1901*, p. 64, c. 2, § 18; *Gen. St. Conn. 1902*, § 2735; *Hurd's Rev. St. Ill. 1901*, p. 1719, c. 131, § 1, subd. 6.

The words "insane person" may include an idiotic, non compos, lunatic, or distracted person; but, in reference to idiotic or non compos persons, this rule does not apply to the chapter relating to the insane hospital. *Rev. St. Me. 1883*, p. 59, c. 1, § 6, subd. 8.

The words "insane person," when used in a statute, shall be construed to include

every idiot, non compos, and lunatic person. Rev. Code Del. 1893, p. 43, c. 5, § 1, subd. 5.

The term "insane person," when used in a statute, includes every idiot, non compos, lunatic, and insane person. Rev. St. Fla. 1892, § 1; U. S. Comp. St. 1901, p. 3.

The words "insane person" include every one who is an idiot, lunatic, non compos, or deranged. Code W. Va. 1899, p. 134, c. 13, § 17; Code Va. 1887, § 5.

The term "insane" includes all persons of unsound mind. Shannon's Code Tenn. 1896, § 62; Civ. Code Ala. 1896, § 1; Pen. Code Ga. 1895, § 2.

The term "insane," as used in statutes relating to the care of the insane, includes any species of insanity or mental derangement. Rev. St. Okl. 1903, § 3985; Rev. Codes N. D. 1899, § 1532; Cobbey's Ann. St. Neb. 1903, § 9643; Bates' Ann. St. Ohio 1904, §§ 720, 907, 1536; Code Iowa 1897, § 2298; Rev. St. Mo. 1899, § 4894.

The words "insane" and "lunatic" include every species of mental deficiency or derangement. Rev. St. Wyo. 1899, § 2724.

The term "insane," as used in the Probate Code, includes every species of insanity, but does not include idiocy or imbecility. Gen. St. Minn. 1894, § 4689.

The term "insane" or "insane persons," as used in the act relating to asylums for the insane, includes every species of insanity, and extends to every deranged person and to all of unsound mind other than idiots. Comp. Laws Mich. 1897, § 1940.

For the purposes of the chapter relating to guardianship, the words "insane person" shall be construed to mean either an idiot, or lunatic, or a person of unsound mind and incapable of managing his own affairs, as the case may be. Rev. St. Wyo. 1899, § 4896.

Persons of insane mind are those who do not enjoy the exercise or use of reason after they have arrived at the age at which they ought, according to nature, to possess it, whether the defect results from nature or accident. Civ. Code La. 1900, art. 31.

The word "insane," in the act relating to charities and charitable and reformatory institutions, shall be construed to mean any person whose mind by reason of brain sickness has become unsound, rendering such person incapable of managing or caring for his own estate, or rendering him dangerous to himself or others, or who is in such condition of mind or body as to be a fit subject for care and treatment in a hospital for brain disease or insanity. No person idiotic from birth, or whose mental development was arrested by disease or physical injury prior to the age of puberty, and no person who is afflicted with simple epilepsy, shall be re-

garded as insane, unless the manifestations of abnormal excitability, violence, or homicidal or suicidal impulses are such as to render his confinement in a hospital for the afflicted, as herein provided, a proper precaution to prevent him from injuring others or himself. Gen. St. Kan. 1901, § 6570.

#### As disease, infirmity, or sickness.

See "Bodily infirmity"; "Disease"; "Infirmity"; "Sickness."

#### As disease of brain or mind.

Insanity is a disease that impairs or totally destroys the understanding. *Bradley v. State*, 31 Ind. 492, 509.

"Insanity" is a mental disease, and also implies disease or congenital defect in the brain, and within the meaning of an insurance contract one insane cannot be deemed in good health. *McNeil v. Southern Tier Masonic Relief Ass'n*, 58 N. Y. Supp. 119, 122, 40 App. Div. 581.

Insanity "is a diseased or disordered condition or malefaction of the physical organs through which the mind receives impressions or manifests its operations, by which the will and judgment are impaired and the conduct rendered irrational." *Blackstone v. Standard Life & Accident Ins. Co.*, 42 N. W. 156, 162, 74 Mich. 592, 3 L. R. A. 486.

According to the great current of modern medical authorities insanity is a disease—a disease of the mind—the existence of which is a question of fact to be proved, just as much as the possible existence of any other disease. *Haile's Curator v. Texas & P. Ry. Co.* (U. S.) 60 Fed. 557, 560, 9 C. C. A. 134, 23 L. R. A. 774 (citing *State v. Felter*, 25 Iowa, 67, 68).

"It is now generally conceded that insanity is a disease of the brain—of that mass of matter through and by which that mysterious power, the mind, acts. There the mind is supposed to be enthroned, acting through separate and distinct organs. These organs may become diseased, one or more, or all, and in the degree, or to the extent of such degree, is insanity measured. A disease of all the organs causes total insanity, while of one or more partial insanity only. There is, it seems, a general intellectual mania, and a partial intellectual mania, and a moral mania, which is also divided into general and partial." *Hopps v. People*, 81 Ill. 385, 390, 83 Am. Dec. 231.

"Insanity" may be defined generally to be a disease of the mind. It is such a derangement of the mental faculties that the individual has lost the power of reasoning correctly; but it differs so much in kind and degree that no precise definition can be given applicable to the various circumstances of

every case. It is defined to be a manifestation of disease of the brain, characterized by a general or partial derangement of one or more of the faculties of the mind, and in which, while consciousness is not abolished, mental freedom is prevented, weakened, or destroyed. *Waters v. Connecticut Ins. Co.* (U. S.) 2 Fed. 892, 893 (citing *Hammond, Diseases of the Nervous System*, p. 332).

Insanity is a disease of the mind, which assumes as many and various forms as there are shades of difference in the human character. It is, as has well been said, a condition which impresses itself as an aggregate on the observer, and the opinion of one personally cognizant of the minute circumstances making up that aggregate, and which are detailed in connection with such opinion, is, in its essence, only fact at shorthand. *Connecticut Mut. Life Ins. Co. v. Lathrop*, 111 U. S. 612, 4 Sup. Ct. 533, 28 L. Ed. 536 (citing 1 Whart. & S. Med. Jur. § 257).

#### **Drunkenness or delirium tremens.**

In Co. Litt. 247, there is given a classification of the different cases of mental derangement, and in that express mention is made of those who by inebriation or drunkenness have deprived themselves of their memory and understanding. *Bliss v. Connecticut & P. R. R. Co.*, 24 Vt. 424, 425.

"Insanity," as understood in criminal law, where a person is accused of crime, means that at the time of committing the act he was "laboring under such defect of reason as not to know the nature or quality of the act he was doing, or, if he did know, that he did not know he was doing wrong; that is, that he did not know the difference between the right and wrong as to the particular act charged against him, or, if he did know that it was wrong, he did not have the will and mental power to refrain from doing it. Whether such insanity be continuous or temporary is immaterial in its legal effect; the only material inquiry being as to whether it existed at the very time of the commission of the act charged. If such insanity is shown to exist at such time, and was produced by mental disease, it would be a complete defense; \* \* \* but, if produced by the voluntary recent use of ardent spirits, it could only be considered in determining the degree of the crime and the penalty to be assessed," unless such intoxication produced in the mind of the defendant at the time of the act a state of insanity. *Rather v. State*, 9 S. W. 69, 72, 25 Tex. App. 623.

Insanity does not include drunkenness, nor does drunkenness answer to what is termed an "unsound mind," unless the derangement which it causes becomes fixed and continued by the drunkenness being habitual, and thereby rendering the party incapable of distinguishing between right and wrong. Drunkenness in one thing, and the disease to

which drunkenness leads is another. If drunkenness brings on a state of disease, which causes such a degree of madness, even for a time, as would have relieved the person from responsibility if it had been caused in any other way, then the person is not criminally responsible for his acts, though his madness is only temporary. *Terrill v. State*, 42 N. W. 243, 246, 74 Wis. 278 (citing *Rennie's Case*, *Lowin*, Cr. Cas. 76; *Reg. v. Davis*, 14 Cox, Cr. Cas. 564).

Drunkenness is a species of insanity that may be attended, when carried far enough, with loss of reason and self-control while under the direct effects of the intoxicant; but this effect is voluntary, and brought about by the acts of the party, and therefore differs from ordinary insanity, which is the act of Providence, and the sufferer is not responsible. There are two kinds of insanity produced by alcoholism: First, *delirium tremens*, caused by the breaking down of the person's system by long-continued or habitual drunkenness, and brought on by abstinence from drink. This is what is called settled insanity, to distinguish it from temporary insanity or drunkenness directly resulting from drink. Settled insanity from the earliest times has been held to be a complete defense to crime. Lord Hale says: "If by means of drunkenness a habitual or fixed madness be caused, though contracted by the will of the party, it will excuse crime." Story, J., says: "Insanity, whose remote influence is habitual drunkenness, is an excuse for crime committed by the party while so insane, but not intoxicated or under the influence of whisky. Such insanity has always been deemed a sufficient excuse for any crime done under its influence." The other kind of insanity is temporary insanity, and is that condition of the mind directly produced by the use of ardent spirits; and where a fit of intoxication is carried to such a degree that the person becomes incapable of knowing the act he is doing is wrong and criminal, he is in that condition referred to by the statute as being temporarily insane. There is no difference between the two kinds of insanity, so far as the mental status is concerned; but they differ widely in their causes and results. The first is from drinking as a remote result; the second, from drinking as a direct result. The first is a voluntary result, from which all shrink alike; the second is voluntarily sought after. In the first there is no criminal responsibility, but in the second responsibility never ceases. *Evers v. State*, 20 S. W. 744, 748, 31 Tex. Cr. R. 818, 18 L. R. A. 421, 37 Am. St. Rep. 811.

"Insanity" is a comprehensive word, and includes within it the definition of mental disorders, delusions, and manias, but is never used with reference to intoxication, either by intoxicating liquors or stimulating drugs. *State v. Hawkins*, 63 Pac. 258, 260, 23 Wash. 289.



Settled insanity, produced by intoxication, affects the responsibility of the party in the same way as insanity produced by any other cause. Temporary insanity from intoxication does not destroy responsibility, where the patient, when sane and responsible, made himself voluntarily intoxicated. *State v. Thompson*, 12 Nev. 140, 149.

The word "insanity" embraces every species of mental unsoundness, whatever may be its source or cause, and includes, not only that derangement of the mind produced by disease of the brain that is recognized by law as a defense to crime which is the sole product of it, but it also embraces that condition of subverted reason which may be produced by intoxication. *Gunter v. State*, 3 South. 600, 606, 88 Ala. 96.

Insanity, rendering a person incapable of the commission of crime, includes delirium tremens. *Erwin v. State*, 10 Tex. App. 700, 702.

#### **Emotional insanity.**

"The law regards insanity as a disease of the mind, implying fixedness of mental conditions. Many of the forms and degrees of mental disease, which in the judgment of learned men would be regarded as insanity, are utterly rejected by law in the administration of penal justice. It rejects the doctrine of what is called 'emotional insanity,' which begins on the eve of the criminal act and ends when it is consummated. Insanity is only a manifestation of a disease of the brain. The doctrine that the individual can be entirely sane immediately before and after any particular act, and yet insane at the instant the act was committed, is contrary to every principle of sound psychological science. To establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the act the accused was so laboring under a defect of reason from a disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that he was doing wrong. If the accused has sufficient mind to know the difference between right and wrong with respect to the act he is doing, and to control his conduct under ordinary circumstances, he cannot discharge himself from responsibility by showing that he did the act under the influence of an irresistible impulse. Capacity and reason sufficient to enable the accused to distinguish between right and wrong was adopted as the test of insanity in criminal cases by the English courts as early as 1843." *Graves v. State*, 45 N. J. Law (16 Vroom) 347, 350, 46 Am. Rep. 778.

#### **Epilepsy.**

The word "insanity" does not properly include "epilepsy," although epilepsy may,

and commonly does, terminate in insanity. *Aurents v. Anderson* (Pa.) 3 Pittsb. R. 310, 314.

#### **Hereditary insanity.**

"Insanity," within the meaning of a question in an application for a life policy as to whether the applicant's parents, etc., have been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or other hereditary disease, is to be construed only as an inquiry whether such relatives have been afflicted by such disease in a hereditary form, the word "other" in the question plainly indicating that the inquiry is so limited. *Gridley v. Northwestern Mut. Life Ins. Co.* (U. S.) 11 Fed. Cas. 2, 8.

#### **Hypochondria.**

Insanity as a defense to crime means a mental incapacity of the accused to distinguish between right and wrong at the time of committing the act complained of. This mental incapacity may result from various causes, such as nonage, lunacy, or idiocy. An instruction in a criminal case that mere oddity or hypochondria is not insanity, and if accused, at the time of committing the offense, was in possession of reason and able to discern right from wrong, he would be responsible for his actions, was approved. *Hawe v. State*, 10 N. W. 452, 453, 11 Neb. 537, 38 Am. Rep. 375.

#### **Idiocy distinguished.**

See "Idiot—Idiocy."

#### **Ignorance distinguished.**

"Insanity" is an impairment of the brain, which for the time is paralyzed and is no longer subject to the will; its operations ceasing to be voluntary and its perceptions impaired. It is a condition of the mind itself, and the power of thinking, judging, and willing are gone. As distinguished from "ignorance," it is an incapacity to act perfectly, while ignorance is the never having acted, though perfectly capable of so doing. *Meeker v. Boylan*, 28 N. J. Law (4 Dutch.) 274, 279.

#### **Imbecility.**

The term "insane person" includes an idiot. *Hiett v. Shull*, 15 S. E. 146, 147, 36 W. Va. 563.

"Insane," as used in Rev. St. c. 133, § 29, providing that, if a person entitled to bring an action be insane at the time the cause of action accrues, the time of such disability shall not be deemed a part of the time limited for the commencement of the action, does not imply merely a deprivation of reason, or a total absence of understanding, but implies as well a weakness of understanding, including an imbecile. The word "insane" in many cases must be construed

as equivalent to the term "non compos," or "a person of unsound and deranged mind." "Insanity" is the generic term for these diseases and others of a kindred character. If a person is so unsound of mind or so deranged in intellect that he would be incapable of making a valid will, he should be considered "insane" within the meaning and intent of the statutes of limitations. It is true the degree of imbecility which will render a person legally non compos is sometimes defined as an entire loss of understanding. One who has not sufficient mentality to know what he is doing and the nature of the act done may well be deemed insane, within the statute of limitations. The degree of deprivation of mind which would be sufficient to avoid an act done, or give or continue a right, on the ground of "insanity," could not be a total deprivation of mind. It must have some relation to the nature of the act done or to be understood. Mere weakness of mind, short of imbecility, is not a sufficient ground in itself to invalidate the acts done; but when the mind becomes enfeebled and disordered by disease, so that the person does not act rationally, nor recognize the obvious and ordinary relation of things, he acts without such understanding, or from delusion, or "insane impulse." Then his acts are in law invalid, and a person who has not sufficient mental ability to know what he is doing and the nature of the act done is "insane." *Burnham v. Mitchell*, 34 Wis. 117, 134.

"Insane person," as used in Code, §§ 16, 32, 33, 35-37, relating to the application for the examination of an insane person and the appointment of a guardian for his estate, if it be found by the court that the person so brought before it is of unsound mind and incapable of managing his own affairs, should be construed to include idiotic persons, and as well all who are incapable of managing their own affairs by reason of any unsoundness of mind, due to whatever cause, even from intoxication. In *re Wetmore's Guardianship*, 33 Pac. 615, 616, 6 Wash. 271.

#### **Incapacity to control volition.**

"Insanity is a disease of that mental faculty or element of a man's spiritual nature which impairs what is familiarly called his 'will power,' or ability to control his action. It seems at first view very unreasonable to suppose that one who is capable of knowing right from wrong should not be entirely able to decide between them, if he chooses to do so; but it is a well-known truth that such a capacity of knowledge may be perfect in an individual, and yet he may be unable, from destruction or impairment by disease of that function of the brain which is concerned with the will, to avoid doing what he knows to be wrong.

The insanity which excuses this act is an inability to distinguish between right and wrong in reference to the act itself, and the power to choose whether he will do it or not. The true test is not the capacity merely to distinguish between rightfulness and wrongfulness of the act committed, but also sufficient will power to choose whether he shall do or refrain from doing it. *State v. Reidell* (Del.) 14 Atl. 550, 552, 9 Houst. 470.

The term "insanity," as used in a defense for crime, means such a perverted and deranged condition of the mental and moral faculties as to render the person incapable of distinguishing between right or wrong, or unconscious at the time of the nature of the act he is committing, or when, though conscious of it, and able to distinguish between right and wrong, he knows the act is wrong, yet his will—by which is meant the governing power of his mind—has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control. *Davis v. United States*, 165 U. S. 373, 17 Sup. Ct. 360, 362, 41 L. Ed. 750; *Butler v. State*, 78 N. W. 590, 591, 102 Wis. 364; *Rather v. State*, 9 S. W. 69, 72, 25 Tex. App. 623; *Lowe v. State*, 96 N. W. 417, 424, 118 Wis. 641. A more concise definition is given in *Bish. New Cr. Law*, § 396a: "One is insane who, from whatever cause, is incompetent to have the criminal intent, or who is incapable of so controlling his volition as to avoid doing the forbidden thing." *Doherty v. State*, 50 Atl. 1113, 1114, 73 Vt. 380.

In law a man is "insane" when he is not capable of understanding (1) that a design is unlawful, or that an act is morally wrong; (2) understanding this, when he is unable to control his conduct in the light of such knowledge. *Waters v. Connecticut Mut. Life Ins. Co.* (U. S.) 2 Fed. 892, 893. See, also, *People v. Finley*, 38 Mich. 482, 483.

"Insanity may be either total or partial in its character; so, also, it may be total and permanent, or total, but temporary in duration. A person totally and permanently insane is incapable of committing any crime whatever, because, the will and judgment of the man being overborne and obliterated by the malady, his act cannot justly be considered the voluntary act of a free agent, but rather the mere act of the body, without the consent of a directing or controlling mind. So, in regard to total, but temporary, insanity, if it be such, for the time being, as to totally overwhelm the reason, conscience, will, and judgment, the accused cannot justly be held criminally responsible for his acts done during the continuance of such temporary insanity. In order to exempt a person from responsibility for a criminal act, the controlling power of

the insanity, whether arising from delusion or from real cause, must be so intense and overwhelming as utterly to deprive the party of his reason as to the act charged as criminal. If the person had sufficient capacity at the time to distinguish between the right and wrong of the particular act, if he had sufficient capacity to know that the act was wrong, and the power to choose whether he would do it or not, he is responsible for it, and for all its fatal consequences." *State v. Cole* (Del.) 45 Atl. 391, 393, 2 Pennewill, 344.

The insane or false illusion must be of such a character as to deprive him of will power, and have such control over him as to force him to do the act, without the power to control his mind and will, and render him unable to resist the impulse to do the act. *Wilcox v. State*, 28 S. W. 312, 315, 94 Tenn. 106.

If defendant has an irresistible impulse to commit a crime, and does not know the nature and quality of the act, he is insane. If he does know the nature and quality of the act, and does know right from wrong, and knows the act to be wrong, he is not insane. *Cannon v. State*, 56 S. W. 351, 361, 41 Tex. Cr. R. 467.

"An irresistible impulse to commit an act which one knows is wrong or unlawful, if it ever exists, does not constitute the insanity which is a legal defense." *People v. Hoin*, 62 Cal. 120, 45 Am. Rep. 651.

It is said that no definition can include all the varieties of disorder, but the power which is most manifestly deficient in the insane is generally the controlling power of the will. *Francke v. His Wife*, 29 La. Ann. 302, 303.

Capacity to comprehend the nature and moral quality of an act determines criminal responsibility. There is no other safe or practical test. It is entirely certain that defendant, on trial for incest, did not have a well-balanced mind. He had an inherited tendency to insanity, and had in past years received treatment in a hospital for the insane. He had at times illusions and delusions, but these were not in any way connected with the crime in question. He had groundless fears, and heard voices in the air; but it was not in consequence of these things that he committed the crime with which he was charged. It may be conceded that his mental powers were impaired, and his conscience blunted by misuse; but that does not render him legally irresponsible. If he understood what he was doing, and knew it was wrong and deserved punishment, the obligation to control his conduct and keep within the law was absolute. Having this degree of mental capacity, he cannot allege the sway of a turbulent passion as an excuse for his crime. The doctrine of moral insanity or uncontrollable impulse

is not recognized in the jurisprudence of Nebraska. *Schwartz v. State* (Neb.) 91 N. W. 190, 191.

#### **Incapacity to distinguish between right and wrong.**

"Insanity," which constitutes a defense in criminal law, means such an impaired and diseased condition of the mind that, at the time of the commission of the act, the party committing it was not capable of distinguishing the nature and quality of the act done by him; that is, incapable of distinguishing between right and wrong with respect to the act done. *Genz v. State*, 37 Atl. 69, 70, 59 N. J. Law, 488, 59 Am. St. Rep. 619; *Mackin v. State*, 36 Atl. 1040, 1041, 59 N. J. Law, 495; *Davis v. United States*, 16 Sup. Ct. 353, 354, 160 U. S. 469, 40 L. Ed. 499; *In re Guiteau* (U. S.) 10 Fed. 161, 164; *Waters v. Connecticut Mut. Life Ins. Co.* (U. S.) 2 Fed. 892; *State v. Redemeier*, 71 Mo. 173, 174, 36 Am. Rep. 462; *Butler v. State*, 78 N. W. 590, 591, 102 Wis. 364; *People v. Finley*, 38 Mich. 482, 483; *State v. Ferrer*, 9 West. Law J. 513, 519, 1 Ohio Dec. 428; *People v. Hoin*, 62 Cal. 120, 45 Am. Rep. 651; *Cannon v. State*, 56 S. W. 351, 361, 41 Tex. Cr. R. 467; *Carr v. State*, 22 S. E. 570, 96 Ga. 284; *Rather v. State*, 9 S. W. 69, 72, 25 Tex. App. 623; *Evers v. State*, 20 S. W. 744, 748, 31 Tex. Cr. R. 318, 18 L. R. A. 421, 37 Am. St. Rep. 811; *Doherty v. State*, 50 Atl. 1113, 1114, 73 Vt. 380; *Wilcox v. State*, 28 S. W. 312, 315, 94 Tenn. (10 Pickle) 106; *State v. Knight*, 50 Atl. 276, 277, 95 Me. 467. The term "insanity" means such a perverted and deranged condition of the mental and moral faculties as renders the person incapable of distinguishing from right or wrong, and makes him unconscious at times of the nature of the act he is about to commit. *State v. Redemeier*, 8 Mo. App. 1, 7. In order that insanity may be sufficient as a defense for crime, it must be shown that accused did not know right or wrong, or did not know that he was doing wrong at the time he committed the deed. It is not sufficient to satisfy the jury that he is a man of weak mind, but they should be satisfied that he was insane. *State v. Spivey*, 43 S. E. 475, 476, 132 N. C. 989.

"Insanity," which constitutes a defense to the prosecution for murder, is a physical disease located in the brain, which disease perverts and deranges one or more of the mental or moral faculties so far as to render the person suffering from this affliction incapable of distinguishing right from wrong in reference to a particular act charged against him, and incapable of understanding that the particular act in question was a violation of the law of God and of society. Insanity is either partial or general. General alienations always excuse. Partial insanity does not always excuse. One may be partially insane, and yet be responsible for his criminal act. The law does not ex-

cuse, unless the derangement is so great that it actually renders the person incapable at the time of its commission of distinguishing between right and wrong in the particular act charged and proved against him. *State v. Holloway*, 56 S. W. 734, 736, 156 Mo. 222; *State v. Duestrow*, 38 S. W. 554, 561, 137 Mo. 44. See, also, *State v. Privitt*, 75 S. W. 457, 459, 175 Mo. 207.

It is held that, within the legal definition of insanity, a defendant is responsible for the acts, if at the time of their commission he was of sufficient mental capacity to understand their nature and quality, and that the particular act in question was wrong and in violation of the law of the land, for which he would be amenable to punishment under that law. Thus, upon the condition of mind of a defendant regarding witches, a holding of a court that, if his belief in witches and his right to kill them was the product of a diseased brain, he was irresponsible, and if his belief was not the product of an insane delusion, but simply an erroneous conclusion of a sane mind, he was responsible, is correct. *Hotema v. United States*, 22 Sup. Ct. 895, 898, 186 U. S. 413, 46 L. Ed. 1225.

"Insanity," as a defense to the commission of a crime, is such defect of reason, from disease of the mind, as prevents the accused from knowing the nature or quality of the act he was doing, or, if he did know it, he did not know that he was doing wrong—the party's knowledge of right and wrong in respect to the very act with which he is charged. The test is a knowledge of right and wrong. The mere impairment of one's faculties, depriving them of their full vigor, or a mind impaired by disease or infirmity, does not constitute insanity. To constitute insanity the intellect must be so disordered that the person does not know the nature or quality of the act he is doing, and that it is an act which he ought not to do. It is the dethronement of the reason at the time of the act, and the absence of the power to exercise judgment, of such a degree as to create an uncontrollable impulse to do the act, by overriding the reason and judgment, and obliterating the sense of right and wrong, and depriving the person of the power of choosing between right and wrong as to the particular act done. *Leache v. State*, 3 S. W. 539, 542, 22 Tex. App. 279, 58 Am. Rep. 638.

#### **Incapacity to have criminal intent.**

"Insanity," as a defense for crime, means incapacity of having a criminal intent. The law does not inquire into the peculiar constitution of the mind of the accused, or what weakness, or even disorders, he was affected with, but in this connection limits the question as to whether he was incapable of having, or did have, a criminal intent. Medically speaking, there are two

forms of insanity, moral or intellectual; but in law there is only one, that which affects the mind. Moral insanity is not admitted as a bar to responsibility for civil or criminal acts, except in so far as it may be accompanied by intellectual disturbance. *Spencer v. State*, 13 Atl. 809, 814, 69 Md. 28 (citing 2 Tayl. Med. Jur. [Ed. 1873] p. 479; *United States v. McGlue* [U. S.] 26 Fed. Cas. 1093, 1096).

In the criminal law, insanity is any defect, weakness, or disease of the mind, rendering it incapable of entertaining, or preventing its entertaining in the particular instance, the criminal intent which constitutes one of the elements in every crime. *State v. Peel*, 59 Pac. 169, 173, 23 Mont. 358, 75 Am. St. Rep. 529. See, also, *Doherty v. State*, 50 Atl. 1113, 1114, 73 Vt. 380.

#### **Incapacity to know consequences of act.**

A policy of insurance, excusing the insurer from liability for loss where "death was occasioned by one's own hand while insane," means death while in such a state of insanity that the person knows that death will result from his act, and does not refer to death while the person is in such a state of mind that he does not know the consequences of his act. *Mutual Ben. Life Ins. Co. v. Davless' Ex'r*, 9 S. W. 812, 815, 87 Ky. 541.

A policy of life insurance, providing that in case of the death of the insured by his own act or intention, whether sane or insane, the company should only be liable for the net value of the policy at that time, means a condition of mind in which the insured was conscious of the physical nature and consequences of his act, and intended to destroy his life, though he was not conscious of the moral guilt or criminality of the act. *Adkins v. Columbia Life Ins. Co.*, 70 Mo. 27, 28, 35 Am. Rep. 410.

A man who does not understand, as a man of sound mind would, the consequences to follow from his contemplated suicide to himself, his character, his family, and others, and who was not able to comprehend the wrongfulness of what he was about to do as a sane man would, is to be regarded as insane. *Ritter v. Mutual Life Ins. Co.* (U. S.) 69 Fed. 505, 507.

"General insanity" is the term used to designate the condition of a man who is mad on all subjects, though he may have glimmerings of reason. If it be not so great in its extent or degree as to blind him to the nature and consequences of his moral duty, it is no defense to an accusation of crime. *Commonwealth v. Mosler*, 4 Pa. (4 Barr) 264, 266; *Commonwealth v. Wireback*, 42 Atl. 542, 545, 190 Pa. 138, 70 Am. St. Rep. 625.

**Incapacity to know ingredients of crime.**

Within the meaning of the law, which excuses persons from liability for crimes committed while insane, "insanity" is a condition of the mind in which the party is unable to see all of the ingredients of the crime of which he is accused and to acknowledge their existence. Merely being able to recognize one of the ingredients of crime is insufficient to make the party liable for his act, as, for instance, where a party, in taking property, is sufficiently sane to recognize the fact that it belongs to another. *People v. Cummings*, 11 N. W. 184, 185, 47 Mich. 334.

**Incompetency as witness.**

"Insane person," within the meaning of the statute prohibiting testimony as to personal transactions with an insane person, as against certain persons, means a person who is so insane that he cannot be permitted to testify. It does not include an insane person whose insanity is not to such an extent to preclude him from being a competent witness. *Kendall v. May*, 92 Mass. (10 Allen) 59, 64.

**Insane delusion as test of.**

The term "insanity" is broad enough to include every species of mental aberration or sickness of the mind. Sir John Nicholl says that a true test of the absence or presence of insanity is the absence or presence of delusion. "Insane delusion" is "insanity," whether partial or general. *State v. Wilner*, 40 Wis. 304, 306; *Dew v. Clarke*, 3 Addams' Ecc. 79 (cited in *State v. Jones*, 50 N. H. 369, 395, 9 Am. Rep. 242); *Boardman v. Woodman*, 47 N. H. 120, 137; *Gass' Heirs v. Gass' Ex'rs* (3 Humph.) 278, 283.

"Setting aside dementia, or loss of mind and intellect, the true test of insanity is delusion. If a person persistently believes supposed facts which have no real existence, except in his perverted imagination, against all evidence and probability, and conducts himself, however logically, on the assumption of their existence, he is, so far as they are concerned, under a morbid delusion, and delusion in that sense is insanity. Such a person is essentially mad or insane on those subjects, though on other subjects he may reason, act, and speak like a sensible man." In re *Shaw's Will* (N. Y.) 2 Redf. Sur. 107, 126 (citing *Dew v. Clarke*, 3 Addams' Ecc. 79).

In holding that an instruction that insanity or unsoundness of mind is that mental condition which exists when common sense and reason are destroyed or greatly impaired, and delusion exists, was erroneous, the court said: "If insanity or unsoundness of mind is that condition of mind which exists when common sense and reason are

greatly impaired, and delusion exists, then, when delusion exists, the mind is unsound, insane, and destroyed. If the true test of the absence or presence of insanity is the absence or presence of delusion, then insanity and delusion become the same thing, and insanity or delusion are no more than different terms used to designate the same condition of the mind. Tried by such a metaphysical or psychological test, Emanuel Swedenborg, John Wesley, Martin Luther, Joan of Arc, Joseph Addison, the author of *Rasselas*, Napoleon Bonaparte, and hundreds more of the greatest and soundest minded which have existed on earth, must be declared insane; for each of these stoutly maintained what men of the present day would declare delusion. Indeed, delusion is so common that, if the whole human family were tried by an infallible standard, there would be very few who could maintain an absolute sanity; and it is not improbable that the very few would be among the most asinine specimens of humanity." *Denson v. Beazley*, 34 Tex. 191, 199.

**Kleptomania.**

"Insanity," as used in Gen. St. 1878, c. 62, § 5, allowing the annulment of a marriage for the insanity of one of the parties, etc., does not include the morbid propensity to steal, commonly denominated "kleptomania." The insanity contemplated by the statute means such a want of understanding at the time of the marriage as to render the party incapable of assenting to the contract of marriage. *Lewis v. Lewis*, 46 N. W. 323, 44 Minn. 124, 9 L. R. A. 505, 20 Am. St. Rep. 559.

**Occasional or intermittent insanity.**

"Insanity," within the meaning of the rule that insanity, once established, will be presumed to continue, does not include occasional or intermittent insanity, but includes all cases, of whatever nature, wherever the insanity is apparently confirmed. *Raymond v. Wathen*, 41 N. E. 815, 816, 142 Ind. 367.

**Temporary delusion.**

The word implies unsoundness or derangement of mind or intellect, not a mere temporary or slight delusion, which might be occasioned by fever or accident. *Karow v. New York Continental Ins. Co.*, 15 N. W. 27, 31, 57 Wis. 56, 46 Am. Rep. 17.

**INSANE DELUSION.**

Insane delusion consists in the belief of facts which no rational person would have believed. *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267; *Nicewander v. Nicewander*, 151 Ill. 156, 37 N. E. 698, 700; *Huggins v. Drury*, 61 N. E. 652, 654, 192 Ill. 523. "In-

sane delusion consists in a belief of facts which no rational person would believe." In re Forman's Will (N. Y.) 54 Barb. 274, 289.

An insane delusion is exhibited in the belief of facts which no rational person would believe, and the inability to be reasoned out of such belief. *Bull v. Wheeler* (N. Y.) 6 Dem. Sur. 123, 126; In re Tracey, 11 N. Y. St. Rep. 103, 107.

An insane delusion is a belief in the existence of that which is only in existence in the imagination of the person. *Colhoun v. Jones* (N. Y.) 2 Redf. Sur. 34, 40; *Morse v. Scott* (N. Y.) 4 Dem. Sur. 507, 508.

"Insane delusion" is that diseased state or condition of mind which "gives to airy nothing a local habitation and a name." *State v. Pratt* (Del.) *Houst. Cr. Cas.* 249, 266.

An insane delusion is not only one which is error, but one in favor of the truth of which there is no evidence, but the clearest evidence often to the contrary. It must be a delusion of such character that no evidence or argument would have the slightest effect to remove. It is only a delusion or conception which springs up spontaneously in the mind of a testator, and is not the result of extrinsic evidence of any kind, that can be regarded as furnishing evidence that his mind was diseased or unsound. *Merrill v. Rolston* (N. Y.) 5 Redf. Sur. 220, 252; *Middleditch v. Williams*, 45 N. J. Eq. (18 Stew.) 726, 734, 17 Atl. 826, 829, 4 L. R. A. 738; In re Cole's Will, 49 Wis. 179, 5 N. W. 346; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *Boardman v. Woodman*, 47 N. H. 120, 139; *Appeal of Kimberly*, 68 Conn. 428, 36 Atl. 847, 37 L. R. A. 261, 57 Am. St. Rep. 101; *American Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619; *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; In re White's Will, 121 N. Y. 406, 24 N. E. 935; *Smith v. Smith*, 48 N. J. Eq. (3 Dick.) 566, 25 Atl. 11; In re Carpenter's Estate, 94 Cal. 406, 29 Pac. 1101; In re Scott's Estate, 60 Pac. 527, 529, 128 Cal. 57.

An insane delusion seems to be the unreasoning and incorrigible belief in the existence of facts which are either impossible absolutely, or at least impossible under the circumstances of the individual. A man, with no reason for it, believes that another is attempting his life, or that he is himself the owner of untold wealth, or that he is the President of the United States, or God, or that he is dead, or that he has a glass arm. The delusion is generally something affecting the senses. It may concern the relations of the party with others. But generally the delusion centers around himself, his cares, sufferings, rights, and wrongs. It comes and goes independently of the exercise of the will. The important thing is that an insane delusion is never the result of reasoning and reflection. It is not generated by them, and it

cannot be dispelled by them. The insane delusion does not relate to mere sentiments or theories, or abstract questions in law, politics, or religion. All these are the subjects of opinion, which are beliefs founded on reasoning and reflection. *Guiteau's Case* (U. S.) 10 Fed. 161, 170.

"An insane delusion exists when a person imagines that a certain state of facts exists which has no existence at all, except in the imagination of the party, and which false impression cannot be removed from such person's mind by any amount of reason and argument." *Bundy v. McKnight*, 48 Ind. 502, 512.

"An insane delusion is an unreasonable and incorrigible belief in the existence of facts, which are either impossible absolutely, or impossible under the circumstances of the individual. A man, with no reason for it, believes that he is the owner of untold wealth, or that he has invented something which will revolutionize the world, or that he is the President, or the King, or God, or Christ, or that he is dead, or that he is immortal, or that he is inspired by God to do something. These delusions are as real to the demented person as anything about him can be. He knows it, the same as he knows his own existence. An insane delusion is never the result of reasoning and reflection. It is not generated by them, and it cannot be dispelled by them. A man may reason himself, and be reasoned by others, into absurd opinions, and may be persuaded into impracticable schemes and foolish resolutions; but he cannot reason himself, or be reasoned or persuaded, into insanity or insane delusions. The insane delusion does not relate to mere sentiments or theories, or abstract questions in law, politics, or religion. These are subjects of opinions which are beliefs founded upon reasoning or reflection. These opinions are often absurd in the extreme. Men believe in animal magnetism, spiritualism, and other like matters, to a degree that seems unreason itself to most other people; and there is no absurdity in relation to religious, political, and social questions that has not its sincere supporters. These opinions result from naturally weak or ill-trained reasoning powers, hasty conclusions from insufficient data, ignorance of men and things, fraudulent imposture, and often from perverted moral sentiments; but still they are founded upon some kind of evidence and reasoning, and liable to be changed by better external evidence or sounder reasoning, but they are not insane delusions." *State v. Lewis*, 22 Pac. 241, 250, 20 Nev. 333.

A delusion is an insane delusion, or insanity, where one persistently believes supposed facts which have no real existence, except in his perverted imagination, against all evidence and probability, and conducts him-

self, however logically, on the assumption of their existence; but if there are facts, however sufficient, from which a prejudiced or a narrow or a bigoted mind might derive a particular idea or belief, the fact that such a mind holds such a belief does not warrant the conclusion that such mind is diseased in that respect. The belief may be illogical or preposterous, but it is not, therefore, evidence of insanity in the person. In *re White*, 24 N. E. 935, 937, 121 N. Y. 406.

"Insane delusions are conceptions that originate spontaneously in the mind, without evidence of any kind to support them, and can be accounted for on no reasonable hypothesis. The mind that is so disordered imagines something to exist, or imputes the existence of an offense, which no rational person would believe to exist or to have been committed without some kind of evidence to support it. They are as baseless as the fabric of a dream, conjured into existence by a perverted or disordered imagination, without any sort of foundation in fact. Where there is a claim of facts upon which the belief is founded, and unjust and unfeeling as may be such belief, it is not the spontaneous product of pure fancy, but a grave error, showing a lack of judgment or a want of reasoning powers. The belief or suspicion the testator entertained of his wife's infidelity and the illegitimacy of the children, to be an insane delusion, must have been wholly without foundation in reality, and the mere figment of his perverted imagination. Where the evidence discloses that it was formed on an apparent cause, leading on his part to a view of his wife's conduct which was erroneous, unjust, and unusual, it is not an insane delusion; for it only shows an unfortunate error of judgment or a want of reasoning power, but not an absolute want of intellect on the subject. The conclusion which he drew from the facts was untenable and erroneous, and showed that he formed a bad judgment upon an insufficient state of facts, but does not show that his conclusion or belief was formed without any foundation in fact whatever. *Potter v. Jones*, 25 Pac. 769, 772, 20 Or. 239, 12 L. R. A. 161, 165.

Where a testator's belief in spiritualism was not a morbid fancy, but a conviction produced by evidence, it cannot be said to be an insane delusion. *Sir John Nicholl*, in the celebrated case of *Dew v. Clark*, 3 Addams, Ecc. 79, 2 Eng. Ecc. R. 441, defined "insane delusion" as follows: "Wherever the patient once conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination, and wherever, at the same time, having once so conceived, he is incapable of being, or at least of being permanently, reasoned out of that conception, such a patient is said to be under a delusion, in a peculiar, half technical sense of the term, and the absence or presence of delu-

sion, so understood, forms, in my judgment, the true and only test or criterion of present or absent insanity. *Middleditch v. Williams*, 17 Atl. 826, 829, 45 N. J. Eq. (18 Stew.) 726, 4 L. R. A. 738.

An unsound mind is marked by delusion. It mingles ideas of imagination with those of sensation, and mistakes one for the other. It is often accompanied by an apparent insensibility to or perversion of those feelings which belong to our nature. Insane delusion consists in a belief of facts which no rational person would have believed. It may sometimes exist on one or two subjects, though sometimes it is accompanied by eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks and symptoms which may lead to confirm the existence of delusion and establish its insane character. Instances of delusion on particular subjects, or partial insanity, are recorded where the judgment and reasoning faculties were not only unimpaired on all other subjects, but where the monomaniac was in other respects remarkably acute and shrewd. *Duffield v. Morris' Ex'r* (Del.) 2 Har. 375, 380.

#### As insanity or unsoundness of mind.

Insane delusion is insanity, whether partial or general. *State v. Wilner*, 40 Wis. 304, 306; In *re Shaw's Will* (N. Y.) 2 Redf. Sur. 107, 126.

"Insane delusion," as used in an instruction stating that under certain facts the jury might find that a testator possessed testamentary capacity, unless they found that he was affected by some insane delusion, should not be construed as being stronger words than the words "unsound mind," or "unsoundness of mind and memory"; such expressions being synonymous. *Nicewander v. Nicewander*, 37 N. E. 698, 700, 151 Ill. 156.

#### Pessimistic beliefs.

The term "insane delusions" does not include pessimistic beliefs, and therefore the fact that testator has such beliefs is not sufficient proof of his want of testamentary capacity to authorize the setting aside of his will. It cannot be held that because a man is ungenerous, unkind, and unjust, and misconceives the conduct of his fellows, that he is void of testamentary capacity; nor does the fact of his disgust for his relatives show want of testamentary capacity. In *re McKean's Will*, 66 N. Y. Supp. 44, 46, 31 Misc. Rep. 703.

#### INSANE IMPULSE.

A person acts under an insane impulse when, by reason of duress or mental disease, he has lost the power to choose between right and wrong, to avoid doing the act in question; his free agency being at the time destroyed. *McCarty v. Commonwealth* (Ky.)

71 S. W. 656, 658 (citing *Parsons v. State*, 81 Ala. 577, 2 South. 584, 60 Am. Rep. 193; *Moore v. Commonwealth*, 92 Ky. 630, 637, 18 S. W. 833).

### INSANE PERSON.

See "Insane—Insanity."

### INSANE POOR.

The term "insane poor," when applied to a person without a family, shall mean one whose estate, after payment of his debts, and excluding from the estimate such part of his estate as is exempt from execution, is worth less in cash than \$300; and, when applied to a person having a family, shall mean one whose estate, estimated as aforesaid, is worth less in cash, after payment of his debts and the support of his family for one year, than \$1,000: provided that, when applied to a married woman, her estate and that of her husband shall be estimated as aforesaid, and the amount shall determine the question aforesaid, whether she be a poor person or not within the meaning of the chapter relating to asylums. Rev. St. Mo. 1899, § 4894.

### INSECURE.

See "Unsafe and Insecure."

### INSENSIBLE.

The books inform us that a bond is insensible when the terms and conditions thereof are so unintelligently expressed as to render an ascertainment of the intention of the parties impossible. Such bond is utterly void. *Union Sewer Pipe Co. v. Olson*, 84 N. W. 756, 757, 82 Minn. 187.

### INSERT.

The word "inserting," in Act June 19, 1891, relating to elections, and providing (section 23) that the voter shall prepare his ballot by marking a cross opposite the name of the candidate of his choice, or by inserting in the blank space provided therefor any name not already on the ballot, does not mean by inserting by writing only, and the name of the candidate may be placed upon the ballot by the use of what is commonly known as a "sticker." *De Walt v. Bartley*, 24 Atl. 185, 188, 146 Pa. 529, 15 L. R. A. 771, 28 Am. St. Rep. 814; *Fletcher v. Wall* (Ill.) 50 N. E. 230, 233, 40 L. R. A. 617.

### INSIMUL COMPUTASSENT.

The emphatic words of a count upon an account stated were, in former days, "insimul computassent"—that they, the plaintiff

and defendant, accounted together; and the count went on to say that on such accounting the defendant was found in arrears and indebted to the plaintiff in a sum named, and, being so found in arrears, he undertook and promised to pay the same to the plaintiffs. *Loventhal v. Morris*, 15 South. 672, 673, 103 Ala. 332 (citing 2 Chit. Pl. 90; 1 Chit. Pl. 358).

"Insimul computassent" is a writ that lies between two merchants or other persons upon an account stated between them. In such case the law implies that the one against whom the balance appears has engaged to pay it to the other, although there be no actual promise. *Fraley v. Bispham*, 10 Pa. (10 Barr) 320, 325, 51 Am. Dec. 486.

### INSOLENTLY.

"Insolently" is defined to be anything said or done rudely, and its root word, "insolent" to be rude, saucy, insulting, abusive, offensive. In discussing the meaning of the word, it was said that what acts in a slave toward a white person will amount to insolence it is manifestly impossible to define, but that insolence in such a case may be the pointing of a finger, or the refusal or neglect to step out of the way, when a white person is seen to approach. *State v. Bill*, 35 N. C. 373, 376, 377.

### INSOLUBLE PHOSPHORIC ACID.

By the term "insoluble phosphoric acid," whenever used in the article relating to manures and fertilizers, is meant phosphoric acid in any form or combination which requires the action of an acid upon it to cause it to become soluble in pure cold water. Pub. Gen. Laws Md. 1888, p. 972, art. 61, § 8.

By the term "insoluble phosphoric acid," as used in the chapter relating to fertilizers, is meant phosphoric acid in any form or combination which requires the action of an acid upon it to become readily soluble in pure cold water. Code Va. 1887, § 1895.

### INSOLVENCY—INSOLVENT.

See "Act of Insolvency"; "Adjudication of Insolvency"; "Open and Notorious Insolvency"; "Statutory Insolvency." Insolvency proceedings as an action, see "Action."

"Insolvency," in its general sense, is a term used to denote an insufficiency of the entire property and assets of an individual to pay his debts. *Dewey v. St. Albans Trust Co.*, 56 Vt. 475, 478, 48 Am. Rep. 803; *Toof v. Martin*, 80 U. S. (13 Wall.) 40, 47, 20 L. Ed. 481; *Citizens' Bank & Trust Co. v. Union Mining & Gold Co.* (U. S.) 106 Fed. 97, 100; *Smith v. Collins* (Ala.) 10 South. 334,



340; *Curtis v. Leavitt*, 15 N. Y. 9, 199; *Van Riper v. Poppenhausen*, 43 N. Y. 68, 75; *Marsh v. Dunchel* (N. Y.) 25 Hun, 167, 169; *Akers v. Rowan*, 12 S. E. 165, 170, 33 S. C. 451, 10 L. R. A. 705; *Mitchell v. Mitchell* (S. C.) 20 S. E. 405, 409; *Morey v. Milliken*, 30 Atl. 102, 105, 86 Me. 464; *Stadler v. First Nat. Bank* (Mont.) 56 Pac. 111, 119, 74 Am. St. Rep. 582; *McArthur v. Chase* (Va.) 13 Grat. 683, 692; *Noble v. Worthy* (Ind. T.) 45 S. W. 137, 140; *Mueller v. Monongahela Fire Clay Co.* (Pa.) 38 Atl. 1009, 1011, 183 Pa. 450; *Miller v. Southern Land & Lumber Co.* (S. C.) 31 S. E. 281, 282.

A person is insolvent, within the meaning of section 2, c. 74, Code 1891, when all his property is not sufficient to pay all his debts. *Weigand v. Alliance Supply Co.*, 28 S. E. 803, 44 W. Va. 133 (citing *Wolf v. McGugin*, 16 S. E. 797, 37 W. Va. 552).

Chapter 1, § 1, cl. 15, Bankr. Act July 1, 1898, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], defines "insolvent" in these words: "A person shall be deemed insolvent, within the provisions of this act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." *Brown v. Gulchard*, 74 N. Y. Supp. 735, 737, 37 Misc. Rep. 78; *State v. Superior Court of King County*, 56 Pac. 35, 37, 20 Wash. 545, 45 L. R. A. 177. This definition was approved as a correct definition of the term in *Miller v. Southern Land & Lumber Co.*, 31 S. E. 281, 282, 53 S. C. 364.

Insolvency implies that all the assets of the insolvent, if honestly appropriated, will be insufficient to pay his debts. *Leitch v. Hollister*, 4 N. Y. (4 Comst.) 211, 215.

A person is insolvent when his assets at a fair market value are not sufficient to pay his liabilities. *Shaw v. Gilbert*, 86 N. W. 188, 192, 111 Wis. 165.

Whether the adjective "insolvent" is used to define the condition of the decedent's estate or the financial status of a living person, its signification is the same. It means unable to meet liabilities after converting all of the property or assets belonging to the person or estate into money at market prices, and applying the proceeds, with the cash previously on hand, to the payment of them, and will not be held to mean that persons who, in the course of active business, are unable to meet the demand of creditors without borrowing money, are insolvent. *Silver Valley Min. Co. v. North Carolina Smelting Co.*, 25 S. E. 954, 119 N. C. 417.

"Insolvency," in relation to sales of insolvent's property as being fraudulent as to

his creditors, is the inadequacy of the debtor's means, with all his whole means or resources, including not only money, or its equivalent, but property in its most extensive sense, for the payment of all his debts. Under such definition, if the property of a person, whether real or personal, tangible or intangible, removable or nonremovable, be in value more than sufficient to discharge all of his debts, such person can in no proper sense be termed insolvent. *Cohen v. Parish*, 28 S. E. 122, 123, 100 Ga. 335.

As understood in dealing with contracts challenged on the ground of fraud, actual or constructive, insolvency has reference to the insufficiency of assets of the debtor to cover his liabilities. In respect to the bona fides of a sale of property, when challenged by a creditor of the vendor on the ground of fraud, the latter is said to be solvent at the time of the sale if he then possessed a substantial excess of assets on a cash basis over and above his liabilities, and such rule applies to corporations, as well as to natural persons. *Marvin v. Anderson*, 87 N. W. 226, 227, 111 Wis. 387.

By the statement that a firm is "insolvent" is meant that, if they had been forced into liquidation and the business wound up, they would not have been able to meet and pay all their obligations, and their assets were insufficient, and would have been at any time during the period contemplated, when sold out and collected and fully realized upon, to pay all their obligations. *Rome Furniture & Lumber Co. v. Walling* (Tenn.) 58 S. W. 1094, 1096.

"Insolvency" generally signifies insufficiency of assets, when turned into money, to discharge existing indebtedness. In *Appeal of Bowersox*, 100 Pa. 434, 45 Am. Rep. 387, it was held that insolvency, such as disqualified an administratrix from taking out letters on the estate of her deceased husband, was the owing of debts in excess of the value of her tangible property; and this is the commonly accepted meaning of the word. A corporation is not insolvent at the time its directors authorized a judgment to be confessed against it in favor of creditors where its debts are little more than a third of the market value of its property. *Mueller v. Monongahela Fire Clay Co.*, 38 Atl. 1009, 1011, 183 Pa. 450.

"Insolvency," in legal definition, does not mean that condition in which a business concern is placed when it finds that upon the settlement and ending up of its affairs it will be unable to pay its debts in full. *Hayden v. Chemical Nat. Bank* (U. S.) 84 Fed. 874, 876, 28 C. C. A. 548.

"Insolvency" has been differently defined in different courts. By some it is said to be a condition in which the value of the

assets is less than the amount of liabilities. By others it is said to be a general inability to pay obligations as they become due in the regular course of business. Many a business it at times insolvent according to the first of these uses of the word, though it is prosperous, and no one thinks for a moment that any necessity will arise for applying its property to the payment of its liability by process of law. The word is used in the latter meaning in Laws 1890, c. 564, forbidding any transfer or assignment of the property of a corporation to any person in contemplation of its bankruptcy. *French v. Andrews*, 30 N. Y. Supp. 796, 797, 81 Hun, 272.

Where an alleged insolvent is not a trader or a merchant, the term "insolvency" is ordinarily held to have a less restricted meaning than when applied to bankers, traders, etc. *Williamson v. Hatch*, 55 Minn. 344, 57 N. W. 56.

#### **As act of insolvency.**

"Insolvency," as used in Act Cong. March 2, 1799, § 65, which regulates the collection of duties on imports and tonnage, and enacts that in all cases of insolvency debts due to the United States on any bond for the payment of duties shall be satisfied, and also in Act March 3, 1797, which contains substantially the same provisions, means some overt and notorious act of insolvency, which the laws of the state recognize as an insolvency *Bartlet v. Prince*, 9 Mass. 431, 435.

#### **As absence of property.**

Insolvency does not mean a total want of property. The insolvent debtor may yet have means to secure or pay the diligent creditor. *Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank*, 49 N. E. 171, 176, 19 Ind. App. 69. The term does not include those who merely have no property or funds with which to commence business or with which to buy an interest in a business. *Teitig v. Boesman*, 31 Pac. 371, 380, 12 Mont. 404.

Insolvency does not mean the mere absence of property liable to a seizure on execution. It is the owing of debts in excess of the value of his tangible property. If a man owes no debts, he is not insolvent, although he may have no such property. A young mechanic or laborer, out of debt, just starting for himself, with no property but his knowledge, brawny arm, and energetic will, is not insolvent; nor is one without visible property, owing no debt, and who has acquired a learned profession, which he is about to follow. In all these cases each may by labor, industry, and economy pay his way and contract no debts. Without debts there can be no insolvency. "Poverty" and "insolvency" are not synonymous terms. *Appeal of Bow-ersox*, 100 Pa. 434, 438, 45 Am. Rep. 387.

The term "insolvent" usually means one whose estate is not sufficient to pay his debts, or one who is unable to pay all his debts from his own means. Hence one who is utterly without means comes within the meaning of the term. Accordingly, where there was a finding in a case that a certain person was insolvent, and the judgment was invalid unless such person was entirely without means, the intentment in favor of the judgment was sufficient to carry the conclusion, nothing to the contrary being shown that such person was entirely without means. *Van Riper v. Poppenhausen*, 43 N. Y. 68, 75.

#### **Bankruptcy synonymous.**

"Insolvency," as used in Bankr. Act 1867, § 39, means a simple inability to pay his debts as they become payable, and is not synonymous with "bankruptcy." In *re Black* (U. S.) 3 Fed. Cas. 495, 498.

"Insolvency," in a popular sense, means bankruptcy. There is, however, a state of insolvency which does not necessarily imply bankruptcy. It is the incident of nearly every business that periods of depression are experienced, when there is a total inability to meet obligations as they mature, not from want of sufficient assets, but from inability to turn them presently into money for the payment of debts. This is a state of insolvency which, continuing, may ultimately result in bankruptcy. *Phipps v. Harding* (U. S.) 70 Fed. 468, 470, 17 C. C. A. 203, 30 L. R. A. 513.

The term "insolvent," as used in a charge in an involuntary petition that the debtor is insolvent or in contemplation of bankruptcy at the time of an alleged fraudulent preference, should not be construed to be synonymous with "in contemplation of bankruptcy," since bankruptcy is a legal status, determined by judicial decree, which is clearly distinguishable from insolvency. To say that one is insolvent is not the same as saying that he contemplates bankruptcy. In *re Hanibel* (U. S.) 11 Fed. Cas. 431.

#### **General assignment.**

Insolvency, under the English bankrupt laws, exists when the trader is not in condition to pay his debts in the usual and ordinary course of business, although his estate may ultimately prove sufficient to discharge them. *Shone v. Lucas*, 3 Dow. & R. 218. In the United States insolvency signifies the situation of a person who has done some injurious act to divest himself of all his property, as a general assignment, or an application for relief under an insolvent law. *Bouv. Law Dict* and cases there cited; *Conard v. Atlantic Ins. Co.*, 26 U. S. (1 Pet.) 438, 7 L. Ed. 189. Under either definition an assignment of all the debtor's real and personal property to trustees for the benefit of certain creditors is an act of insolvency of the most unequivocal.

cal character. *Morewood v. Hollister*, 6 N. Y. (2 Seld.) 309, 323.

Within the meaning of a credit insurance policy, insuring against any loss sustained by the insolvency of debtors of the insured, and defining such losses as those arising on sales to persons who have made a general assignment for the benefit of creditors, or who have been declared insolvent in legal or judicial proceedings, or whose business has been sold by an officer under legal process, or against whom execution has been returned unsatisfied, the execution of a general assignment is employed as a test of insolvency, which is in its ordinary meaning such as renders it impossible for the insured to realize their claims. *Goodman v. Mercantile Credit Guarantee Co.*, 45 N. Y. Supp. 508, 511, 17 App. Div. 474.

The term "insolvent," as used in St. 33 Geo. III, c. 54, enacting that if any person appointed to any office by any of the friendly societies, and being intrusted with moneys, shall die or become a bankrupt or insolvent, his executors or administrators shall, within 40 days after demand, deliver over all things belonging to such society, does not include a person who has made a mere assignment for the benefit of his creditors, but means a person who has taken the benefit of an insolvent debtor's act. In re *Birmingham Benefit Ass'n*, 3 Sim. 421, 423.

#### Inability to pay debts.

"In one sense," says Mr. Bell, by which he no doubt intends the primary and ordinary sense, "insolvency is the inadequacy of a man's funds to the payment of his debts." 2 Bell, Comm. 162. A man's inability to pay his debts by his own means amounts to insolvency. *Herrick v. Borst* (N. Y.) 4 Hill, 650, 652. See, also, *Van Riper v. Poppenhausen*, 43 N. Y. 68, 75; *Marsh v. Dunkel* (N. Y.) 25 Hun, 187, 189; *First Nat. Bank v. Dickson*, 40 N. W. 351, 352; 5 Dak. 286; *David Adler & Sons Clothing Co. v. Hellman* (Neb.) 75 N. W. 877, 884.

"Insolvent" is understood to refer to the inability of a person to pay his debts. *Cunningham v. Norton*, 8 Sup. Ct. 804, 811, 125 U. S. 77, 31 L. Ed. 624; *Biddlecomb v. Bond*, 4 Adol. & El. 332, 333; *Rogers v. Thomas*, 20 Conn. 53, 68.

The term "insolvency" is used to designate a man's inability to pay all his debts or just claims. *McKown v. Furgason*, 47 Iowa, 636, 637; *Herald v. Scott*, 2 Ind. (2 Cart.) 55, 57.

If a man's debts cannot be paid in full out of his property, he is "insolvent," within the primary meaning of the word, and particularly in the sense in which the word is used in the bankruptcy act. *Ex parte Randall* (U. S.) 20 Fed. Cas. 222, 224.

"Insolvency" and "inability to pay" are synonymous, but solvency does not mean ability to pay at all times, under all circumstances, and everywhere on demand, nor does it require that a person should have in his possession the amount of money necessary to pay all claims against him. Difficulty in paying particular demands is not insolvency. *Walkenshaw v. Perzel*, 27 N. Y. Super. Ct. (4 Rob.) 426, 433, 32 How. Prac. 233, 240.

"A man is insolvent when he is unable to pay his debts, and is regarded in a state of insolvency by the law." *Kunzler v. Kohaus* (N. Y.) 5 Hill, 317, 320.

Insolvency carries with it inability to presently pay indebtedness and suspension of that function. *Ft. Wayne Electric Corp. v. Franklin Electric Light Co.*, 41 Atl. 217, 219, 57 N. J. Eq. 16.

Where, owing to peculiar circumstances, the debtor's assets, though in ordinary times ample, may prove unavailable, because inconvertible into money, he is "insolvent," though indulgence in point of time on the part of creditors may enable him to satisfy all his engagements in full; and the prospects of such a result in such a case may be morally certain, and it does not follow that he is not insolvent, because in the end his affairs may come around, and he may ultimately have a surplus on winding them up. *Hull v. Evans* (Ky.) 59 S. W. 851, 852 (quoting *Burill*, Assignm. § 44).

A person shall be deemed insolvent, within the provisions of the bankruptcy act, whenever the aggregate of his property, exclusive of any property, which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts. U. S. Comp. St. 1901, p. 3419.

A person is insolvent, allowing the right of stoppage in transitu, when he ceases to pay his debts in the manner usual with persons of his business, or when he declares his inability or unwillingness to do so. Civ. Code Cal. 1903, § 3077; Rev. Codes N. D. 1899, § 4848; Civ. Code S. D. 1903, § 2164.

#### Inability to pay debts in usual course of business.

The term "insolvency," under the bankruptcy laws and acts of like character, is declared to be a person's inability to pay current obligations as they mature. *Lodi Chemical Co. v. Charles H. Pleasants Co.*, 54 N. Y. Supp. 668, 669, 25 Misc. Rep. 97 (citing *Hayden v. Chemical Nat. Bank*, 28 C. C. A. 548, 84 Fed. 874; *Ferry v. Bank of Central New York* [N. Y.] 15 How. Prac. 445); *Akers v. Rowan*, 12 S. E. 165, 170, 33 S. O. 451, 10 L. R. A. 705.

Insolvency means a general inability of a debtor to answer pecuniary engagements, and it does not follow that he is not insolvent because he may ultimately have a surplus after winding up his affairs. *Miller v. Gourley* (N. J.) 55 Atl. 1083, 1089.

Although the assets of a debtor may be rightly estimated at four times the amount of his debts, he is insolvent, within the meaning of the bankrupt law, if unable to meet his engagements as they become due. *In re Woods* (U. S.) 30 Fed. Cas. 529, 530.

A trader is insolvent when he cannot pay his debts in the ordinary course of trade and business. *Wilson v. Brinkman* (U. S.) 30 Fed. Cas. 114, 115.

The popular meaning of the term "insolvency" is the insufficiency of the entire property and assets of an individual to pay his debts. In legal contemplation, insolvency is the state of a person who from any cause is unable to pay his debts in the ordinary or usual course of trade. *Clarke v. Ingram*, 107 Ga. 565, 582, 33 S. E. 802.

Insolvency, when applied to a person, firm, or corporation engaged in trade, means inability to pay debts as they become due in the usual course of business. *Atwater v. American Exch. Nat. Bank*, 38 N. E. 1017, 1019, 152 Ill. 605; *Shone v. Lucas*, 3 Dow. & R. 218; *Willison v. First Nat. Bank*, 30 Atl. 749-751, 80 Md. 196; *Strouse v. American Credit Indemnity Co.*, 46 Atl. 327, 330, 91 Md. 244; *May v. Le Claire* (U. S.) 18 Fed. 164, 166; *Dutcher v. Wright*, 94 U. S. 553, 557, 24 L. Ed. 130; *Citizens' Bank & Trust Co. v. Union Mining & Gold Co.* (U. S.) 106 Fed. 97, 100; *Roberts v. Hill* (U. S.) 23 Fed. 311, 312; *Dodge v. Mastin* (U. S.) 17 Fed. 660, 665; *In re Dibble* (U. S.) 7 Fed. Cas. 651, 654; *Wager v. Hall*, 83 U. S. (16 Wall.) 584, 599, 21 L. Ed. 504; *Martin v. Toof* (U. S.) 16 Fed. Cas. 907, 909; *Id.*, 80 U. S. (13 Wall.) 40, 47, 20 L. Ed. 481; *Mayer v. Hermann* (U. S.) 16 Fed. Cas. 1240, 1242; *Mayer v. Hellman*, 91 U. S. 496, 500, 23 U. S. 377; *Swan v. Robinson* (U. S.) 5 Fed. 287, 297; *Warren v. Tenth Nat. Bank* (U. S.) 29 Fed. Cas. 287, 288; *Buchanan v. Smith*, 83 U. S. (16 Wall.) 277, 308, 21 L. Ed. 280; *Anshutz v. Hoerr* (U. S.) 1 Fed. 592, 593; *Munson v. Ellis*, 25 N. W. 305, 307, 58 Mich. 331; *Bloomfield Woolen Mills v. State Bank of Bloomfield*, 70 N. W. 115, 116, 101 Iowa, 181; *Minton v. Stahlman*, 34 S. W. 222, 225, 96 Tenn. 98; *Stadler v. First Nat. Bank*, 56 Pac. 111, 119, 22 Mont. 190, 74 Am. St. Rep. 582; *Bell v. Ellis*, 33 Cal. 620, 625; *Barnard v. Crosby*, 83 Mass. (6 Allen) 327, 331; *Vennard v. McConnell*, 93 Mass. (11 Allen) 555, 561; *Lee v. Kilburn*, 69 Mass. (3 Gray) 594, 600; *Skirm v. Eastern Rubber Mfg. Co.* (N. J.) 40 Atl. 679, 770; *Ferry v. Bank of Central New York* (N. Y.) 15 How. Prac. 445, 451; *Baker v. Emerson*, 88 N. Y. Supp. 576, 578, 4 App. Div. 348;

*Herrick v. Borst* (N. Y.) 4 Hill, 650, 652; *Morey v. Milliken*, 30 Atl. 102, 105, 86 Me. 464; *Dewey v. St. Albans Trust Co.*, 56 Vt. 476, 480, 48 Am. Rep. 803; *Appeal of Levan*, 3 Atl. 804, 807, 112 Pa. 294; *State v. Burlingame*, 48 S. W. 72, 74, 146 Mo. 207; *Mitchell v. Bradstreet Co.*, 22 S. W. 358, 361, 116 Mo. 226, 20 L. R. A. 138, 38 Am. St. Rep. 592; *State v. Cadwell*, 44 N. W. 700, 706, 79 Iowa, 432. *Contra*, see *Smith v. Collins* (Ala.) 10 South. 334, 340; *David Alder & Sons Clothing Co. v. Hellman*, 75 N. W. 877, 884, 55 Neb. 266; *Castleberg v. Wheeler*, 12 Atl. 3, 6, 68 Md. 266; *Moore v. Carr*, 65 Mo. App. 64, 70; *In re Shoenberger* (U. S.) 21 Fed. Cas. 1334, 1335; *In re Schoenenberger* (U. S.) 21 Fed. Cas. 720, 722; *Market Nat. Bank v. Pacific Nat. Bank* (N. Y.) 30 Hun, 50, 54.

Insolvency means a general inability to answer in the course of business the liability existing and capable of being enforced. *People v. Excelsior Gaslight Co.* (N. Y.) 3 How. Prac. (N. S.) 137, 138; *Joseph v. Raff*, 81 N. Y. Supp. 546, 549, 82 App. Div. 47; *Brouwer v. Harbeck*, 9 N. Y. 589, 593; *Best v. Fuller & Fuller Co.* (Ill.) 56 N. E. 1077, 1078; *Walton v. First Nat. Bank*, 22 Pac. 440, 442, 13 Colo. 265.

"Insolvency," in the law, has two distinct and well-defined significations. A person is said to be insolvent who is not pecuniarily able to pay his debts as they fall due; also a person is insolvent whose property, if distributed among his creditors, would not suffice to pay their claims in full. These different meanings are recognized by the California insolvency act, in that in proceedings for involuntary insolvency one may be cast into insolvency who is shown to be unable to meet his debts as they fall due, but where one voluntarily seeks the benefit of the act he must allege his inability to pay all his debts in full. Thus, where a petition in involuntary insolvency has been filed, it sufficiently shows that a creditor cannot make good his debt from the estate of the insolvent, so as to authorize an action to set aside a mortgage as fraudulent. *Ruggles v. Cannedy* (Cal.) 53 Pac. 911, 916.

By the term "insolvency" is not to be understood an absolute inability to pay one's debts at some future time, upon a settlement and winding up of all a trader's concern; but a trader may be said to be in insolvent circumstances when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do. *Thompson v. Thompson*, 58 Mass. (4 Cush.) 127, 134; *Hazelton v. Allen*, 85 Mass. (3 Allen) 114, 117; *Walton v. First Nat. Bank*, 22 Pac. 440, 442, 13 Colo. 265; *In re Bininger* (U. S.) 3 Fed. Cas. 412, 416; *Rison v. Knapp* (U. S.) 20 Fed. 835, 837; *Daniels v. Palmer*, 29 N. W. 162, 164, 35 Minn. 347; *Amsden v. Fitch* (Vt.) 32 Atl. 478, 479; *Skirm*

v. Eastern Rubber Co., 57 N. J. Eq. 179, 40 Atl. 769; Joseph v. Raff, 81 N. Y. Supp. 546, 549, 82 App. Div. 47.

A trader is insolvent when he cannot pay his debts in the ordinary course of business, although he may not be compelled to stop business from his inability, and although, on a settlement of his affairs, he may have sufficient to pay in full. *Jackson v. McCulloch* (U. S.) 13 Fed. Cas. 299, 300; *Rison v. Knapp* (U. S.) 20 Fed. Cas. 835, 837; *Case v. Citizens' Bank of Louisiana* (U. S.) 5 Fed. Cas. 251, 252; *Wager v. Hall*, 83 U. S. (16 Wall.) 584, 599, 21 L. Ed. 504; *Webb v. Sachs* (U. S.) 29 Fed. Cas. 523, 525; *Foster v. McAlester*, 58 S. W. 679, 683, 3 Ind. T. 307; *Lee v. Kilburn*, 69 Mass. (3 Gray) 594, 600.

A man is not expected to be able to at once pay every debt he owes; but he must be able to pay or provide for his debts as they fall due in the usual course of business. *State v. Burlingame*, 48 S. W. 72, 74, 146 Mo. 207; *Appeal of Levan*, 3 Atl. 804, 807, 112 Pa. 294.

An institution is solvent when it possesses assets of sufficient value to pay within a reasonable time all its liabilities through its own agencies. It is insolvent when it does not possess assets of such value. *State v. Cadwell*, 79 Iowa, 432, 44 N. W. 700, 704; *Bloomfield Woolen Mills v. State Bank of Bloomfield*, 70 N. W. 115, 116, 101 Iowa, 181. Nevertheless this is but a general rule, modified more or less by the habits and usages of the place where the debtor resides and of the particular branch of business in which he is engaged. The evidence which would satisfy a jury of the insolvency of a banker might wholly fail to convince them of that of a farmer. *Lee v. Kilburn*, 69 Mass. (3 Gray) 594, 600.

Insolvency indicates an inability to continue business in the ordinary way; an inability to meet business obligations as they mature; an inability to keep one's credit good so that his commercial promises bear upon their face an assurance that they will be met as they mature. The latter sense is that of the word as used in insolvency and bankruptcy laws. *Morey v. Milliken*, 30 Atl. 102, 105, 86 Me. 464.

The test of a trader's insolvency is his inability to pay his debts in the ordinary course, not inability to raise money for them in the ordinary course. *Stadler v. First Nat. Bank*, 56 Pac. 111, 119, 22 Mont. 190, 74 Am. St. Rep. 582.

An insolvent debtor is one who, either from absolute deficiency of funds or some temporary embarrassment, is unable to meet his financial engagements. *Alexander v. Gibson* (S. C.) 1 Nott & McC. 480, 496.

A debtor is "insolvent," within the meaning of the statute relating to assignments for

benefit of creditors, when he is unable to pay his debts from his own means as they become due. Civ. Code Mont. 1895, § 4511; Civ. Code S. D. 1903, § 2373; Rev. St. Okl. 1903, § 203.

The term "insolvency," in the mercantile sense, describes a person unable to pay his debts according to the ordinary usages of trade; but in the sense used by the statute, prohibiting the making of a preference by a debtor in contemplation of insolvency, it means a person whose affairs have become so deranged that he is unable to pay his debts as they fall due, and if, from such deranged state of his affairs and the sense of inability to meet his engagements, he should transfer his property to a trustee to pay his debts, such assignment is made in contemplation of insolvency, within the meaning of the statute. *Mitchell v. Gazzam*, 12 Ohio, 315, 336.

An allegation that the purchaser furnished by a broker had requested an extension of time on a draft drawn against the first shipment of the goods sold, because he was "not able to pay at the time," was not equivalent to an allegation that at such time the purchaser was insolvent. *Fairly v. Wappoo Mills*, 44 S. C. 227, 247, 22 S. E. 108, 116, 29 L. R. A. 215.

#### **As insolvency judicially ascertained.**

"Insolvency" is an inability of the debtor to pay his debts as they fall due in the ordinary course of business, and this it not dependent upon a formal adjudication. *Strouse v. American Credit Indemnity Co.*, 46 Atl. 323, 330, 91 Md. 244.

The term "insolvency," as used in Corporation Act, § 63 (Revision, p. 188), which provides that in case of the insolvency of any corporation the laborers in the employ thereof shall have a lien upon the assets thereof, etc., means that insolvency which is judicially ascertained, and which becomes a ground of the court's jurisdiction. *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 33 N. J. Eq. (6 Stew.) 192, 195.

The word "insolvent," as used in the statute relating to homesteads, providing that if the estate is insolvent the homestead shall vest in the widow and minor children absolutely, means a judicial ascertainment and declaration of insolvency. A judicial ascertainment and declaration of insolvency must be had before the fee passes to such minors and widow. *Smalley v. Chisenhall*, 18 South. 739, 740, 108 Ala. 683.

#### **Liabilities exceeded by assets.**

A person may be "insolvent," in the proper signification of the term, although his assets may exceed his liabilities. *Munson v. Ellis*, 25 N. W. 305, 307, 58 Mich. 331; *Citizens' Bank & Trust Co. v. Union Mining*

& Gold Co. (U. S.) 106 Fed. 97, 100; *Aushutz v. Hoerr* (U. S.) 1 Fed. 592, 593; *Strouse v. American Credit Indemnity Co.*, 46 Atl. 328, 330, 91 Md. 244. His solvency or insolvency does not depend on the simple question whether his assets, at the date alleged, will or will not satisfy all the demands against him due and to become due. *Bell v. Ellis*, 33 Cal. 620, 625.

"Insolvency" means a general inability of a debtor to answer pecuniary engagements, and it does not follow that he is not insolvent because he may ultimately have a surplus after winding up his affairs. *National Bank of Metropolis v. Sprague*, 21 N. J. Eq. (6 C. E. Green) 583 (cited and approved in *Sewell v. Cape May & S. P. R. Co.* [N. J.] 9 Atl. 785).

"Insolvent," in such sense as to affect the validity of a transfer of property by a debtor as against his creditor, does not include a debtor who has in his own name, subject to be levied upon by execution, sufficient property to pay all his debts. *Camp v. Thompson*, 25 Minn. 175.

#### Stoppage of payment evidence of.

"Insolvency" means a general inability to pay one's debts, and the failure to pay one just and admitted debt is probably sufficient evidence of insolvency. *Jeffris v. Fitchburg*, 67 N. W. 424, 426, 98 Wis. 250, 83 L. R. A. 351, 57 Am. St. Rep. 919 (citing *Benj. Sales*, § 837; *Smith*, *Merc. Law*, 550, and note); *Chicago & S. E. Ry. Co. v. Kenney*, 62 N. E. 26, 28, 159 Ind. 72; *Sahlien v. Bank of Lonoke*, 16 S. W. 373, 375, 90 Tenn. 221. Tested by this rule, the failure to pay a small draft drawn for part of a debt, followed by an assignment soon after, would be sufficient to show insolvency. *Sahlien v. Bank of Lonoke*, 16 S. W. 373, 375, 90 Tenn. 221.

The term "insolvent," when it relates to the right of stoppage in transitu, means a general inability to satisfy obligations, evidenced by stopping payment. *Inslee v. Lane*, 57 N. H. 454, 458.

Where it is shown that a corporation has suffered the foreclosure of a mortgage against it, and that there are unpaid judgments, under which levies have been made, and unpaid taxes and outstanding notes, the existence of such unpaid obligation shows insolvency. *Ft. Wayne Electric Corp. v. Franklin Electric Light Co.*, 40 Atl. (N. J.) 441, 442.

The refusal of a corporation to pay its debts, notes, or obligations at maturity is generally a suggestion of "insolvency"; but whether such refusal results from disability of the corporation to meet its obligations, or is based on other reasons, will be ordinarily best known to the officers and stockholders.

*New Britain Nat. Bank v. A. B. Cleveland Co.*, 36 N. Y. Supp. 387, 391, 91 Hun. 447.

#### Sufficient property accessible to legal process.

An "insolvent" is a debtor who has not sufficient property accessible to legal process to satisfy all legal demands. *Smith v. Collins*, 10 South. 334, 340, 94 Ala. 394.

A man may be fully able to pay his debts if he will, and yet in the eye of the law he is "insolvent" if his property is so situated that it cannot be reached by process of law, and subjected, without his consent, to the payment of his debts. *Schwabacher v. Kane*, 13 Mo. App. 126, 132 (citing *Eddy v. Baldwin*, 32 Mo. 369); *Mitchell v. Bradstreet Co.*, 22 S. W. 358, 361, 116 Mo. 226, 20 L. R. A. 138, 38 Am. St. Rep. 502 (citing *Thompson v. Thompson*, 58 Mass. [4 Cush.] 427; *Walton v. Bank*, 22 Pac. 440, 130 Colo. 265, 5 L. R. A. 765, 16 Am. St. Rep. 200).

A debtor who has no property subject to execution is an "insolvent debtor." *State v. Harper*, 120 Ind. 23, 25, 22 N. E. 80.

An "insolvent" is one who is not able to pay all his debts from his own means, or whose property is not in such a situation that all his debts may be collected out of it by legal process. *Lamberton v. Windom*, 18 Minn. 506, 515 (Gil. 455, 461).

It is held that a requested instruction that a man who is insolvent for the want of means to pay his debts in this state is in law insolvent, without reference to any property in another state, states the proposition too broadly. *Thompson v. Paige*, 16 Cal. 77.

An "insolvent person," within the meaning of the chapter relating to voluntary assignments, is one whose nonexempt property is insufficient in amount, at a fair valuation, to pay his debts. *Rev. St. Wis.* 1898, § 1694c.

#### As taking proceeding in insolvency

The term "insolvency," as used in the statute providing that preferences made with a view to insolvency are void means insolvency in its technical sense; that is, proceedings in insolvency. A debtor may be in actual insolvency—that is, his assets may not be sufficient to pay his debts—and yet he may be very far from legal insolvency or serious danger of it. *Hayden v. Allyn*, 11 Atl. 31, 35, 55 Conn. 280.

Acts Cong. 1790, 1797, 1799, which provides that, in all cases of "insolvency," debts due to the United States on any bond for the payment of duties shall be first satisfied, means a legal insolvency. *United States v. Barker*, 15 U. S. (2 Wheat.) 395, 425, 4 L. Ed. 271.

"Insolvent," as used in the law relative to stoppage in transitu, means nothing more

than a general inability to pay. It does not refer to taking the benefit of any act for the relief of insolvent debtors. *Rogers v. Thomas*, 20 Conn. 53, 68.

"Becoming insolvent" means a general inability to pay debts, and does not signify taking the benefit of the insolvent debtors' act, unless so limited by the context. *Biddlecomb v. Bond*, 4 Adol. & E. 332.

#### Of bank.

"Insolvency" in a bank, like an individual, is inability to pay its debts. It means a general present inability to answer in the course of business its liabilities existing and capable of being enforced. It does not necessarily follow that a bank is solvent when its assets are equal to or in excess of its liabilities, but in order to be solvent its resources must be equal in value to its liabilities, and be of such a character as to be available at the command of the bank, to be used in paying its liabilities past due, whenever the same may be demanded in the ordinary course of business; and all debts owing by the bank to any and all persons whomsoever, including its capital stock, surplus fund, and unpaid salaries of its officers, are its liabilities, while all debts owing to the bank, together with all other property owned by it, constitute its assets or resources. *State v. Myers*, 38 Pac. 296, 298, 54 Kan. 206.

A bank without funds for the redemption of its notes, and dependent on individual resources and exertions to provide funds for the redemption of its notes, rather than upon the immediate ability of the institution itself, is insolvent. *Oakley v. Paterson Bank*, 2 N. J. Eq. (1 H. W. Green) 173, 177.

Undoubtedly, in a general sense, "insolvency," means a pecuniary condition of a person who has no means to pay his debts as they fall due according to the usual course of business. But not only in England, but in this country, under bankrupt and insolvent acts, the statutes which at times use these terms interchangeably, and treat them as synonymous, at other times distinguish between bankruptcy and insolvency; the one having reference to a person not a trader, and the other to one engaged in trade. As said by Cowen, J., in *Herrick v. Borst* (N. Y.) 4 Hill, 650, 652: "The meaning of the word 'solvency' is usually tested by the word 'insolvency.' Supposing a man to be unable to pay all his debts by his own means, or that all his debts cannot be collected out of those means by legal process, is there any doubt that, in the general sense of the word, he is 'insolvent'? Debts are paid with property, and in one sense the insolvency is the inadequacy of a man's funds. As used in relation to a banking corporation, the term 'insolvency' means an insufficiency of the property and assets of the company to pay all of

its debts." *Higgins v. Worthington*, 42 N. Y. Supp. 737, 738, 12 App. Div. 361 (citing *Curtis v. Leavitt*, 15 N. Y. 9, 190).

As employed in the statute with reference to banks, the word "insolvent" means a present inability to pay depositors as banks usually do, and meet all liabilities as they become due in the ordinary course of business. *State v. Stevens* (S. D.) 92 N. W. 420, 423 (*Daniels v. Palmer*, 35 Minn. 347, 29 N. W. 162).

Whatever may be the rule as to when a bank may be said to be insolvent, the closing of its doors and suspension of its business must be deemed prima facie evidence of insolvency. *Stone v. Dodge*, 96 Mich. 524, 56 N. W. 75, 78, 21 L. R. A. 280.

#### Of building and loan association.

The "insolvency of a building association" is that condition of its affairs in which it is unable to pay back to its members the amounts paid in by them respectively, dollar for dollar, puts an end at once to its operations, and, as it thus prevents the stock from maturing and extinguishing the loans according to the contracts between the association and its borrowing members, constitutes a breach of those contracts, and, on the one hand, excuses the borrowers from all further liability for the payment of dues and fines, and, on the other, renders the mortgage given to secure the loans due and enforceable at once, without regard to their terms, even though payable in installments, and the receiver can proceed to collect them. *Johnson v. Grosvenor*, 59 S. W. 1028, 1031, 105 Tenn. 353.

Applied to building and loan associations, "insolvency" is where the available and collectible funds of the association are reduced below the level of the stock already paid in, and the amount of contribution of each stockholder cannot be paid back dollar for dollar. It is the inability, not to pay outside debts, but to satisfy demands of its members. *Bingham v. Marion Trust Co.*, 61 N. E. 29, 32, 27 Ind. App. 247; *People v. Empire Loan & Investment Co.*, 44 N. Y. Supp. 308, 310, 15 App. Div. 69 (citing *Towle v. American Building Loan & Investment Soc.* [U. S.] 61 Fed. 446); *Continental Nat. Building & Loan Ass'n v. Miller* (Fla.) 33 South. 404, 407. So, where an association had enough cash on hand to pay all the creditors and 15 per cent. of the face value of the stock of the stockholders, it is insolvent. In *Boice v. Rabb*, 55 N. E. 880, 24 Ind. App. 368, the court treated as insolvent an association which paid upon dissolution 46⅓ per cent. to the stockholders. *Bingham v. Marion Trust Co.*, 61 N. E. 29, 32, 27 Ind. App. 247.

#### Of corporation.

The term "insolvency," as applied to a corporation, signifies insufficiency of prop-

erty to satisfy creditors. In re Glen Iron Works (U. S.) 17 Fed. 324, 327.

In *Brouwer v. Harbeck*, 9 N. Y. (5 Seld.) 589, 594, it is said that a corporation, like an individual, is insolvent when it is not able to pay its debts. *Baker v. Emerson*, 38 N. Y. Supp. 570, 578, 4 App. Div. 348.

In *Corey v. Wadsworth*, 11 South. 350, 353, 99 Ala. 68, 23 L. R. A. 618, 42 Am. St. Rep. 29, the court, after announcing the general principles governing the assets of an insolvent corporation, after asking at what stage of a corporation's affairs must it be pronounced insolvent so as to bring it within the principles we have declared, said: "It is not enough that its assets are insufficient to meet its liabilities, if it be still prosecuting its line of business with the prospect and expectation of continuing to do so; in other words, if it be in good faith what is sometimes called a 'going business' or 'establishment'; but when a corporation's assets are insufficient for the payment of its debts, and it has ceased to do business, or has taken or is in the act of taking a step which will practically incapacitate it for conducting a corporate enterprise with reasonable prospect of success, and its embarrassments are such that early suspension and failure must ensue, then such corporation must be pronounced insolvent." *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 24 S. W. 16, 25, 86 Tex. 143, 22 L. R. A. 802.

So long as a corporation is a going corporation engaged in the conduct of the business for which it was organized, and not known or believed to be insolvent by its officers and managers, with assets exceeding its liabilities by many thousand dollars, it is not "insolvent" in such a sense as will preclude its executing a mortgage on its property in good faith to secure a debt of the corporation, though its directors are security for the debt. *Sabin v. Columbia Fuel Co.*, 25 Or. 15, 34 Pac. 692, 42 Am. St. Rep. 756.

#### Of mutual insurance company.

Used in reference to mutual life insurance companies, the term "insolvent" means nothing more than financial inability to carry out the agreement of members, and a mutual insurance company, the assets of which greatly exceed the value of its indebtedness to its general creditors, was not "insolvent" in the ordinary meaning, but was insolvent in that it could not accomplish its purpose and pay its certificates in full. In re *Youths' Temple of Honor*, 76 N. W. 59, 60, 73 Minn. 319.

#### Of partnership.

The term "insolvency," as used in the bankruptcy acts of 1898 and 1907, has not the same meaning. Under the act of 1867 it did not mean an absolute inability to pay

one's debts by the application of one's property upon a settlement of all one's affairs, as in the act of 1898, but an inability to pay debts in the ordinary course of business. The supreme test is whether the aggregate of a debtor's property at a fair valuation is sufficient to pay the debtor's debts. In determining the insolvency of a partnership, the debtor consists of the partnership as well as the partners individually. If, collectively, there was property subject to partnership debts, the partnership was not insolvent, though the partnership itself may not have had sufficient means to pay its debts. *Vaccaro v. Security Bank of Memphis* (U. S.) 103 Fed. 436, 443, 43 C. C. A. 279.

Under a statute concerning limited partnerships, and declaring that every sale, assignment, or transfer of any property or conveyance of such partnership, made when insolvent or in contemplation of insolvency, shall be void, etc., it is held that the word "insolvency" means that the partnership has not sufficient property and effects to pay all of its debts. *McArthur v. Chase* (Va.) 13 Grat. 683, 692.

#### INSOLVENT CIRCUMSTANCES.

By being "in insolvent circumstances" is meant that the whole property and credits are not equal in amount, at a fair appraisal, to the debts due by the party. *Kennedy v. New Orleans Sav. Inst.*, 36 La. Ann. 1, 8; *State Nat. Bank v. New Orleans Brewing Ass'n*, 22 South. 48, 52, 49 La. Ann. 934 (citing Rev. Civ. Code, art. 1985).

#### INSOLVENT LAW.

"Insolvent laws" are positive regulations made by the Legislature to exonerate the person or property of a debtor and to relieve him from the pressure of creditors. *Cook v. Rogers*, 31 Mich. 391, 396.

In so far as a general assignment law of a state provides for a release by the accepting creditors of an insolvent assignor, it is an "insolvent law"; that is to say, such a law as is suspended by the general bankrupt act of the United States. *Haijek & Simecek v. Luck*, 74 S. W. 305, 96 Tex. 517 (citing *Boese v. King*, 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760).

A law cannot be termed an "insolvent law" which does not compel, or in terms even authorize, assignments for the benefit of creditors, but assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced, providing for the security of the creditors by exacting a bond from the trustees for the discharge of their duties, requiring them to file statements showing what they have done with the property, and affording in various



ways the means of compelling them to carry out the purposes of the conveyance. *Patty-Joiner & Eubank Co. v. Cummins* (Tex.) 59 S. W. 297, 299.

Not every law which discharges the person and property, as well future as in possession, of the debtor, is a bankrupt law. A distinction is recognized both in this country and England between bankrupt laws and insolvent laws. In England the bankrupt system has been confined exclusively to traders and the creditors of traders, whereas the insolvent laws of this country embrace every class of debtors. It is of no importance whether the debt has been contracted by way of trade or not, for a person to come within the purview of an insolvent law. So exclusively have bankrupt laws operated on traders that it may well be doubted whether an act of Congress subjecting to such a law every description of persons within the United States would comport with the spirit of the powers vested in them in relation to this subject. But it is not only in the persons who are the objects of these laws that a difference exists, but their general and most important provisions are essentially dissimilar. Under a bankrupt law the debtor is at once, by operation of law, as soon as he has committed an act of bankruptcy, divested of all his property, which is transferred to assignees in trust for his creditors. All dispositions by the bankrupt himself after this are void; an insolvent, on the contrary, retains the management of his own estate, however he may misbehave towards his creditors at large, and it is rarely, unless on his own application, vested in others. It is of no importance how many acts he may commit which, under a bankrupt system, would enable his creditors to take from him the control of his property; they can seldom act upon him compulsively under the provisions of an insolvent law, if he be obstinate or dishonest, until he has given what preferences he thinks proper, and has become so poor as to be scarcely worth pursuing. Under the one system the creditors are actors, and under the other the debtor himself originates the proceedings. *Adams v. Storey* (U. S.) 1 Fed. Cas. 141, 142.

In the reign of Henry the Eighth the first act was passed making special provision for bankrupt traders. Following this, and prior to the American Revolution, the bankrupt laws grew up to be a great system. Distinct from this system were the insolvent laws, made for the relief of those imprisoned for debt. They respected a different class of men, and their objects, effects, and administration were different. The insolvent laws were optional, the bankrupt laws were compulsory; and they were never, either in common conversation or in juridical language, confounded. The insolvent laws had for their object only the liberation of the

insolvent from the imprisonment of his person, while the bankrupt system respected only merchants and traders and their negotiations and concerns. It took a retrospective view of their proceedings, it detected their frauds, it set aside their fraudulent contracts and conveyances, it restored to the fair creditor the proceeds of that property to which he was justly entitled, and it dealt with the debtor according to his merits. If misfortune had overtaken him, it discharged him from imprisonment, exonerated him from his debts, and left him something wherewith to begin the world anew. Such should be the interpretation of the constitutional provision which delegated to Congress the power of establishing uniform laws upon the subject of "bankruptcy" throughout the United States, and all laws which have in view the objects of the bankrupt system as it existed at the time of the adoption of the Constitution, and especially those which exonerated the debtor from his debt, are bankruptcy laws, and can only properly be passed by Congress. *Vanuxem v. Hazelhursts*, 4 N. J. Law (1 Southard) 192, 195, 7 Am. Dec. 582.

## INSPECT—INSPECTION.

See "Ordinary Inspection"; "Trial by Inspection."

Webster defines "inspect" to mean "to look; to view or oversee for the purpose of examination; to look into; to view and examine for the purpose of ascertaining the quality or condition of the thing; to view and examine for the purpose of discovering and correcting errors, as to inspect the press or proof sheets of a book." *People v. General Committee*, 49 N. Y. Supp. 723, 728, 25 App. Div. 339.

"Inspection" is derived from a Latin word "inspicere," to look into. *People v. General Committee*, 49 N. Y. Supp. 723, 728, 25 App. Div. 339 (quoting *Bouv. Law Dict.*).

The "inspection" of a machine or appliance, or of premises, to ascertain whether they are in good repair or in good condition, means a critical examination. *Armour v. Brazeau*, 60 N. E. 904, 907, 191 Ill. 117.

The term "inspection," as used in a finding that the method of constructing a double dwelling house would have been disclosed by an inspection if the purchaser had made one before purchasing, means a careful inspection by a person who is reasonably familiar with the premises. An inspection may be very general, or it may be very minute. It may be made by one having no skill, or it may be made by one having great skill. *Whiting v. Gaylord*, 34 A.J. 85, 87, 66 Conn. 337, 50 Am. St. Rep. 87.

"The courts are frequently called upon to act upon evidence addressed to the senses,

often called 'view' or 'inspection,' and to recognize without further proof that the person before them is an aged person, male or female, a child, a boy or girl, white or black, a person with or without visible deformity of limbs, or the like. In *People v. Justices of Court of Special Sessions*, 10 Hun, 224, decided in 1877, the court held that evidence of age may be received from any person capable of giving it for the purpose of proving the fact, or, where the appearance of the party sufficiently indicates his probable age, that may be acted upon as evidence of the fact." *Garbarsky v. Simkin*, 78 N. Y. Supp. 199, 200, 86 Misc. Rep. 195.

#### **Autopsy.**

To "inspect" means to look upon; to examine for the purpose of determining quality, detecting what is wrong; and, as used in Rev. St. § 8379, authorizing a coroner to summon a physician to inspect the body and give professional opinion as to the cause of death, is sufficient to authorize an autopsy. *Fairchild v. Ada County*, 55 Pac. 654, 655, 6 Idaho, 340.

#### **As determination of fitness for commerce.**

"Inspection," as defined in *Bouvier's Law Dictionary*, means the examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce. *Neilson v. Garza* (U. S.) 17 Fed. Cas. 1302, 1303; *People v. Compagnie Generale Transatlantique* (U. S.) 10 Fed. 357, 361.

"In *Burrill's Law Dictionary* 'inspection' is defined thus: 'Official view or examination of commodities or manufactures, to ascertain their quality under some statute requiring it.'" *People v. Compagnie Generale Transatlantique* (U. S.) 10 Fed. 357, 361.

Laws 1970, c. 299, requiring tobacco raised in the state, and packed in hogsheads, to be inspected before being carried out of the state except in certain instances, and providing that the tobacco so exported or carried out of this state "without inspection" shall in all cases be marked with the name in full of the owner thereof, means inspection by opening the hogshead and sampling the contents. *Turner v. Maryland*, 2 Sup. Ct. 44, 50, 107 U. S. 38, 27 L. Ed. 370.

#### **Examination by means of evidence.**

Under Const. U. S. art. 1, § 10, prohibiting any state without the consent of Congress from laying any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws, the term "inspection" means something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test. When testimony or evidence is to

be taken and examined, it is not "inspection" in any sense whatever. "To 'inspect' persons arriving from any foreign country to ascertain who among them are habitual criminals or pauper lunatics, idiots, or imbeciles, or orphan persons without means or capacity to support themselves and subject to become a public charge, means something different than 'inspection' as used in the Constitution." *People v. Compagnie Generale Transatlantique*, 2 Sup. Ct. 87, 90, 107 U. S. 59, 27 L. Ed. 383; *Id.* (U. S.) 10 Fed. 357, 361; *State v. McGough*, 24 South. 395, 397, 118 Ala. 159.

#### **Making memorandum or copy.**

The right of a member of a political party to inspect the enrollment of the registered voters of his party includes the right to make a copy of the list of names found there, providing such member in copying does not take up unnecessary time or interfere with the right of inspection by any other member. *People v. General Committee*, 49 N. Y. Supp. 723, 728, 25 App. Div. 339.

The term "inspection," in Act 1902, No. 180, p. 344, prescribing that the poll tax book shall be open to the inspection of all persons, does not mean that the sheriff shall be harassed at all times by the wanton conduct of evil-disposed persons, nor that this inspection should be conducted unreasonably, nor that the sheriff should be deprived of the possession of that book to such an extent as to lay him open to the heavy penalty imposed by the act for any failure on his part to keep said book in the manner, time, and form provided for therein, but it does include the right to make memoranda or copies from the book. *Marsh v. Sanders*, 34 South. 752, 754, 110 La. 726.

#### **As optical observation.**

Inspection means to look upon; to examine for the purpose of determining quality and detecting what is wrong, and is not necessarily confined to optical observation, but is ordinarily understood to embrace tests and examinations. *Fidelity & Casualty Co. v. City of Seattle*, 47 Pac. 963, 964, 16 Wash. 445.

The term "inspection," as used in an instruction defining the inspection required to be made by a railroad company to exonerate it from liability for an injury to a brakeman resulting from a defective handhold on a car, means an inquiry, by actual observation, into the state, efficiency, safety, and quality of the thing inspected. Such inspection should not rest alone upon the vision, because there are many defects the existence of which could be ascertained by reasonable and ordinary tests which involve the exercise of senses other than the sense of vision. *Texas & P. R. Co. v. Allen* (U. S.) 114 Fed. 177, 178, 52 C. C. A. 183.

With reference to the duties of an inspector of flour, it is said that it is conceded that the word "inspect" means more than to make a mere ocular examination. *Dela-plane v. Crenshaw* (Va.) 15 Grat. 457, 467.

### INSPECTION LAWS.

The object of inspection laws is to improve the quality of articles produced by the labor of the country, and fit them for exportation, or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce or of commerce among the states, and prepare it for that purpose. That inspection laws may have a remote and considerable influence on commerce will not be denied, but that a power to regulate commerce is the source from which the right to pass them is derived cannot be admitted. *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 202, 6 L. Ed. 23; *Turner v. Maryland*, 2 Sup. Ct. 44, 54, 107 U. S. 38, 27 L. Ed. 370.

"In *Olitsman v. Northrop* (N. Y.) 8 Cow. 45, the inspection laws are said to be laws to protect the community, so far as they apply to domestic sales, from fraud and impositions, and, in relation to articles designed for transportation, to preserve the character and reputation of the state in foreign markets." *People v. Compagnie Generale Transatlantique* (U. S.) 10 Fed. 357, 361.

"Inspection laws," as the term is used in Fed. Const. art. 1, § 10, cl. 2, providing that no state shall, without the consent of Congress, lay any duty on imports or exports except what may be absolutely necessary for executing its inspection laws, means laws relating to the inspection of personal property. The term cannot be construed to include a law requiring commissioners to inspect all persons arriving from any foreign country to ascertain who among them are habitual criminals or pauper lunatics, idiots, or imbeciles, or orphan persons without means or capacity to support themselves and subject to become a public charge, for these are matters incapable of being satisfactorily ascertained by inspection. *People v. Compagnie Generale Transatlantique*, 2 Sup. Ct. 87, 90, 107 U. S. 59, 27 L. Ed. 383; *Id.* (U. S.) 10 Fed. 357, 361.

"Inspection laws," within the meaning of Const. art. 1, § 10, "are not in themselves regulations of commerce, and, while their objects frequently are to improve the quality of articles produced by the labor of the country and fit them for exportation, yet they are quite as often made as fitting them or determining their fitness for domestic use, and in so doing, protecting the citizen from fraud. Necessarily, in the latter aspect, such laws are applicable to articles imported into as well as articles produced within a state, and therefore a state inspection law

may operate upon imports as well as exports. A state inspection law imposing a charge which it declares to be for defraying the cost of inspection will not be held unconstitutional, as an unwarranted tax on interstate commerce, merely because some of the revenue derived therefrom has in fact been applied to other purposes." *Patapasco Guano Co. v. Board of Agriculture*, 18 Sup. Ct. 862, 864, 171 U. S. 345, 43 L. Ed. 191.

"The object of inspection laws, ordinarily, is to improve the quality of the productions of a country, and thereby better fit them for domestic use or for exportation. But we are by no means prepared to conceive that the inspection must be confined to an examination of the quality of the article itself. To prepare the products of a state for exportation, it may be necessary that such products should be put in packages of a certain form and of certain prescribed dimensions. This may be necessary either on account of the character of such products, or to enable the state to identify the products of its own growth, and to furnish the evidence of such identification to the markets to which they are exported." An outrage charge to reimburse the state for the expense of requiring hogsheads of tobacco to be delivered at one of the state tobacco warehouses in order that the inspector may ascertain whether it conforms to the requirements of the law, and whether it is the true growth of the state, is an inspection law within the meaning of the Constitution, prohibiting the states from levying a tax on imports or exports except as may be absolutely necessary for the execution of its inspection laws. *Turner v. State*, 55 Md. 240, 263, affirmed *Turner v. Maryland*, 2 Sup. Ct. 44, 54, 107 U. S. 38, 27 L. Ed. 370.

The office of inspection laws is to certify the quantity and quality of the articles inspected, whether imports or exports, for the protection of buyers and consumers. The act of the Legislature approved March 6, 1869, providing that it shall be unlawful for any person other than the master and wardens to make any survey of the hatches of seagoing vessels coming to New Orleans, or to make any survey of damaged goods coming on board of such vessels, or to give certificates on orders for sale of such damaged goods at auction, is not an inspection law, but is rather a regulation of foreign commerce. *Foster v. Master and Port Wardens of New Orleans*, 94 U. S. 246, 24 L. Ed. 122.

### INSPECTOR.

See "Competent Inspector"; "Factory Inspector."

"Inspector" is a name given to a person whose duty it is to make tests of ma-

chinery, and it is a generally recognized fact that, when an officer or agent of any kind is instructed to inspect, the duty goes beyond a mere survey of the eye, and implies such tests as are necessary to ascertain the quality of the thing inspected. *Fidelity & Casualty Co. v. City of Seattle*, 47 Pac. 963, 964, 16 Wash. 445.

## INSTANCE

"Instance" means specified or enumerated cases. *Padelford v. City of Savannah*, 14 Ga. 438, 477.

### INSTANCE COURT.

The "Instance court" is the division of the admiralty court which takes cognizance of contracts made and injuries committed on the high seas. It is governed by the civil law, the laws of Oleron, and the customs of the admiralty, modified by statutes. All marine torts for which redress can be had in the admiralty court are heard in the instance court. A marine trespass free from the circumstance that the vessel was taken as a prize is cognizable concurrently in the court of common law and in the instance court of the admiralty, and the latter court has no more jurisdiction of the question of prize or no prize than a court of common law. *Percival v. Hickey* (N. Y.) 18 Johns. 257, 265, 271, 9 Am. Dec. 210.

### INSTANCE AND REQUEST.

The words "instance and request," in an allegation in a petition that the plaintiff performed services for defendant at his instance and request, do not operate to limit the plaintiff to proof of an express contract, but he may support his petition by evidence of facts giving rise to an implied contract. *Columbus, H. V. & T. Ry. Co. v. Gaffney*, 61 N. E. 152, 154, 65 Ohio St. 104.

## INSTANT.

"Instant," as used in a summons dated April 5th, requiring defendants to appear on the first day of the next term of the circuit court to be held at the courthouse in Chicago on the third Monday of May instant, shows that the writ was really issued in May, and not in April. *Hemmer v. Wolfer*, 16 N. E. 652, 653, 124 Ill. 435.

### INSTANT DEATH.

"Instant death," as used in a special finding, in an action for damages for death, that the death was of that nature commonly known as "instant death," may be applied to a death caused by an injury necessarily fatal, where death results in a few moments from it. A death is not necessarily

instantaneous in fact because it is of that nature. Where the party injured survived the injury for a few moments, his death, though what would be commonly called "instant death," is not such an instant death as to prevent a cause of action accruing to him for the injury. *Kellow v. Central Iowa Ry. Co.*, 23 N. W. 740, 744, 68 Iowa, 470, 56 Am. Rep. 858.

### INSTANTANEOUS.

Whether a word claimed as a trade-mark is available because it is a fanciful or arbitrary name, or whether it is obnoxious to the objection of being descriptive, must depend upon the circumstances of each case. The word "instantaneous" is not a valid trade-mark as applied to a preparation of taploca which is distinguished from other preparations of that article by reason of its adaptability for immediate use without the preliminary soaking required by other preparations. *Bennett v. McKinley* (U. S.) 65 Fed. 505, 13 C. C. A. 25.

"Instantaneous" means done or occurring in an instant, or without any perceptible portion of time, as the passage of electricity appears to be instantaneous. It is so defined in Webster's International Dictionary. When we say that death must be immediate, it does not mean that it must follow the injury within a period of time too brief to be perceptible. If an injury severs some of the principal blood vessels and causes the person injured to bleed to death, his death may be regarded as immediate, though not instantaneous. If a blow upon the head produces unconsciousness, and renders the person injured incapable of intelligent thought or speech or action, and he so remains for several minutes and then dies, his death may very properly be considered as immediate, though not instantaneous. As used in reference to the death of a person caused by an injury, the words "immediate" and "instantaneous" do not mean precisely the same things, but the word "immediate" is more comprehensive and elastic in its meaning. An instantaneous death is an immediate death, but an immediate death is not necessarily in all cases an instantaneous death. *Sawyer v. Perry*, 33 Atl. 660, 661, 88 Me. 42.

### INSTANTANEOUS CRIME.

An "instantaneous crime," such as arson or killing, is consummated when the act is completed, and the statute of limitations begins to run with the consummation. *United States v. Owens* (U. S.) 32 Fed. 534, 537.

### INSTANTER.

"The courts of law have explained the meaning of the word 'instanter' into twenty-four hours." *Champlin v. Champlin* (N. Y.) 2 Edw. Ch. 328, 329.

"Instanter," when used in a statute, excludes all mesne time, and is not synonymous with "then and there," but means such convenient time as is reasonably necessary for doing the thing. Legal lexicographers define it as being synonymous with "within twenty-four hours." *State v. Clevenger*, 20 Mo. App. 626, 627 (citing 1 Bouv. Law Dict. 682; 1 Abb. Law Dict. 581).

The signification of the word "instanter," which seems to be more in accordance with the practice which has uniformly prevailed in Illinois, is the one suggested in the note to *Rex v. Johnson*, 6 East, 583, viz., "before the rising of the court," when the act is to be done in court, or "before the shutting of the office on the same night," when the act is to be done there. The same definition is adopted by Mr. Wharton in his Law Dictionary. He there lays down the rule that when a party is ordered to plead *instanter* he must plead the same day. *Northrop v. McGee*, 20 Ill. App. 108, 110.

The term "instanter," as ordinarily used, is understood to mean instantly, immediately, or at once; but in an order that defendants plead "instanter," the term means within the judicial day then begun. If the ordinary meaning of the term is adopted, a default would follow the entry of the order, and this in effect would make the order unnecessary, for the default might as well be entered without it. *Smith v. Little*, 53 Ill. App. 157, 160.

The word "instanter," as used in a bail bond conditioned on the principal therein making his personal appearance before a certain court to answer to an indictment *instanter*, means that the principal therein will appear before the court without delay, in a reasonable time, considering the distance to be traveled, the mode of conveyance, and the other circumstances of the case; and therefore the bail bond was not void for uncertainty. *Fentress v. State*, 16 Tex. App. 79, 83.

#### INSTANTLY.

"Instantly," say lexicographers—those who define it etymologically, and those who give its legal meaning—implies "without any intervention of time"; "allows not a particle of delay"; "marks an interval too small to be appreciated." *Borrego v. Territory*, 46 Pac. 349, 354, 8 N. M. 446.

An indictment for murder, alleging that the deceased "did instantly die" from a mortal wound given to him by the defendant, is not sufficient as an averment of the time and place of the killing. *State v. Lakey*, 65 Mo. 217, 218.

An averment, in an indictment for murder, that the deceased "did instantly die," did not amount to an averment of the time and place of the death. The word "instantly"

itself does not supply the place of "then and there," but is used to contradistinguish a case of death immediately succeeding the blow, and a case in which the death does not occur on the day the mortal blow was given. The statement of time and place is necessarily joined to either allegation. *Lester v. State*, 9 Mo. 608, 667.

#### INSTEAD.

The ordinary and popular meaning of the word "instead," and the phrase "in its stead," is in the room of, in lieu of, in the place of. They are expressions of substitution of one thing for another—of equivalence. *Cruikshank v. Cruikshank*, 80 N. Y. Supp. 8, 12, 39 Misc. Rep. 401.

The words "instead of," in Laws 1853, c. 245, § 1, providing that instead of the toll authorized to be demanded and received on plank roads by Laws 1847, c. 210, § 35, certain designated tolls shall be charged, mean in the place of, or room of, and therefore the section constitutes a repeal of the law of 1847 by implication. *Southport Plankroad Co. v. Russell*, 7 N. Y. St. Rep. 596, 597.

In the codicil to a will providing that such codicil should be instead of a certain bequest in the body of the will, the expression "instead of" excludes the idea of revocation in its technical sense, and is equivalent to a declaration that in such particulars as the codicil differs from the bequest it is to take the place of, or to be instead of, the bequest. 1 Jarm. Wills, 178, states the rule to be that the words "instead of," used in a codicil, are held to mean "instead of so much only as is incompatible with the codicil." *In re Watt's Estate*, 32 Atl. 42, 44, 168 Pa. 422.

#### INSTIGATE.

To "instigate" means to stimulate or goad to an action, especially a bad action. One of its synonyms is "abet," which means in law to aid, promote, or encourage the commission of an offense. Where a person procured a policy on his own life, and thereafter pretended to be drowned, whereby his executor was enabled to collect the insurance, he could not be said to have "instigated" the executor to make false pretenses concerning his death for the purpose of collecting the policy. *State v. Fraker*, 49 S. W. 1017, 1022, 148 Mo. 143.

#### INSTITUTE.

See "Art Institute."

#### Action.

"Institute," when applied to legal proceedings, signifies the commencement of the

proceedings. When we talk of 'instituting' an action, we understand bringing an action." *Commonwealth v. Duane* (Pa.) 1 Bin. 601, 608, 2 Am. Dec. 497.

Rev. St. p. 8212, providing that any person interested in any will which shall have been probated may institute a suit in the proper court to contest the validity thereof within 4 years after the probate thereof, the phrase "may institute a suit" means to commence a suit, and not that the party may prosecute, by appellate procedure or by certiorari, an action or suit before commenced and decided. "To 'institute a suit,' as here used, evidently means to demand, to commence, to set in operation." *Franks v. Chapman*, 61 Tex. 576, 580 (citing Webster).

A writ is "issued" or a suit is "instituted" for some purposes at the time it becomes a perfected process, and sometimes the service of a writ is the commencement of the suit; but the making a writ or petition without summons or citation, and signed by no magistrate or judicial authority, does not constitute the commencement of a suit or the bringing of a petition or bill. *Blain v. Blain*, 45 Vt. 538, 543.

The "institution of a legal proceeding in a court" plainly comprehends the filing of a proper complaint, process for bringing the necessary parties into court, and judicial inquiry according to the usual rules and practices of courts. So that a statute giving probate courts authority, by proceedings instituted for that purpose, to determine the manner in which telephone and telegraph companies might construct their lines in the streets of a municipality in case of disagreement between the council and the company as to such location, indicates that such proceedings are not in the nature of an appeal. *City of Zanesville v. Zanesville Telegraph & Telephone Co.*, 59 N. E. 781, 786, 64 Ohio St. 67, 52 L. R. A. 150, 83 Am. St. Rep. 725.

#### **Criminal proceeding.**

Criminal proceedings cannot be said to be "instituted" until a formal charge is openly made against accused, either by indictment presented or information filed in court, or, at least, by complaint before a magistrate. The mere submission of a bill of indictment to the grand jury, and the examination of witnesses, do not constitute the bringing of a charge. *Post v. United States*, 16 Sup. Ct. 611, 613, 161 U. S. 583, 40 L. Ed. 816.

Within the meaning of the statute providing that no person shall be prosecuted, tried, or punished for any misdemeanor unless the indictment, information, or action for the same shall be found or instituted within one year and six months from the time of committing the offense, the term

"information is instituted" refers to the filing of an information by the prosecuting officer, and not to filing of a complaint before the justice of the peace. *State v. Robertson*, 75 N. W. 37, 40, 55 Neb. 41.

## **INSTITUTION.**

See "Banking Institution"; "Business Institution"; "Charitable Institution"; "Educational Institution"; "Literary Institutions"; "Penal Institutions"; "Private Institutions"; "Public Institution"; "Religious Institution"; "Savings Institutions"; "Scientific Institution"; "State Institutions."

"The word 'institution,' both in legal and colloquial use, admits of application to physical things. One of its meanings, as defined in Webster's Unabridged Dictionary is 'an establishment, especially of a public character, or affecting a community.' The term 'institution' is sometimes used as descriptive of an establishment or place where the business or operations of a society or association is carried on. At other times it is used to designate the organized body." *Trustees of the Academy of Richmond County v. Bohler*, 7 S. E. 633, 634, 80 Ga. 159; *Gerke v. Purcell*, 25 Ohio St. 229, 240. The term may be applied by legislation in either sense, but, in whichever sense it may be used, its only operation as respects taxation will be its effect on property. *Gerke v. Purcell*, 25 Ohio St. 229, 240.

A microscope imported by a physician or surgeon, who swears that it is for use in his laboratory, of which he is the instructor, is to be regarded as "imported for the use of the institution," within the meaning of Tariff Act 1890, par. 677. *United States v. Hensel* (U. S.) 72 Fed. 41, 42.

#### **As the buildings or property.**

"The word 'institution' properly means an organization organized or established for some specific purpose, though it is sometimes used in statutes and in common parlance in the sense of the building or establishment in which the business of such a society is carried on." The term in Const. art. 8, § 2, providing that the Legislature may exempt the buildings of "institutions" of purely public charity from taxation, means such buildings only as are used exclusively and owned by such institutions, and hence a hall owned by a chapter of Royal Arch Masons, certain portions of which are rented to persons and for purposes unconnected with the objects of the society, and the proceeds used by the society in furtherance of its charitable objects, is not a building used exclusively by it, and is subject to taxation. *Morris v. Lone Star Chapter, No. 6, R. A. M.*, 5 S. W. 519, 520, 68 Tex. 693.

"Institutions," as used in P. L. 1878-79, p. 82, exempting all institutions of purely public charity from taxation, means the property of such institutions, and not the institutions themselves. *Trustees of the Academy of Richmond County v. Bohler*, 7 S. E. 633, 634, 80 Ga. 159.

Const. art. 12, § 2, providing that "institutions" of purely public charity may be exempt from taxation, may exempt the buildings and lands connected therewith used for carrying on schools. *Gerke v. Purcell*, 25 Ohio St. 229, 240.

The term "institution," as used in Const. § 170, providing that institutions of purely public charity and institutions of education, not used or employed for gain by any person or corporation, etc., shall be exempt from taxation, includes the corporation and all of its property, wherever situated, and whether used in connection with the school or the income from which is devoted to its support. *Trustees of Kentucky Female Orphan School v. City of Louisville*, 86 S. W. 921, 923, 100 Ky. 470, 40 L. R. A. 119.

Const. art. 9, § 1, exempting "institutions of purely public charity" from taxation, does not exempt a vacant lot owned by a charitable institution, separated by a street from other lots on which the buildings of the charity are situated, with nothing to show that such lot is necessary to the use of the charity. *City of Philadelphia v. Ladies United Aid Soc.*, 25 Atl. 1042, 1043, 154 Pa. 12.

Gen. St. 1878, c. 11, § 5, which provides that all buildings belonging to institutions of purely public charity, including public hospitals, together with the land actually occupied by such institutions not leased or otherwise used with a view to profit, shall be exempt from taxation, exempts not only the building and the ground covered by it, but adjacent grounds which are reasonably necessary or appropriate to the purposes and objects in view, and which are used directly for the promotion and accomplishment of the same; hence would include grounds used as a woodyard and vegetable garden. *Hennepin County v. Brotherhood of Gethsemane*, 8 N. W. 595, 596, 27 Minn. 460, 38 Am. Rep. 298.

As first used in Act 1876, c. 260, § 2, exempting from taxation charitable or benevolent institutions so far as used for the benefit of the indigent and afflicted, and the ground on which the buildings used as such hospital, asylum, charitable or benevolent institution shall actually cover, and the equipments owned by such corporations or institutions, the term "institution" only means the establishment or building where the operations of such association or corporation are conducted, but the word as last used in the section is used in its broader sense, as

meaning the organized society or association. *Appeal Tax Court of Baltimore City v. St. Peter's Academy*, 50 Md. 321, 346.

#### Corporation or person.

"Institution," as used in the assessment act of 1876 exempting from taxation benevolent institutions so far as used for the benefit of the indigent, is appropriately descriptive of the buildings or establishment where the business of the corporation is carried on, but wholly inappropriate as the designation of the corporation itself. *Appeal Tax Court of Baltimore City v. St. Mary's Seminary*, 50 Md. 321, 345, 346 (cited in *United Railways & Electric Co. v. City of Baltimore*, 49 Atl. 655, 656, 93 Md. 630).

"Institution," as used in Rev. Code 1899, § 1180, providing that all buildings belonging to institutions of purely public charity shall be exempt from taxation, will not be held to include an individual or natural person, and hence property owned by such person is not exempt. *Engstad v. Grand Forks County*, 84 N. W. 577, 578, 10 N. D. 54.

#### Endowment.

The word "institution," as used in Const. § 170, providing that institutions of education not used for gain shall be exempt from taxation, embraces not only the buildings and grounds so used, but includes the endowment and other funds of the school or corporation which is dedicated solely to the cause of education. *Commonwealth v. Gray's Trustees*, 74 S. W. 702, 25 Ky. Law Rep. 52.

#### Permanency implied.

The term "institutions," as used in Swan & S. St. p. 761, providing that all buildings belonging to institutions of purely public charity, together with the land actually occupied by such institutions, not leased or otherwise used with a view to the profits, and all moneys and credits appropriated solely to sustaining, and belonging exclusively to, such institutions, shall be exempt from taxation, means the corporation or other organized body instituted to administer the charity, which must be permanent in its nature, as contradistinguished from an undertaking which is transient and temporary. *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201, 206.

"Institution," as used in Const. 1851, art. 10, § 1, exempting from taxation buildings erected for the use of a literary or scientific institution, means a permanent establishment, as contradistinguished from an enterprise of a temporary character. *City of Indianapolis v. Sturdevant*, 24 Ind. 391, 395.

#### As public institutions.

The term "institution," in legal parlance, implies foundation by law, by enactment, or prescription. A private school or college may

by courtesy be called an institution. One may open and keep a private school; he cannot properly be said to "institute" it. *Dodge v. Williams*, 50 N. W. 1103, 1107, 46 Wis. 70.

In *Laws* 1872, c. 104, forbidding trustees of charitable and benevolent institutions from receiving salaries, the word "institutions" was employed to distinguish between such corporations or societies as were established as asylums or homes for benevolent or charitable purposes, and which would be entitled to receive public money, and such corporations as were private in their character, and were organized for literary or religious objects. *New York Bible Soc. v. Budlong*, 25 N. Y. Supp. 68, 70, 30 Abb. N. C. 139.

#### University synonymous.

In *Laws* 1854, c. 43, incorporating Hamline University of Minnesota, and providing that all corporate property belonging to the institution shall be free from taxation, etc., "institution" is used as synonymous with "university." The term "institution," although sometimes used as descriptive of the establishment or place where a business is carried on, properly means an association or society organized or established for promoting some specific purpose. In this connection it refers to the university. *Nobles County v. Hamline University*, 44 N. W. 1119, 1120, 46 Minn. 316.

### INSTITUTION OF LEARNING.

The expression "institution of learning," as used in Rev. St. c. 120, § 2, exempting from taxation all property of institutions of learning, etc., includes every description of enterprise undertaken for educational purposes which is of a higher grade than the public schools provided for in the statutes. *McCullough v. Board of Review of Peoria County*, 55 N. E. 685, 686, 183 Ill. 373.

#### Convent and school.

"Institutions of learning," as used in Act May 14, 1874, exempting from taxation all universities, colleges, seminaries, academies, "associations and institutions of learning," should be construed to include a convent used exclusively for the residence of the teachers in a school free to all classes and creeds, erected and maintained by a Catholic church, in which convent teachers are allowed to reside as part consideration for their services. A school for children preliminary to the academy or college is an institution of learning. Its purposes and methods place it within the general term. *White v. Smith*, 42 Atl. 125, 128, 189 Pa. 222, 43 L. R. A. 498.

#### Historical society.

The term "institution of learning maintained by charity," in the law exempting

such institutions from taxation, includes the historical club of a county having as its object the study of the history of the county, which is maintained by its members and keeps its rooms, meetings, and libraries open to the public. In re *Historical Society* (Pa.) 13 Montg. Co. Law Rep'r, 205, 206.

#### Library.

A library company is an institution of learning. *Philadelphia Library Co. v. Donohugh* (Pa.) 12 Phila. 284, 285.

#### Orphan asylum.

An orphan asylum whose inmates receive instruction as incidental to their care, but in which no religious instructions are given during school hours, is not a "school or institution of learning," within the meaning of Const. art. 9, § 4, prohibiting the use of public money or property for the maintenance of any school or institution of learning wholly or in part under the control or direction of any religious denomination. In defining an "institution," regard must be had to its main and essential features. An orphan asylum is organized mainly as a shelter—a home—for fatherless and motherless children. It takes the place of a home to them, and the state steps in and says it will supply them the same instruction as the common schools offer to more fortunate children. The instruction given is incidental to the main purpose of the asylum. *Sargent v. Board of Education*, 71 N. Y. Supp. 954, 956, 35 Misc. Rep. 321.

### INSTRUCT.

Under Pen. Code, § 1118, providing that if, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant, a motion to "instruct" the jury to acquit was properly denied, since the jury cannot direct, but only advise, an acquittal. *People v. Daniels*, 38 Pac. 720, 721, 105 Cal. 262.

"The difference between the demurrer to the evidence and the motion to 'instruct a verdict' for the defendant is technical, but it is still a practical difference, in this: that the defendant does not choose to withdraw his case from the jury and rely upon the testimony already introduced, but exercises his option of calling for the judgment of the court upon the strength of the plaintiff's case, with the privilege, in case the decision is against him, of proceeding to develop his defense to the plaintiff's action." *Eberstadt v. State*, 45 S. W. 1007, 1008, 92 Tex. 94.

### INSTRUCTION.

"Instruction," within the meaning of the rule that the necessities which a hus-



band is bound to provide for his wife includes instruction, etc., means some degree of education as taught in the schools. It does not include religious instruction, and therefore a husband is not liable for the rent of a church pew hired and occupied by his wife without his consent. *St. John's Parish v. Bronson*, 40 Conn. 75, 76, 16 Am. Rep. 17.

A complaint charged that the plaintiff, as treasurer of a corporation, acting under the direction of its creditors, expended \$800 in its behalf over and above his receipts from its funds, and that the corporation was indebted to him. The answer to the complaint was a denial that the plaintiff was "instructed" by resolution of the directors to expend the earnings of the corporation that should come into his hands, and no more. Held, that the word "directions" in the complaint and "instructions" in the answer were synonymous. *Simmons v. Sisson*, 26 N. Y. 264, 275.

The words "charge" and "instruction," as used in a will providing that upon the death of testatrix's husband she gave, devised, and bequeathed all of her estate in such manner as he might by his last will and testament, or by an instrument in the nature of a last will and testament, devise and bequeath, trusting entirely to his discretion to carry into execution such "charge and instruction" as she might during her life have expressed to him in regard thereto, express more than hope or wish, or advice or recommendation. They have an imperative significance which may not rightfully be resisted. Their inherent force is not impaired by testatrix's expression of entire trust in her husband's discretion to carry out her injunctions. *Condit v. Reynolds*, 49 Atl. 540, 541, 66 N. J. Law, 242.

#### In practice.

See, also, "Charge."

Bouvier defines "charge," which in our law is synonymous with "instruction," thus: "'Charging a jury' is stating the precise principles of law applicable to the case immediately in question." *Boggs v. United States*, 63 Pac. 969, 970, 10 Okl. 424.

Literally, the word "instruction" may apply to any direction given to the jury by the court; but as used in the statutes making it incumbent on the court to reduce its instructions to writing, it may properly be said to mean the exposition of the principle of law applicable to the case, or some branch or phase of the case, which the jury are bound to apply in order to render a verdict establishing the rights of the parties in accordance with the facts proved. *Lehman v. Hawks*, 23 N. E. 670, 671, 121 Ind. 541.

Instructions are drawn with reference to the case in hand, and they are designated

for the information of ordinary persons who are called as jurors in deciding the case upon the evidence before them. *Pagels v. Meyer*, 61 N. E. 1111, 1113, 193 Ill. 172.

Under the laws of Oklahoma providing that the giving of oral instructions by the court to the jury, if objected to by the defendant, is reversible error, every communication between the court and the jury on the trial of the cause is not necessarily an instruction; only when the statements of a court amount to a positive direction as to the law of the case will such statements be regarded as an instruction. *Boggs v. United States*, 63 Pac. 969, 970, 10 Okl. 424.

A statement to the jury that they must find a verdict for one party or the other between whom issues are joined, that they must find either for or against the plaintiff in the cross-complaint, but no rules of law were stated by which they were to be governed in rendering such a verdict, was not an "instruction" within the meaning of the statute. *Lehman v. Hawks*, 23 N. E. 670, 671, 121 Ind. 541.

"Instructions," properly, are the directions in reference to the law of the case. A rule of the court excluding from the consideration of the jury the evidence of a witness is not an instruction of the court to the jury. *Lawler v. McPheeters*, 73 Ind. 577, 579.

A direction to the jury to direct evidence, as to the form of verdict, or the like, is not an instruction. *Bradway v. Waddell*, 95 Ind. 170, 175; *Boggs v. United States*, 63 Pac. 969, 970, 10 Okl. 424.

The jury having already been instructed as to what punishment they might inflict, a direction as to the different forms the verdict might take, which was accompanied by no rule of law governing the guilt or innocence of accused, or governing the jury in reaching a verdict, was not an "instruction" within Rev. St. 1894, § 1892, subd. 5 (Rev. St. 1881, § 1823), requiring instructions to be in writing if request therefor be made before argument. *Herron v. State*, 46 N. E. 540, 543, 17 Ind. App. 161.

The direction to retire with the bailiff, to separate for meals, to seal up the verdict, to abstain from talking among themselves or with others, to sign the general verdict, or to answer interrogatories, are not "instructions" within the meaning of the law. *McCallister v. Mount*, 73 Ind. 559. Accordingly it was not error for the court, after a request that the jury be instructed in writing, to orally direct the jury to retire, after it had brought in its verdict, and answer unanswered interrogatories, or, if there was no evidence on which they could base an answer to such interrogatories, to so state. *Hatfield v. Chenowith*, 56 N. E. 51, 53, 24 Ind. App. 343.

**INSTRUMENT.**

See "Dangerous Instrument"; "Scientific Instrument"; "Separate Instrument"; "Testamentary Instrument."

An instrument is one who, or that which, is made a means or caused to serve a purpose. *Magnon v. United States* (U. S.) 66 Fed. 151, 152; *United States v. Magnon* (U. S.) 71 Fed. 293, 294, 18 C. C. A. 43 (citing Webster).

Rev. St. p. 269, c. 44, div. 5, art. 3, § 7, prohibits the conveying to any person lawfully imprisoned any "instrument," arms, or other thing calculated to aid his escape. It was no violation of such statute for the person to convey to such prisoner an instrument of writing informing him that he has a friend and can be released from confinement. The design of the statute was prohibiting the conveying to the prisoner of any substantial thing which might be used or handled by him in facilitating or effecting his escape. *Hughes v. State*, 6 Ark. (1 Eng.) 181, 184.

Articles of property used by the owner, a woman, and by her sister in making cheese, such as cheese vats, cheese presses, curd knives, and the like, are tools and implements, or "instruments," within the meaning of the Kansas exemption laws. *Fish v. Street*, 27 Kan. 270, 272.

**Books and office furniture.**

Code, § 3072, exempting the proper tools, "instruments," and books of a lawyer, the head of a family, from execution, exempts an office table. Strictly speaking, perhaps a table is not an instrument. Its general use is such that the word "instrument" seems inapplicable, but it should be borne in mind that a lawyer's table is used specifically in his employment. It is one of the things which he employs as a means in the accomplishment of his work. The fact that a table in its general use is not an instrument is not important. It appears quite different when it is adopted specifically as a means of employment. *Abraham v. Davenport*, 73 Iowa, 111, 112, 34 N. W. 767, 5 Am. St. Rep. 665.

"Instruments," as used in Comp. Laws 1879, p. 438, exempting necessary tools and instruments of any mechanic, etc., or other person, used and kept for the purpose of carrying on his trade or business, should be construed to include the iron safe, set of abstracts, cabinet, and table used in the business of an insurance agent and abstracter of titles. *Davidson v. Sechrist*, 28 Kan. 324, 325.

"Tools and instruments," within the meaning of the statute exempting from execution the tools and instruments necessary for the exercise of a trade or profession by

which the debtor gains a living, include the commercial books and countinghouse furniture of the merchant, and an iron chest therein in which his books and papers are kept. *Farmers' & Merchants' Bank v. Franklin*, 1 La. Ann. 393, 394.

"Tools and instruments," within the meaning of Code Prac. art. 641, exempting the tools and instruments necessary for the exercise of the trade or profession of the debtor from seizure, being intended to encourage such trade or profession by enabling the debtor to sustain himself and family by his own industry, include the books of professional men. The lawbooks of a lawyer are perhaps not any less necessary to the proper exercise of his profession than the tools of a mechanic are to the latter, and enable him to carry on his trade. *Lambeth v. Milton* (La.) 2 Rob. 81.

**Building.**

The "instruments and tools" exempt from execution by Code, § 3072, mean the instruments and tools used or handled by the mechanic, and do not include the building or place where trade is pursued. Thus the building in which a photographer carries on his business is not exempt, even though it is personal property. *Holden v. Stranahan*, 48 Iowa, 70, 71.

**Horse of physician.**

"Tools and instruments," within the meaning of the statute exempting from execution the tools and instruments necessary for the exercise of the trade or profession by which the debtor gains his living, do not include the horse of a physician. "His surgical instruments, those for the preparation of medicines usually employed by country practitioners, and possibly, under the dictum in *Milton's Case* (La.) 2 Rob. 81, his medical library, are protected by the Code. But we cannot go further and treat as tools and instruments of his profession all other things that contribute to its convenient exercise." *Hanna v. Bry*, 5 La. Ann. 651, 655, 52 Am. Dec. 606.

**Sewing machine.**

"Instruments and tools," in a statute which exempts the tools and instruments of any mechanic, minor, or other person, used and kept for the purpose of carrying on his trade, includes two sewing machines kept by a tailor and personally used in his trade if reasonably necessary therefor. *Cronfeldt v. Arrol*, 52 N. W. 857, 50 Minn. 327, 36 Am. St. Rep. 648.

**Sign.**

It is doubtful whether the sign of a dentist is an "instrument," within a statute providing that his instruments are not liable to seizure for debt. *Duperron v. Commune*, 6 La. Ann. 789.

**Trained snakes.**

Trained snakes, imported by a professional snake charmer, to be used in exhibitions of skill in that profession, and which were not for sale, are "instruments" with which such snake charmer practices her profession, and are her professional instruments. *Magnon v. United States* (U. S.) 66 Fed. 151, 152; *United States v. Magnon* (U. S.) 71 Fed. 293, 294, 18 C. C. A. 43.

**Watch and chain.**

A watch and chain belonging to a cigar-maker are not exempt as "tools or instruments" used and kept for the purpose of carrying on his trade, for the trade necessarily involves the employment of no one besides himself. *Rothschild v. Boelter*, 18 Minn. 361, 363 (Gil. 331, 332).

**INSTRUMENT (A Writing).**

See "False Instrument"; "Like Instrument"; "Negotiable Instrument"; "Sealed Instrument."

Body of instrument, see "Body."

The word "instrument," in a legal sense, is defined to be a writing as the means of giving formal expression to some act; a writing expressive of some act, contract, process, or proceeding, as a deed, contract, writ, etc. *Webst. Int. Dict.* "A writing given as the means of creating, securing, modifying, or terminating a right, or affording evidence; as a writing containing the terms of contract, a deed of conveyance, a grant, a patent, an indenture, etc." *Cent. Dict.* "A formal legal writing, e. g., a record, charter, deed, or written instrument." *Rap. & L. Law Dict.* "Anything reduced to writing; a written instrument, or instrument of writing; more particularly, a document of formal or solemn character." *And. Law Dict.* "The term 'instrument,' in the broadest sense, comprises formal or legal documents in writing, including contracts, deeds, wills, bonds, leases, mortgages, etc." 16 *Am. & Eng. Enc. Law* (2d Ed.) p. 824. *Abbott* in his *Law Dictionary* defines the term "instrument" as something reduced to writing as a means of evidence. The word "instrument" is frequently employed in the registry laws, and usually refers to some written document that is entitled to be recorded in a public record. *State v. Phillips*, 62 N. E. 12, 14, 157 Ind. 481.

In *Bouvier's Law Dictionary* the word "instrument" is defined as the writing which contains some agreement, and is so called because it has been prepared as a memorandum of what has taken place or been agreed on. It includes bills, bonds, conveyances, leases, mortgages, promissory notes, and wills, but scarcely accounts or ordinary letters or memoranda. *Patterson v. Churchman*, 122 Ind. 379, 388, 23 N. E. 1082.

The term "instrument," in its broad sense, includes formal or legal documents in writing, including contracts, deeds, wills, bonds, leases, mortgages, etc. In the law of evidence it has a still wider meaning, and includes not merely documents, but witnesses and things, animate and inanimate, which may be presented for inspection. *Cardenas v. Miller*, 39 Pac. 783, 784, 108 Cal. 250, 49 Am. St. Rep. 84.

**Attachment.**

"Instrument," as used in *Civ. Code*, § 1217, which declares that an unrecorded instrument is valid as between the parties thereto and those who have notice thereof, means some written paper or instrument, signed and delivered by one person to another, transferring the title to, or giving a lien on, property, or giving a right to a debt or duty. It does not include a writ of attachment. *Warnock v. Harlow*, 31 Pac. 166, 168, 96 Cal. 298, 31 Am. St. Rep. 209 (citing *Hoag v. Howard*, 55 Cal. 564).

**Engraved or printed instrument.**

The word "instrument," as used in a statute providing that every person who, with intent to injure or defraud, shall falsely make, alter, forge, or counterfeit any instrument or writing, etc., shall be guilty of forgery, includes not only written instruments and writings, but also engraved or printed instruments. *People v. Rhomer* (N. Y.) 4 Parker, Cr. R. 168, 174; *Benson v. McMahon*, 8 Sup. Ct. 1240, 1247, 127 U. S. 457, 32 L. Ed. 234.

**Letter or note.**

By the word "instrument," as used in the definition of express acceptance, as when an heir assumes the quality of heir in an unqualified manner in some authentic or private instrument, or in some judicial proceeding, is understood any writing made with the intention of obligating himself or contracting as heir, and not a simple letter or note in which the person who is called to the succession may have styled himself the "heir." *Civ. Code La.* 1900, art. 989.

**Mechanic's lien notice.**

A mechanic's lien notice is an "instrument," within the statute relating to the recording of instruments. *State v. Phillips*, 62 N. E. 12, 14, 157 Ind. 481.

**Mortgage.**

"Instrument," as used in *Civ. Code*, § 1186, providing that the acknowledgment of a married woman to an instrument shall be taken or certified under certain conditions, should be construed to include a conveyance which also includes a mortgage by a married woman. *Tolman v. Smith*, 16 Pac. 189, 191, 74 Cal. 345.

The term "instrument" includes a chattel mortgage. *Cardenas v. Miller*, 39 Pac. 783, 784, 108 Cal. 250, 49 Am. St. Rep. 84.

#### **As negotiable instrument.**

The term "instrument," as used in the negotiable instrument law, means negotiable instrument. Rev. Laws Mass. 1902, p. 653, c. 73, § 207; Ann. Codes & St. Or. 1901, § 4592; Bates' Ann. St. Ohio 1904, § 3178; Code Supp. Va. 1898, § 2841a; Rev. Codes N. D. 1899, § 1060.

#### **Power of attorney and revocation.**

As used in a statute relating to evidence, providing that certain copies taken from county records of any writing, instrument, or deed purporting to affect any real estate, or any right or interest in the same, may be used in evidence under certain circumstances, the expression "writing, instrument, or deed" should be construed to include powers of attorney for the conveyance of land. *Muldrow v. Robison*, 58 Mo. 331, 345.

Under an act making it necessary to record every instrument whereby the title to real estate may be affected, it is held that an instrument revoking a power of attorney which had authorized the attorney to make a conveyance of real estate was an "instrument whereby the title to real estate might be affected" within the act. *Arnold v. Stevenson*, 2 Nev. 234, 239.

#### **Railroad ticket.**

The term "instrument," as used in Code, § 2086, providing that, when by the terms of an instrument its assignment is prohibited, an assignment of it shall nevertheless be valid, embraces a railroad ticket issued to an individual specifically by name, and providing that it should be void if presented by another. *Way v. Chicago, R. I. & P. R. Co.*, 19 N. W. 828, 831, 64 Iowa, 48, 52 Am. Rep. 431.

#### **Writing imported.**

The word "instrument" imports a writing. Hence a verification by an attorney, in an action upon an instrument for the payment of money only, is not defective because it fails to state expressly that the instrument sued on is in writing. *Abbott v. Campbell* (Neb.) 95 N. W. 591, 592.

#### **INSTRUMENT OF DEFEASANCE.**

See "Defeasance."

#### **INSTRUMENT FOR THE PAYMENT OF MONEY.**

See "Writings for Payment of Money."  
Other instrument for payment of money, see "Other."

The expression "instruments of writing for the payment of money," as used in an

act providing that judgment for plaintiff shall be rendered unless an affidavit of defense is filed in actions on such instruments, has been given a strict construction by some of the decisions, which hold that no instrument is within its purview that does not upon its face exhibit a prima facie case in favor of plaintiff; an instrument which, without facts dehors the writing itself, would warrant a jury in rendering a verdict in its favor. Other cases more in harmony with the remedial purposes of the act hold that an instrument, if it be for the payment of money, as contradistinguished from one for the performance of any collateral undertaking, though not exhibiting on its face a prima facie right in plaintiff to recover, may be helped out by proper averments of fact, which, coupled with the instrument itself, will warrant a verdict in plaintiff's favor. The statute is undoubtedly remedial, intended to prevent vexatious and useless delay and expense in the administration of justice, and thus facilitate the collection of pecuniary claims founded on written instruments in cases where the defendant has no meritorious or available defense, and in this view should be liberally construed. An indorsement on a contract between a city and contractor for constructing a pavement, by which indorsement defendant agreed to be responsible to plaintiff for a certain proportion of the price of such construction, is an instrument in writing for the payment of money. *Vulcanite Paving Co. v. Philadelphia Traction Co.*, 8 Atl. 777, 778, 115 Pa. 280.

"Instrument for the payment of money only," as used in Code 1851, § 162, providing that, in an action or defense founded on an "instrument for the payment of money only," it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party a specified sum, which he claims, means an instrument which is on its face evidence of the debt which is claimed to be due; evidence not merely of the right of the plaintiff to recover, but the liability of the defendant to pay; so that in all cases where proof, not merely of the instrument itself, but of extrinsic facts, is necessary to be given, the existence of the facts must be averred in the complaint. Though the words "instrument for the payment of money only," strictly and literally construed, mean an instrument which creates no obligation on the part of the person who is sought to be charged, other than for the payment of money, which contains on his part no other promise, stipulation, or covenant whatever, yet the consequences of this literal construction are so unreasonable that it cannot be believed that it expresses truly the intent of the framers of the Code, or of the Legislature. A promissory note in a suit against

the indorser is not an "instrument for the payment of money only," in the sense of the Code. *Alder v. Schmidt*, 10 N. Y. Leg. Obs. 363. Contra, see *Alder v. Bloomingdale*, 8 N. Y. Super. Ct. (1 Duer) 601, 602.

The expression "instrument for the payment of money only," as used in Rev. St. c. 125, § 24, declaring that, in an action for defense founded on an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument and to state that there is due to him a specified sum, should be construed to include a money bond, with coupon attached, issued by a town. *Veeder v. Town of Lima*, 11 Wis. 419, 421.

The phrase "instrument for payment of money only" includes an undertaking given by a defendant in an attachment suit to obtain possession of the goods attached; hence this instrument may be declared on as an instrument for the payment of money only. *Coe v. Straus*, 11 Wis. 72, 73. It cannot be construed to include a mortgage, but is limited almost exclusively to bills of exchange, promissory notes, and other written promises for the payment of money without any other stipulation. *Andrews v. Wynn*, 54 N. W. 1047, 1048, 4 S. D. 40. It cannot be construed to include a contract that the parties to it, being stockholders in a certain company, will indemnify those who are or become indorsers of the paper of the company in the proportion of each stockholder's ownership of stock. *Taylor v. Coon*, 48 N. W. 123, 125, 79 Wis. 76.

An "instrument for the payment of money," as used in Code Civ. Proc. § 648, which describes upon what property an attachment may be levied, and directs that it may be levied upon a cause of action arising on a contract, including a bond, promissory note, or other "instrument for the payment of money" only, negotiable or otherwise, whether past due or yet to become due, executed by a foreign or domestic government, state, county, public officer, municipality, or other corporation, or by a private person, either within or without the state, which belongs to defendant and is found within the county, is clearly shown by such section to refer to the securities which are described thereafter. These securities are such as are made primarily for the payment of money, and they involve in every case the promise to pay a sum of money, stated therein, to the person who is entitled by the terms of the paper to receive it. A life insurance policy which has not matured, and on which premiums are still to be paid, but which has a surrender value, is not an "instrument for the payment of money" within such provision. *Kratzenstein v. Lehman*, 46 N. Y. Supp. 71, 72, 19 App. Div. 228.

## **INSTRUMENT IN THE NATURE OF A MORTGAGE.**

As used in Rev. St. 1872, p. 422, providing that an instrument in writing in the nature of a mortgage shall, when recorded, operate as constructive notice, the expression "instrument in the nature of a mortgage" means a paper which is signed, sealed, and delivered in the presence of two subscribing witnesses; these requirements being essential to the due execution of a mortgage. *Arthur v. Screven*, 17 S. E. 640, 641, 39 S. C. 77.

## **INSTRUMENT IN WRITING.**

See "Written Instrument."

## **INSTRUMENT OF APPROPRIATION.**

The making and filing of a map of the harbor for the purpose of condemning lands for the construction of a wharf, describing the lands by metes and bounds so that a surveyor could identify and locate it, is commonly called the "instrument of appropriation." *City of Madison v. Daley* (U. S.) 58 Fed. 751, 756.

## **INSUFFICIENCY.**

The action of a city in permitting persons to coast a public street does not constitute an insufficiency or want of repair in such street, within the meaning of Rev. St. § 1339, making a city liable for injuries resulting from the "insufficiency or want of repair" of its streets. *Schultz v. City of Milwaukee*, 5 N. W. 342, 49 Wis. 254, 35 Am. Rep. 779.

### **Of pleadings.**

In discussing the word "insufficiency," as used in the statutory provision that plaintiff may demur for "insufficiency" when the answer contains new matter constituting a counterclaim, the court says that it is borrowed from the old chancery pleadings, and that an answer was said to be insufficient when it was not a full answer of the facts and charges contained in the bill. Insufficiency had no reference to the question whether the answer contained a defense. *Houghton v. Townsend* (N. Y.) 8 How. Prac. 441, 446.

Rev. St. § 4290, provides that a state may appeal in a criminal action wherever an indictment is adjudged "insufficient on demurrer." Held, that the insufficiency referred to was any insufficiency which should be presented by demurrer, and therefore included a failure to state facts constituting an offense, as well as a failure in form. *State v. Burgdoerfer*, 17 S. W. 646, 649, 107 Mo. 1, 14 L. R. A. 846.

Code 1849, § 155, provides that, if a reply of the plaintiff to any defense set up by the answer of the defendant is insufficient, the defendant may demur thereto and state the grounds thereof. Held, that the word "insufficient" should be construed to mean a failure of the reply to state facts constituting a good answer to the facts stated in the answer of the defendant. *White v. Joy*, 13 N. Y. (Kern.) 83, 89.

Code, § 153, provides that the complainant may demur to the answer for insufficiency, stating in his demurrer the grounds thereof. An answer in slander stated that the defendant did not utter the precise word at the precise time and in the particular place and manner stated in the complaint. Held, that the answer might, without being literally false, leave a good cause of action undenied, and was insufficient as containing a negative pregnant and not controverting the allegations of the complaint separately and substantially. "In common-law pleadings the word 'insufficiency' was sometimes used. The pleading was said to be defective and bad, but it was not generally called insufficient. In chancery, however, the word was extensively used in connection with answers that were called insufficient when they did not fully respond to the allegations or interrogatories of the bill. But it was always applied to those answers which did not explicitly respond either by admitting or denying substantially the matters charged or inquired of by the complainant, and was not deemed applicable to statements of new matter." *Salinger v. Lusk* (N. Y.) 7 How. Prac. 430 431.

The term "insufficiency," in reference to pleadings, used in a looser sense as synonymous with "immateriality" or "irrelevancy," is, however, occasionally met with in our practice as applied to a part of a pleading, and in this sense a portion of a pleading is not insufficient if taken in connection with the facts with which it is pleaded; it tends to the making of a sufficient statement taken in its entirety. *Hill v. Fair Haven & W. R. Co.*, 52 Atl. 725, 726, 75 Conn. 177.

### INSUFFICIENT EVIDENCE.

"Insufficient evidence," as used in Rev. St. c. 132, § 18, providing that a verdict may be set aside for insufficient evidence on a motion founded on the judge's minutes, means testimony which does not support and clearly warrant a verdict in the case, where plaintiff, if entitled to recover at all, was clearly entitled to a larger amount than that allowed by the jury, a verdict may be set aside for insufficient evidence, for there is in truth no evidence to support such a verdict, but it would be against all the evidence, which the jury was bound to regard. It is

one clearly contrary to evidence, and found on insufficient evidence. *Emmons v. Sheldon*, 26 Wis. 648, 649.

The expression "insufficient evidence," as used in Rev. St. U. S. § 804 [U. S. Comp. St. 1901, p. 625], relating to the District of Columbia, authorizing the trial judge to hear a motion for a new trial on his minutes where the verdict is attacked for insufficient evidence, is not to be limited to evidence insufficient in point of law, but includes insufficiency in point of fact, and is equivalent to "against the weight of evidence." *Inland & Seaboard Coasting Co. v. Hall*, 8 Sup. Ct. 397, 398, 124 U. S. 121, 31 L. Ed. 369. But for holding that it means evidence not sufficient in law to support a verdict, see *Metropolitan R. Co. v. Moore*, 7 Sup. Ct. 1334, 1336, 121 U. S. 558, 30 L. Ed. 1022.

That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated "insufficient evidence." *Ann. Codes & St. Or.* 1901, § 688.

### INSULT.

"To insult," says Webster, is "to leap upon; to treat with abuse, insolence, or contempt; to commit an indignity upon, as to call a man a liar." The term "insult" necessarily involves malice, which in this connection denotes ill will, or an intent to injure or to offend, or to wound the feelings of, another. Such is the meaning of the word in Code 1873, c. 145, § 2, providing that all words which, from their usual construction and common acceptance, are construed as insults, shall be actionable. *Chaffin v. Lynch*, 1 S. E. 803, 809, 83 Va. 106.

To "insult" means to treat with insolence and contumely, so that an information charging that defendant unlawfully, mischievously, and maliciously by "insult," did strike, etc., implies that defendant touched the prosecuting witness in a rude, angry, and insolent manner. *Ford v. State*, 35 N. E. 84, 85, 7 Ind. App. 567.

An indictment charging that, at the dwelling of and in the presence of the family of another, defendant, speaking to his niece, said, "If you don't give up my pistol, I'll knock your brains out, by God," was held sufficient, under Code 1876, § 4203, the object of which section was to shield the family residence from abusive, "insulting," or vulgar language uttered in the presence of the family, or any member thereof, or of any female. The court said: "The language charged and proved in this case was addressed to a female, in the dwelling house of another; was coarse, menacing, and emphasized with gross profanity. If the same

language would have been used to a male it would doubtless have been construed to be insulting, and would have tended to provoke a breach of the peace. We would be loath to hold that language which would insult a man would not be insulting to a female because, by reason of her sex and tender nature, she would not resent it with blows." *Benson v. State*, 68 Ala. 513, 514.

"Indecorous" means impolite, or a violation of good manners, or improper breeding. It is broad enough to cover the slightest departure from the most polished politeness to conduct which is vulgar and insulting. It does not necessarily, nor indeed generally, involve an insult. The latter assumes superiority, and offends the self-respect of the person to whom it is offered, while the former excites pity for the one guilty of it. The word or act may be both indecorous and insulting, but yet it often lacks the essential elements of an insult. And though it may have been "Indecorous" in a conductor not to stop a train at the platform for a woman passenger, or not to carry her valise when she was leaving the train, or to let her get off between stations rather than suffer inconvenience by being carried to the next station, yet none of these things amounted to insult, indignity, oppression, or inhumanity. *Louisville & N. R. Co. v. Ballard*, 85 Ky. 307, 312, 3 S. W. 530, 7 Am. St. Rep. 600.

A statute relating to manslaughter arising on "insulting words used toward a female relative" cannot be construed to include the term "damned son of a bitch," which is rather a sudden expression of anger and contempt, and, when used, no one understands it to be directed at the mother of the person to whom used. *Simmons v. State*, 5 S. W. 208, 209, 23 Tex. App. 653.

## INSUPERABLE OBSTACLE.

The words "insuperable obstacle," as used in an opinion reversing a decree giving the custody of a child to a divorced father, and providing that such custody shall be given to the wife unless there are insuperable obstacles to this, mean one which in law would have been sufficient in the first instance to control the chancellor's judgment to the contrary. *Masterson v. Masterson* (Ky.) 71 S. W. 490, 491.

## INSUPPORTABLE.

The meaning of the words "insupportable" and "outrageous" in the divorce statute in reference to insupportable and outrageous conduct is a question of law, but the existence and truth of the facts that amount to such outrages are for the jury. *Byrne v. Byrne*, 3 Tex. 336, 340.

## INSURABLE INTEREST.

### In fire and marine insurance.

An "insurable interest" is said to be sui generis, and peculiar in its texture and operation. It sometimes exists where there is not any present property or jus in re jus ad rem. Yet such a relation must be established between the subject-matter insured and the party in whose behalf the insurance has been effected as may be sufficient for the purpose of deducing the existence of a loss to him from the occurrence of injury to it. *Ferris v. Carson Water Co.*, 16 Nev. 44, 48, 40 Am. Rep. 485; *Warren v. Davenport Fire Ins. Co.*, 31 Iowa, 464, 467, 7 Am. Rep. 160; *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 53, 20 Am. Rep. 451. See, also, *Sawyer v. Dodge County Mut. Ins. Co.*, 37 Wis. 503, 504, 537.

An "insurable interest" in property is such an interest as shall make the loss of the property of pecuniary damage to the insured. It is a right, benefit, or advantage arising out of the property or dependent thereon, or any liability in respect thereof, or any relation to or concern therein, of such a nature that it might be so affected by the contemplated peril as to directly damnify the insured. 2 Joyce, Ins. §§ 887, 888.

"Interest" does not necessarily imply a right to the whole or part of the thing, nor necessarily or exclusively that which may be the subject of privation, but the having some relation to or concern in the subject of the insurance, which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage, detriment, or prejudice to the party insuring. To be "interested" in the safety of a thing is to be so circumstanced in respect to it as to have benefit from its existence, prejudice from its destruction. *Key ex rel. Heaton v. Continental Ins. Co.*, 74 S. W. 162, 165, 101 Mo. App. 344 (citing *Lucena v. Craufurd*, 2 Bos. & P. [N. R.] 269; *Herkimer v. Rice*, 27 N. Y. 163).

If the holder of an interest in property will suffer loss by its destruction, he may indemnify himself therefrom by a contract of insurance. If by the loss the holder of the interest is deprived of the possession, enjoyment, or profits of the property, or of a security or lien resting thereon, or other certain benefits growing out of or depending upon it, he holds an insurable interest. *Merritt v. Farmers' Ins. Co.*, 42 Iowa, 11, 13 (citing 1 Phil. Ins. §§ 375, 342, 346).

An interest, to be insurable, does not depend necessarily upon the ownership of the property. It may be a special or limited interest, disconnected from any title, lien, or possession. If the holder of an interest in property will suffer a loss by its destruction, he may indemnify himself therefrom by a

contract of insurance. If by the loss the holder of the interest is deprived of the possession, enjoyment, or profit of the property, or a security or lien resting thereon, or other certain benefits growing out of or depending upon it, he has an insurable interest. *German Ins. Co. v. Hyman*, 52 N. W. 401, 402, 34 Neb. 704.

As the term is used in the law of fire insurance, "insurable interest" means such a pecuniary interest in the property as would be damaged by its destruction. *Mutual Fire Ins. Co. v. Wagner*, 7 Atl. 103, 104.

As a general proposition, whenever any person will suffer a loss by a destruction of his property, he has an insurable interest therein. *Gilman v. Dwelling-House Ins. Co.*, 17 Atl. 544, 545, 81 Me. 488. See, also, *Green v. Green*, 27 S. E. 952, 958, 50 S. C. 514, 62 Am. St. Rep. 848.

Whoever may be fairly said to have a reasonable expectation of deriving pecuniary advantage from the preservation of the subject-matter of insurance, whether that advantage inures to him personally or as the representative of the rights or interests of another, has an "insurable interest." *Continental Fire Ins. Co. v. Brooks*, 30 South. 876, 877, 131 Ala. 614. Under this definition, the owner of stock in a corporation organized for pecuniary profit has an insurable interest in the corporate property. *Warren v. Davenport Fire Ins. Co.*, 31 Iowa, 464, 467, 7 Am. Rep. 160.

The holder of a life interest in property has an insurable interest. *Green v. Green*, 27 S. E. 952, 958, 50 S. C. 514, 62 Am. St. Rep. 848.

The test of insurable interest is whether an injury to the property, or its destruction by the peril insured against, would involve the insured in pecuniary loss. Under this definition it is held that one in possession of property for life, under a verbal agreement with the owner to pay the insurance, repairs, and taxes, has an insurable interest therein. *Berry v. American Cent. Ins. Co.*, 30 N. E. 254, 255, 132 N. Y. 49, 28 Am. St. Rep. 548.

A person can have no insurable interest where his only right arises under a contract which is void or unenforceable either at law or in equity. *Pope v. Glens Falls Ins. Co.*, 34 South. 29, 80, 136 Ala. 670.

Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest. *Rev. Codes N. D. 1899, § 4450; Civ. Code S. D. 1903, § 1802; Civ. Code Mont. 1895, § 3400; Civ. Code Cal. 1903, § 2548.*

#### Same—Equitable interest or title.

The interest of the insured in the property at risk need not be a legal one. A mere equitable title, or any qualified property in the thing insured, may be legally protected. *Goodall v. New England Mut. Fire Ins. Co.*, 25 N. H. 169, 186.

An "insurable interest" includes a mere equitable interest, or any qualified property in the thing insured; hence a mortgagor who has merely the right in equity to redeem property from a mortgage has an insurable interest in such property, even if such equity of redemption has been sold on execution, provided his right to redeem such equity continues. *Strong v. Manufacturers' Ins. Co.*, 27 Mass. (10 Pick.) 40, 43, 20 Am. Dec. 507.

An equitable interest in a ship is an "insurable interest," but nevertheless, if one intends to insure an equitable ownership, he must give notice to the underwriter. A common policy on a ship covers only the legal ownership. *Ohl v. Eagle Ins. Co. (U. S.)* 18 Fed. Cas. 630, 632.

One who had contracted to sell, a deed to be made when the entire purchase money was paid, had an insurable interest; the deed not having been made and there remaining due a part of the purchase money. *Continental Fire Ins. Co. v. Brooks*, 30 South. 876, 877, 131 Ala. 614.

The mortgagor's equity of redemption is an insurable interest. *French v. Rogers*, 16 N. H. 177, 183, 185.

The plaintiff and two others contracted for the purchase of a ship, paid part of the price in cash, gave their joint and several notes for the remainder, and received possession of the ship; but the vendor retained the legal title, with authority, in case the price should not be paid, to sell the ship and apply the proceeds to the notes. The plaintiff caused a sum to be insured on the ship, for whom it might concern, payable, in case of loss, to the vendor; and after a partial loss the vendor repaired and sold the ship and paid himself out of the proceeds, and the other two contractors assigned to the plaintiff all their interest under the contract, and all the benefit to be derived therefrom. It was held that the plaintiff and the other two contractors had an insurable interest, and that the plaintiff might recover on the policy, for the whole of the partial loss, by an action in his own name alone; but that he should aver the interest truly in his declaration, viz., that the policy was made for the use of himself and the other two, and that they were jointly interested at the time when the policy was made and when the loss happened. *Rider v. Ocean Ins. Co.*, 37 Mass. (20 Pick.) 259, 265.



**Same—Right of property.**

An "insurable interest," within the law of marine and fire insurance, includes not only a qualified property in the thing insured, but also any reasonable expectation of legitimate profit or advantage to spring therefrom. The right of property is not always an essential ingredient of an insurable interest. The loss or injury from the destruction of property, or benefit from its preservation, may be sufficient to constitute an insurable interest. As a general rule, whatever furnishes a reasonable expectation of pecuniary benefit from the continued existence of the subject of insurance is a valid insurable interest. *International Marine Ins. Co. v. Winsmore*, 16 Atl. 516, 517, 124 Pa. 61 (citing *Miltenberger v. Beacon*, 9 Pa. 198, 199).

An interest, to be insurable, does not depend upon the title or ownership of the property. It may be a special or limited interest, disconnected from the title, lien, or possession. If the holder of an interest in property will suffer loss by its destruction, he may indemnify himself therefrom by a contract of insurance. *Schaeffer v. Anchor Mut. Fire Insurance Co.*, 85 N. W. 985, 113 Iowa, 652 (citing *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 11).

"A mortgagee of real estate, though he hold also the bond of the mortgagor, his judgment being a lien on the same real estate and the same building, is said not to have an 'insurable interest' in them. The interest of the first is said to be specific, the interest of the latter general. As a general rule the distinction may be sound, but I think it would be difficult to show an appreciable practical difference in the pecuniary result to the two. If the mortgagor and judgment debtor should die leaving no personal property, and no real estate save that mortgaged, it principally valuable for the buildings on it, and they should be burned, each must then look to the real estate, and, if that be insufficient, each must suffer a pecuniary disaster resulting directly from the fire. What legal reason is there why the one may not, as well as the other, protect himself by a contract of insurance? \* \* \* I conclude that a creditor of the estate of one deceased, whose personal property left is insufficient for the payment of his debts, has an 'insurable interest' in the sole real estate of the deceased debtor, when it is plain that if it is damaged by fire pecuniary loss must ensue to the creditor thereby." *Robrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 53, 60, 20 Am. Rep. 451.

An "insurable interest" includes the interest which a person has in the profits to be derived from a bill of goods to be shipped to him, though such person has no interest in the goods themselves. It also includes the interest which a person has in goods consign-

ed to him to be sold on commission. *French v. Hope Ins. Co.*, 33 Mass. (16 Pick.) 397, 399.

The homestead right of occupancy is insurable. *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 11; *Schaeffer v. Anchor Mut. Fire Ins. Co.*, 85 N. W. 985, 113 Iowa, 652; *Rockford Fire Ins. Co. v. Nelson*, 65 Ill. 415, 420.

The term "interest," as used in an application to describe the right of the insured, does not necessarily imply the entire property in the subject of insurance. One who, at the time the policies were issued, was the legal and equitable owner of part of the cargo insured, and legally, though not equitably, owner of the residue, had a good insurable interest in the whole cargo, and could insure the same for whom it may concern, and, on proof of such legal and equitable interest, could recover the whole sum insured. *Buck v. Chesapeake Ins. Co.*, 26 U. S. (1 Pet.) 151, 163, 164, 7 L. Ed. 90.

**In life insurance.**

It is not easy to define with precision what will in all cases constitute an "insurable interest," so as to take the contract out of the class of wager policies; but in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. "It may be said, generally, that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 460, 24 L. Ed. 251. It is not necessary that the one for whose benefit the life of another is insured should be a creditor of that other. It is enough that, in the ordinary course of events, loss and disadvantage will naturally and probably arise, to the party in whose favor the policy is written, from the death of the person whose life is insured. *Hoyt v. Insurance Co.*, 3 Bosw. 440, 446; *Kentucky Ins. Co. v. Hamilton* (U. S.) 63 Fed. 93, 11 C. C. A. 42. The interest need not be such as to constitute the basis of any direct claim in favor of the plaintiff upon the party whose life is insured; it is sufficient if an indirect advantage may result to the plaintiff from his life. *Trenton Mut. Life Ins. Co. v. Johnson*, 24 N. J. Law (4 Zab.) 576, 586. The tendency of the American decisions is to hold that, wherever there is any well-founded expectation of or claim to any advantage to be derived from the continuance of a life, there is an insurable interest in the life, though there may be no claim upon the person whose life is insured that can be recognized in law or in equity. *Bliss, Life Ins.* §§ 21-31; *May, Ins.* §§ 102-111. A person has an insurable interest in the life of another when there is a reasonable probability that he will gain by the latter's remain-

ing alive, or lose by his death. 3 Kent. Comm. (14th Ed.) 566, note. The result of a recent review of the American cases is thus stated: An "insurable interest" which will take an insurance policy out of the class of wager policies is such an interest, arising from ties of blood or other relations, as will justify a reasonable expectation of advantage or benefit from a continuance of the life of the assured. This rule, it would appear, does not dispense entirely with a pecuniary interest, but merely permits that interest to consist of a mere expectation of pecuniary benefit, as distinguished from the requirement of the other rule, that the interest must amount to a claim recognizable or enforceable in law. *Life Ins. Co. v. O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 234, note. In short, the essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazards of a life." *Mechanics' Nat. Bank v. Comins* (N. H.) 55 Atl. 191, 193.

"Insurable interest," as the term is used in the law of life insurance, is defined to be "such an interest in the life of the person insured, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as would justify a reasonable expectation of advantage or benefit from the continuance of his life." *Warnock v. Davis*, 104 U. S. 775, 779, 26 L. Ed. 924; *Connecticut Mut. Life Ins. Co. v. Luchs*, 2 Sup. Ct. 949, 952, 108 U. S. 498, 27 L. Ed. 800; *Appeal of Corson*, 6 Atl. 213, 215, 113 Pa. 438, 57 Am. Rep. 479; *Adams' Adm'r v. Reed* (Ky.) 36 S. W. 568, 570; *Trinity College v. Travelers' Ins. Co.*, 18 S. E. 175, 176, 113 N. C. 244, 22 L. R. A. 291; *Opitz v. Karel*, 95 N. W. 948, 951, 118 Wis. 527, 62 L. R. A. 982. It is not necessary that the expectation of advantage or profit should always be capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful, as operating the more efficaciously, to protect the life of the insured than any other consideration, but in all cases there must be a reasonable ground, founded on relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924; *Appeal of Corson*, 6 Atl. 213, 215, 113 Pa. 438, 57 Am. Rep. 479; *Connecticut Mut. Life Ins. Co. v. Luchs*, 2 Sup. Ct. 949, 952, 108 U. S. 498, 27 L. Ed. 800.

Whenever there is such a relationship that the insurer has a legal claim on the insured for services or support, or when, from the personal relations between them, the for-

mer has a reasonable right to expect some pecuniary advantage from the continuance of the life of the other, or to fear loss from his death, an insurable interest exists. *Adams' Adm'r v. Reed* (Ky.) 36 S. W. 568, 570 (citing *May, Ins.*). Under such definition, the policy for life insurance procured by a religious society, supported largely by the members, on the life of one of its members, is void as a wagering policy. *Trinity College v. Travelers' Ins. Co.*, 18 S. E. 175, 176, 113 N. C. 244, 22 L. R. A. 291.

An "insurable interest" in the life of another is a pecuniary interest. A policy of insurance secured by one for his own benefit upon the life of another, the beneficiary being without interest in the continuance of the life of the insured, is against public policy, and therefore void. It is thoroughly settled that such contract cannot be enforced. It has been held that a wife has an insurable interest in the life of her husband, and although in that case, especially, it might be assumed that love and affection furnished a sufficient basis for it, the decisions do not place it on that ground, but rather on the support she is entitled to from him. The books formulate the general principle somewhat in this way: When the insurable interest arises or is implied from relationship, it will be deemed to exist when the relationship is such that the insurer has a legal claim upon the insured for services or support. Even though such legal claim does not exist, yet where, from the personal relations of the two, and the kindness and good feeling displayed by the insured to the insuree, the latter has a reasonable right to expect some pecuniary advantage from the continuance of the life of the former, or to fear loss from his death, an insurable interest will be held to exist. *Rombach v. Piedmont & A. Life Ins. Co.*, 35 La. Ann. 233, 234, 48 Am. Rep. 239.

The presumption is that a husband has an insurable interest in the life of his wife, in the absence of any showing that she is insane or an invalid. *Currier v. Continental Life Ins. Co.*, 57 Vt. 496, 52 Am. Rep. 134.

It is held that a person has an insurable interest in his own life. *Fairchild v. Northeastern Mut. Life Ass'n*, 51 Vt. 613.

A partner having a legal claim on his copartner for services, skill, etc., in carrying out the partnership enterprise, may have an insurable interest in his life. *Adams' Adm'r v. Reed* (Ky.) 36 S. W. 568, 570 (citing *Valton v. National Fund Life Assur. Co.*, 20 N. Y. 32).

The premium is not the only consideration that supports a contract of life insurance, but the insurable interest of the beneficiary is essential. A creditor has an insur-

able interest in the life of his debtor, upon which, if he sees fit, he may take out a policy which would be supported by that interest. A man has an insurable interest in his own life, and, when he takes out a policy payable to himself or his administrator, the policy rests for its validity on that insurable interest, and whatever indirect benefit his creditors have in that policy rests also on that interest. But the wife also has an insurable interest in her husband's life, and his creditors have no right to that interest, or to anything that is predicated upon it. Proceeds of life insurance, therefore, are not the product of premiums alone, but of premiums united with the beneficiaries' insurable interest. *Judson v. Walker*, 55 S. W. 1083, 1089, 155 Mo. 166.

## INSURANCE.

See "Accident Insurance"; "Additional Insurance"; "Assessment Company"; "Assessment Plan"; "Casualty Insurance"; "Commercial Insurance"; "Concurrent Insurance"; "Double Insurance"; "Endowment Insurance"; "Fire Insurance"; "Fraternal Insurance"; "General Insurance"; "Guaranty Insurance"; "Life Insurance"; "Lloyd's Insurance"; "Marine Insurance"; "Mutual Insurance"; "Other Insurance"; "Special Insurance"; "Subsequent Insurance"; "Valid and Existing Insurance."

Carry insurance, see "Carry."

Employer's liability insurance, see "Employer's Liability."

Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, prejudice, or damage by the happening of the perils specified to certain things which may be exposed to them. *Lucena v. Craufurd*, 2 Bos. & P. 300. Insurance, in its most general sense, is a contract whereby one party agrees to indemnify another in case he shall suffer loss in respect of a specified subject by a specified peril. 11 Am. & Eng. Enc. Law, 280. Insurance is a contract, whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. 1 May, Ins. §§ 1, 2. A contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks. 1 Phil. Ins. § 1. A contract by which a person, in consideration of a gross sum or a periodical payment, undertakes to pay a larger sum on the happening of a particular event. *Smith, Com. Law*, 299. In law, a contract by which one party, for an agreed consideration, which is proportioned to the risk involved, undertakes to compensate the other for loss on a specified thing from specified causes. Cent. Dict. "Insurance." An

act or system of insuring or assuring against loss; specifically, the system by or under which indemnity or pecuniary payment is guaranteed by one party or several parties to another party, in certain contingencies, upon specified terms. *People v. Rose*, 51 N. E. 246, 247, 174 Ill. 310, 44 L. R. A. 124 (citing Stand. Dict. "Insurance").

Insurance is an agreement by which the insurer, for a consideration, agrees to indemnify the insured against loss, damage, or prejudice to certain property described in the agreement, for a specified period, by reason of specified perils. *Barnes v. People*, 48 N. E. 91, 93, 168 Ill. 425.

"In *Patterson v. Powell*, 9 Bing. 320, 'insurance' is defined to be a contract in which a sum is paid as a premium in consideration of the insurer's incurring the risk of paying a larger sum upon a certain contingency. 'Insurance,' says Marshall (volume 1, p. 1), following the civilians whom he cites in the note, 'is a contract whereby one party, in consideration of a stipulated sum, undertakes to indemnify the other against certain perils or risks to which he is exposed, or against the happening of some event.'" *State ex rel. Beach v. Citizens' Ben. Ass'n of St. Louis*, 6 Mo. App. 163, 169.

A "contract of insurance" is defined as an agreement by which one party, for a consideration, which is usually paid in money, either in one sum or at different times during the continuance of the risk, promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest. In fire insurance and marine insurance the thing insured is property; in life or accident insurance it is the life or health of a person. *Commonwealth v. Wetherbee*, 105 Mass. 149, 160; *Supreme Commandery of Knights of the Golden Rule v. Ainsworth*, 71 Ala. 436, 448, 46 Am. Rep. 332; *State ex rel. Beach v. Citizens' Ben. Ass'n of St. Louis*, 6 Mo. App. 163, 169; *Clafin v. United States Credit System Co.*, 43 N. E. 293, 165 Mass. 501, 52 Am. St. Rep. 528. In either case, neither the time and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question whether the contract between them is a contract of insurance. All that is required to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract. *Commonwealth v. Wetherbee*, 105 Mass. 149, 160; *Masonic Aid Ass'n v. Taylor*, 50 N. W. 93, 94, 2 S. D. 324; *Sims v. Commonwealth (Ky.)* 71 S. W. 929.

A contract by which one party promises to make a certain payment on the loss or de-

struction of something which the other party owns or has an interest in is a contract of insurance, whatever may be the terms of payment of the consideration, or the mode of estimating or securing payment of the sum to be insured in case of loss. *State v. Vigilant Ins. Co.*, 2 Pac. 840, 841, 30 Kan. 585.

Insurance is a contract by which, in consideration of a premium, one or more persons assure another person or persons in a certain amount against the happening of a particular event. *Commonwealth v. Provident Bicycle Ass'n*, 38 Atl. 197, 198, 178 Pa. 636, 38 L. R. A. 589 (citing *Smith*, Cont. 248).

An "insurance," in relation to property, is a contract whereby the insurer becomes bound, for a definite consideration, to indemnify the insured against loss or damage to certain property named in the policy by reason of certain perils to which it may be exposed. *Dover Glass Works Co. v. American Fire Ins. Co. (Del.)* 29 Atl. 1039, 1041, 1 Marv. 32, 65 Am. St. Rep. 264.

Insurance "is a business venture in which one, for a stipulated consideration or premium, engages to make up wholly or in part, or in an agreed amount, any specific loss which another may sustain, and that may apply to loss of property, to a personal injury, or to the loss of life. To grant indemnity or security against loss, for a consideration, is the dominant and characteristic feature of the contract of insurance." *Commonwealth v. Equitable Ben. Ass'n*, 18 Atl. 1112, 1113, 137 Pa. 412.

A contract of insurance is not in any manner incident to the estate running therewith, but a special agreement with the underwriters against losses or damage which the assured may sustain, and not the loss or damage which may fall upon any other person having an interest, as grantee, mortgagee, creditor, or otherwise, by reason of a subsequent destruction by fire. *Adams v. Rockingham Mut. Fire Ins. Co.*, 29 Me. (16 Shep.) 292, 294.

A contract of insurance is purely a business adventure, not founded on any philanthropic or charitable privilege; and the design and purpose of an insurance company, and the characteristic feature of its contract, are the granting of an indemnity or security against loss, for a stipulated consideration. *State v. Pittsburgh, C., C. & St. L. Ry. Co.*, 67 N. E. 93, 98, 68 Ohio St. 9, 96 Am. St. Rep. 635, 64 L. R. A. 405 (citing *Commonwealth v. Equitable Ben. Ass'n*, 137 Pa. 412, 18 Atl. 1112).

To constitute a valid contract of insurance, the minds of the parties should meet as to the premises insured and the risk, as to the amount insured, as to the time the risk

should continue, and as to the premium period. *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153, 161.

Insurance is a contract *sui generis*, governed by a peculiar and rather an arbitrary code of the modern common law, but recently molded, and not yet stamped in all respects with conclusive authority. Its character, however, is so far matured and established as to distinguish it essentially from ordinary commercial contracts, and especially in the effect of war on its pre-existing validity, which the war as a general rule destroys. *New York Life Ins. Co. v. Olopton*, 70 Ky. (7 Bush) 179, 185, 3 Am. Rep. 290.

A contract of insurance contains five necessary ingredients: First, the subject-matter; second, the risks insured against; third, the amount; fourth, duration of the risk; fifth, the premium of insurance. A contract of insurance which wants any of these ingredients is incomplete. *Tyler v. New Amsterdam Fire Ins. Co.*, 27 N. Y. Super. Ct. (4 Rob.) 151, 155.

A contract of insurance is merely a guaranty against a loss of property by fire or marine disaster. When on chattels on land or sea, it is a protection merely given to the property, for which a price is paid. *Insurance Co. of North America v. Commonwealth*, 87 Pa. 173, 183, 30 Am. Rep. 352.

Insurance is a contract wherein one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event. *Civ. Code Cal.* 1903, § 2527; *Rev. Codes N. D.* 1899, § 4441; *Civ. Code S. D.* 1903, § 1793; *Civ. Code Mont.* 1895, § 3370.

A contract of insurance is an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value, to the assured, upon the destruction or injury of something in which the other party has an insurable interest. *Shannon's Code Tenn.* 1896, § 3275.

#### As business.

See "Business."

#### As commerce.

See "Commerce"; "Interstate Commerce."

#### As a commodity.

See "Commodity."

#### As contract of indemnity.

Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. *Western Assur. Co. v. Redding (U. S.)* 68 Fed. 708, 714, 15 C. C. A. 619 (citing *Imperial Fire Ins. Co.*

of *London v. Coos County*, 151 U. S. 452, 462, 14 Sup. Ct. 379, 38 L. Ed. 231; *Svea Assur. Co. v. Packham*, 48 Atl. 359, 360, 92 Md. 484, 52 L. R. A. 95; *Spare v. Home Ins. Co.* (U. S.) 15 Fed. 707, 708; *Natchez Ins. Co. v. Buckner*, 5 Miss. (4 How.) 63, 79.

Insurance for the purpose of securing an indebtedness is a contract of indemnity, and nothing else. Indemnity is the only logical end to be attained by transactions of this kind, for the creditor can have no possible right to be the beneficiary of such insurance except to protect himself against loss. *Exchange Bank of Macon v. Loh*, 31 S. E. 459, 104 Ga. 446, 44 L. R. A. 873.

A contract against loss by fire is a contract of indemnity. Though it may relate to the loss of real property, yet it in no way attaches to or affects the title to such property. The nature of the contract, therefore, is the same whether the risk is on real or personal property. *Stanhilber v. Mutual Mill Ins. Co.*, 45 N. W. 221, 223, 76 Wis. 285 (citing *Darrell v. Tibbitts*, 5 Q. B. Div. 560).

A contract of insurance is one of indemnity only. It is an agreement to indemnify the insured against any loss, and does not run with the land. *Whitehouse v. Cargill*, 34 Atl. 276, 88 Me. 479.

Strict insurance is indemnity. Voluntary and unnecessary destruction of the property insured is inconsistent with the basis of the contract. *Campbell v. Supreme Conclave Improved Order Heptasophs*, 49 Atl. 550, 552, 66 N. J. Law, 274, 54 L. R. A. 576.

Insurance is not an incident to the thing insured, but indemnity or compensation, to the person insuring, for the loss which he has sustained. At the present day a policy of insurance is invariably treated as a contract to indemnify the party insured, and not a mere undertaking to be answerable to the extent of whatever injury may be sustained by the subject-matter insured. *Annely v. De Saussure*, 2 S. E. 490, 404, 26 S. C. 497, 4 Am. St. Rep. 725 (citing *Carpenter v. Providence Washington Ins. Co.*, 41 U. S. [16 Pet.] 495, 496, 10 L. Ed. 1044, 2 Am. Lead. Cas. 247).

Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. It is a contract of indemnity. This principle underlies the contract, and it can never, without violence to its essence and spirit, be made by the assured a source of profit, its sole purpose being to guaranty against loss or damage. It is a contract with the party to secure him against apprehended loss on account of his interest in a particular subject-matter, and not at all incidental to or transferable with the subject-matter. *Davis v. Phoenix Ins. Co.*, 43 Pac. 1115, 1117, 111 Cal. 409.

An insurance contract is a contract of indemnity. It does not differ from a bond of indemnity or a guaranty of a debt, since the obligor or guarantor takes upon himself certain risks to which the obligee or creditor would otherwise be exposed. The only difference is in name and form of the instrument, the consideration for an insurance being always called a "premium," and the instrument containing the terms of the contract a "policy." *Hunt v. New Hampshire Fire Underwriters' Ass'n*, 38 Atl. 145, 147, 68 N. H. 305, 88 L. R. A. 514, 73 Am. St. Rep. 602 (citing 1 Phil. Ins. [2d Ed.] 2).

A contract of insurance is a personal contract of indemnity between the insured and the underwriter. The contract of insurance does not attach itself to the thing insured, nor go with it when it is transferred. *Northern Trust Co. v. Snyder* (U. S.) 76 Fed. Cl. 37, 22 C. C. A. 47.

Insurance is a contract of indemnity appertaining to the person or party to the contract, and not to the thing which is subjected to the risk against which its owner is protected. *Lahiff v. Ashuelot Ins. Co.*, 60 N. H. 75 (citing *Cummings v. Cheshire County Mut. Fire Ins. Co.*, 55 N. H. 457).

An insurance is a contract of indemnity in which the assurer agrees to stand in the place of the assured and to take the risk upon himself. It is therefore necessary that the latter should possess the former with the knowledge of every fact with which he is acquainted material to the risk, that he may know how to estimate the premium. If a foreign regulation which may affect the risk be known only to the insurer, he must ask for information; but if known also to the assured, it is his duty to state such facts as may be material to enable the insurer to see the extent of the hazard to which such regulation exposes him. *Kohne v. Insurance Co. of North America* (U. S.) 14 Fed. Cas. 835, 837.

A policy of fire insurance is a contract of indemnity. By such a contract the insurer agrees to compensate the assured for losses by fire of certain property for a given time. The existence of such contract gives the insurer an insurable interest in the property insured, coextensive with its liability. *Johannes v. Phenix Ins. Co. of Brooklyn*, N. Y., 27 N. W. 414, 415, 66 Wis. 50, 57 Am. Rep. 249.

Insurance is a contract of indemnity given by the insurer, in consideration of the premium paid by the insured, against such loss or damage by fire as may happen to the insured in respect to the property covered by the policy. It is a special agreement with the person insuring against such loss or damage as he may sustain. The contract of insurance is in general confined

to the parties, and, as a general principle, no other person has any right, in law or equity, to the proceeds. *Plimpton v. Farmers' Mut. Fire Ins. Co.*, 43 Vt. 497, 500, 5 Am. Rep. 297.

#### As contract of insurance.

The word "insurance," in common speech and with propriety, is used quite as often in the sense of contract of insurance or act of insuring, as in that expressing the abstract idea of indemnity or security against loss. It was used in this sense in a contract of insurance, one of the conditions of which was: "If the insured shall hereafter make any 'insurance' in any other company on the property hereby insured, etc., the insured shall not be entitled to recover, etc.," hence the making of the contract of insurance with another company would avoid the policy, it being immaterial whether the contract so made was void or valid. *Funke v. Minnesota Farmers' Ins. Co.*, 13 N. W. 164, 166, 29 Minn. 347, 43 Am. Rep. 216.

#### Contract to procure insurance.

A contract to procure insurance is not a contract of insurance. *The City of Clarksville (U. S.)* 94 Fed. 201, 205.

#### Contract to repair bicycles.

An association which contracts with its members, for a specified annual sum, to repair bicycles in case of accident, and to replace those destroyed by accident or stolen, but not to pay any money, is not an insurance company which must be chartered under Act May 1, 1876 (P. L. 53), but may lawfully do business under General Corporation Act 1874, § 2, which permits incorporation for the maintenance of a society for protective purposes to its members from funds collected therein. *Commonwealth v. Provident Bicycle Ass'n*, 36 Atl. 197, 198, 173 Pa. 636, 86 L. R. A. 589.

#### As covering all risks.

The phrase "insurance on the vessel," in a charter party providing that the owner shall pay for insurance on the vessel, is broad enough to comprehend risks of every character, and would include a risk of collision, including a running-down. *The Barnstable (U. S.)* 84 Fed. 895, 899.

#### As a franchise.

See "Franchise."

#### Guaranty of revenue from land.

"Insurance" is defined by Rev. Codes N. D. § 4441, as a contract whereby one undertakes to indemnify against loss or damage or liability arising from an unknown or contingent event. A corporation which undertakes to guaranty a fixed revenue per acre

from farm lands, and which, in order to do so, contracts for a specified consideration to pay such fixed amount per acre for the crop grown on such land, is an insurance company under Rev. Codes N. D. § 4441, since the farming land is affected by many contingencies, such as wind, hail, frost, drought, ravages by insects, etc., contingencies which, while not likely to happen, yet such as may occur, and make it a proper subject for insurance. *In re Hogan*, 78 N. W. 1051, 1052, 8 N. D. 301, 45 L. R. A. 166, 73 Am. St. Rep. 759.

#### As mercantile pursuit or trade.

See "Mercantile"; "Trade."

#### Paid-up insurance.

In an action on a life insurance policy in which insured had stated in his application that there was no other insurance on his life, and in which it appeared that he had a paid-up policy, it was contended that this did not come within the meaning of "insurance," because it constituted simply an unconditional agreement to pay a certain sum of money upon the death of the assured to his executors, irrespective of the question of insurable interest, or any question of indemnity against loss; but it was held that, as policies in this form are ordinarily known as "insurance policies," and the insured is therein designated by that term, it constitutes insurance within the meaning of the application. *Dimick v. Metropolitan Life Ins. Co.*, 55 Atl. 291, 293, 69 N. J. Law, 384.

#### As the price of risk.

Insurance has been described as a fixed sum as the price of risk; so that where, in a charter party, it is agreed that the owner shall pay for the insurance on the risk, the parties will be held to have contracted with express reference to risks capable of estimate in money. *The Barnstable (U. S.)* 84 Fed. 895, 897.

#### Reinsurance.

As used in Act 1832, p. 292, § 6, incorporating the New York Fire Insurance Company, and giving them power to make contracts of insurance against loss by fire, "insurance" includes reinsurance. *New York Bowry Fire Ins. Co. v. New York Fire Ins. Co. (N. Y.)* 17 Wend. 359, 363.

#### INSURANCE AGENT.

As broker, see "Broker."

As insurance broker, see "Insurance Broker."

The term "insurance agent" includes any acknowledged agent, surveyor, broker, or any other person who aids in any manner in transacting insurance business. People

v. Howard, 15 N. W. 101, 102, 50 Mich. 239.

In a municipal ordinance requiring the licensing of "insurance agents representing corporations," etc., the expression "insurance agents representing corporations" means such agents of insurance companies as during their employment sustain a fixed and permanent relation to the companies they represent. They are clothed with general powers and authority, and assume responsibilities not conferred upon or assumed by brokers. They owe duty and allegiance to the companies employing them, and seek patronage only for the profit and benefit of such, and are precluded from soliciting insurance business for others. They are not brokers. *McKinney v. City of Alton*, 41 Ill. App. 508, 512.

Within Gen. St. c. 58, § 72, providing that a contract of insurance, though not in conformity with the statute, shall nevertheless be valid, and that the agent making it shall be liable to a penalty, the term "agent" includes a person who is employed by the insurance company only occasionally and for single transactions, and is not limited to such agents as perform their functions under some formal and general appointment. *Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass. 221, 225.

"Whoever solicits insurance on behalf of any insurance corporation, or transmits an application for insurance or a policy of insurance to or from any such corporation, or who makes any contract of insurance or collects or receives any premium for insurance, or in any manner aids or assists in doing either or in transacting any business for any insurance corporation, or advertises to do any such thing, is an 'agent' of such corporation to all intents and purposes. Rev. St. § 1977." The several things enumerated in the statute being connected by disjunctives, the doing of any one of them would make a person an "agent" within the definition of the statute. *State v. United States Mut. Acc. Ass'n*, 31 N. W. 229, 230, 67 Wis. 624.

The term "agent," in relation to insurance companies, is defined in General Insurance Law, c. 690, § 49, as follows: "The term 'agent' in this chapter shall include an acknowledged agent or surveyor or any other person or persons who shall in any manner aid in transacting the insurance business of any insurance corporation not incorporated by the laws of this state, and any broker whose business in whole or in part is to negotiate for and place risks, deliver the policies covering the same and collect premiums therefor." But as used in Laws 1892, c. 641, § 1, providing that it shall not be lawful for any fire insurance company, or for any officer, manager, or agent or other representative of such company, to include in

the sum charged or designated in any policy, as the consideration for insurance, any fee, compensation, charge, or perquisites whatever, the word "agent" refers to soliciting agents of insurance, and not to brokers. *Romberg v. Koucher*, 57 N. Y. Supp. 729, 730, 27 Misc. Rep. 227.

The secretary of a mutual fire insurance order, whose duty it is to interest himself in behalf of the order by seeking members and otherwise, to examine buildings on which protection is sought, to see that all questions are answered by the applicant, to present the application to the chairman of the board, and to collect the membership fee and examination fees, is an insurance agent, and, as such, liable to the payment of the privilege tax exacted of insurance agents. *Co-operative Fire Ins. Order of Knoxville v. Lewis*, 80 Tenn. (12 Lea) 136, 140.

"Agent or agents," as used in Act March 11, 1869, § 22, imposing a penalty on agents acting for foreign insurance companies which are not authorized to do business in the state, includes any one who in any manner aided in transacting insurance business in which a foreign company was engaged, though such person might not have been agent of the foreign insurance company in the ordinary sense of that term, and any one who in any manner aided such company in transacting its business was an agent within the meaning of the statute. *People v. People's Ins. Exch.*, 18 N. E. 774, 777, 126 Ill. 466, 2 L. R. A. 340.

"Agent or agents," as used in 1 Starr & C. Ann. St. p. 1322, providing that the term "agent or agents" shall include an acknowledged agent, surveyor, or broker, or any other person or persons who shall in any manner aid in transacting insurance business of any fire insurance company not incorporated by the laws of this state, includes any person who in any manner aids in the transaction of the company's business, and, if the company must in any way avail itself of the acts of such person, the person performing them may be said to aid the company in its insurance business. *Continental Ins. Co. v. Ruckman*, 20 N. E. 77, 82, 127 Ill. 364, 11 Am. St. Rep. 121.

Any person who solicits in behalf of any insurance company, or agent of the same, incorporated by the laws of this or any other state or foreign government, or who takes or transmits, other than from himself, an application for insurance, or any policy of insurance, to or from such company or agent of the same, or who advances or otherwise gives notice that he would receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk at any time, or receive or collect or transmit any premiums of insurance, or make or forward any diagram of any build-

ing or buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company, other than for himself, or who shall examine into or adjust, or aid in adjusting, any loss for or in behalf of any such company, whether any of such acts shall be done at the instance or request or by the employment of such insurance company, or of or by any broker or other person, shall be held to be the agent of the company for which the act is done or the risk is taken. Civ. Code Ga. 1895, § 2054.

### INSURANCE BROKER.

Insurance brokers are brokers who "procure insurance and negotiate between insurers and insured." City of Little Rock v. Barton, 38 Ark. 436, 444 (citing 1 Bouv. Law Dict. 224); Bernheimer v. City of Leadville, 24 Pac. 332, 333, 14 Colo. 518; Romberg v. Kouther, 57 N. Y. Supp. 729, 730, 27 Misc. Rep. 227.

What is understood under the designation of an "insurance broker" is one who acts as a middleman between the insured and the company, and who solicits insurance from the public under no employment from any special company, but, having secured an order, he places the insurance with the company selected by the insured, or, in the absence of any selection by him, then with the company selected by such broker. Ordinarily, the relation between the insured and the broker is that between the principal and his agent. Arff v. Star Fire Ins. Co., 25 N. E. 1073, 1074, 125 N. Y. 57, 10 L. R. A. 600, 21 Am. St. Rep. 721.

Section 216 of an ordinance of Chicago, passed June 11, 1897, defines an "insurance broker" as one engaged in soliciting, procuring, or placing, for a consideration, insurance on lives, or on buildings or other property, either directly or through any other broker, or through any insurance agent, in or with any insurance company or association other than an insurance company or association of which the one soliciting, procuring, or placing the insurance in any case shall be the duly authorized agent. Banta v. City of Chicago, 50 N. E. 233, 235, 172 Ill. 204, 40 L. R. A. 611; O'Neill v. Sinclair, 89 N. E. 124, 125, 153 Ill. 525.

Rev. St. 1899, § 7997, defines an "insurance broker" as one who, for compensation, acts or aids in any manner in negotiating contracts of insurance or reinsurance for any person other than himself, and not being the appointed agent or officer of the company in which such insurance is effected. Edwards v. Home Ins. Co., 73 S. W. 881, 885, 100 Mo. App. 695.

Whoever acts or aids in any manner in negotiating contracts of insurance or reinsurance, or placing risks, or effecting insur-

ance or reinsurance, for any other person than himself, receiving compensation therefor, and is not the officer, member, or agent of the company or companies in which such insurance is effected, shall be deemed to be an insurance broker. 1 P. & L. Dig. Laws Pa. 1894, col. 2397, § 125.

### Insurance agent.

Anderson defines the term "insurance broker," as a person who negotiates contracts of insurance as the agent of both parties; therefore a person who is employed by one company to represent it in soliciting applications for insurance, with authority to write and issue policies, is not an "insurance broker" subject to a city ordinance applicable only to insurance brokers. Bernheimer v. City of Leadville, 24 Pac. 332, 333, 14 Colo. 518.

The insurance broker is ordinarily employed by the person seeking the insurance, and, when so employed, has to be distinguished from the ordinary insurance agent, who is commissioned and employed by the insurance company to solicit and write insurance by and in the company. The former is the agent of the insured; the latter is the agent of the insurers (Mechem, Ag. § 931), and is not included within Laws 1892, c. 631, § 1, forbidding insurers or other agents from including any fee in the premium charge. Romberg v. Kouther, 57 N. Y. Supp. 729, 730, 27 Misc. Rep. 227.

### INSURANCE BUSINESS.

See, also, "Carry on Business."

The business of insurance has been held to be one dependent on the exercise of a franchise which the state has the right to give and to withhold. People v. Loew, 44 N. Y. Supp. 42, 43, 19 Misc. Rep. 248.

Code, art. 23, § 127, providing penalties for any person or association which shall do an "insurance business" without complying with the general regulations provided for the transaction of such business, does not apply to an association the members of which pay an admission fee, monthly dues, and assessments as ordered from time to time, and from funds thus raised the association contracts to repay to the members certain sums in case of sickness or death, or at the expiration of a fixed number of years. Order of International Fraternal Alliance of Baltimore City v. State, 28 Atl. 1040, 1044, 77 Md. 547.

### INSURANCE COMPANY.

See "Accident Insurance Company"; "Fire Insurance Company"; "Graveyard Insurance Company"; "Mutual Insurance Company."



All insurance companies, see "All."

Any insurance company, see "Any."

As moneyed corporation, see "Moneyed Corporation."

An "insurance company" is an institution which undertakes to pay a sum of money on the death of the assured, or at another fixed time, in consideration of premiums, assessments, or payments made in any other way. A benevolent society, having for one of its objects the creation of a fund for the benefit of its members during sickness or other disability, and, in case of death, to pay a stipulated sum to such person or persons as may be designated by each member, thus enabling him to guaranty his family against want, the fund being raised by assessments made up on the occasion of the death of members, and by fees paid upon application for the right to participate in the benefits, is an insurance company. *State v. Nichols*, 41 N. W. 4, 78 Iowa, 747.

Mutual aid associations whose primary objects are social and charitable purposes and securing efficient mutual aid among their members are held not to be insurance companies in Pennsylvania. *Penn Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Trust Co. (U. S.)* 72 Fed. 413, 420, 19 C. C. A. 286, 38 L. R. A. 83, 70; *National Mut. Aid Soc. v. Lupold*, 101 Pa. 111, 119.

An association incorporated under the benevolent association act of New Jersey does not come within the prohibition of the insurance laws of the state so long as it confines its agreements to the payment of sick benefits and burial expenses. *State v. Taylor*, 27 Atl. 797, 798, 56 N. J. Law (27 Vroom) 49.

The term "insurance company" does not apply to a benefit society doing business in Pennsylvania, but organized in Illinois under a law providing that associations which are intended to benefit widows, orphans, heirs, and devisees of deceased members thereof, and where no annual dues or premiums are required, and where members shall receive no money as profits or otherwise, shall not be deemed insurance companies. *Northwestern Masonic Aid Ass'n v. Jones*, 26 Atl. 253, 254, 154 Pa. 99, 35 Am. St. Rep. 810.

The distinguishing feature between insurance companies and mutual benefit societies is generally that the former contemplate gain, while the latter contemplate benevolence only. Regardless of the character of the company, the rights of persons claiming insurance arise out of and depend upon contract, and must be ascertained and fixed by contract. *Block v. Valley Mut. Ins. Ass'n*, 12 S. W. 477, 478, 52 Ark. 201, 20 Am. St. Rep. 164.

The benefits of a mutual fire insurance order are restricted to those who become members, and who agree to do just what they require to be done for themselves upon loss by fire. They all contract for a benefit to themselves in certain contingencies, and pay their money for it. The order is not a benefit or charitable institution, but an insurance company. *Co-operative Fire Ins. Order of Knoxville v. Lewis*, 80 Tenn. (12 Lea) 136, 141.

All benefit societies, whether corporations or mere voluntary associations, are, strictly speaking, insurance organizations, whenever, in consideration of periodical contributions, they engage to pay the member or his designated beneficiary the benefit upon the happening of a specified contingency. It may be also asserted as a general principle that, wherever or whenever a benefit society, paying a benefit to the beneficiaries of its deceased members, claims to be exempt from the operation of certain laws applicable to persons or companies doing a life insurance business, it can only safely base such claim upon express provisions of its charter, or of the statutes exempting similar organizations from such liability. The association may be benevolent and charitable, and only incidentally provide benefits for its members or their beneficiaries; but nevertheless, when it contracts to pay a certain sum to the appointees of its members upon their decease while in good standing, in consideration of certain contributions made by such members while living, it is doing a life insurance business. *Citizens' Life Ins. Co. v. Commissioner of Insurance*, 87 N. W. 126, 128, 128 Mich. 85.

The term "company" or "insurance company," as used in the chapter relating to insurance, includes all corporations, associations, partnerships, or individuals engaged as principals in the business of insurance. *Rev. Laws Mass.* 1902, p. 1120, c. 118, § 1; *Shannon's Code Tenn.* 1896, § 8274; *Civ. Code Ala.* 1896, § 2575.

When consistent with the context, and not obviously used in a different sense, the term "insurance company," as used in a chapter relating to home, life, and accident insurance companies, includes all corporations engaged as principals in the business of life, accident, or life and accident insurance. *Rev. St. Tex.* 1895, art. 3096a.

As used in the chapter regulating insurance companies, "the words 'insurance company or corporation, or association, or insurance organization' shall be held to mean and do mean and include any company, association or corporation engaged in or carrying on in any manner the business of insurance of any character in this state: provided, that the provisions of this chapter shall not apply to secret or fraternal so-

cieties, lodges or councils which conduct their business and secure membership on the lodge system exclusively, having ritualistic work and ceremonies in their societies, lodges or councils, nor to any mutual or benefit association organized or formed and composed only of members of any such society, lodge or council exclusively." Ballinger's Ann. Codes & St. Wash. 1897, § 2838.

The words "insurance company" and "insurance corporation," as used in the article relating to insurance, shall be held to mean and include any association, individual, company, corporation, partnership, or joint-stock company engaged in or carrying on in any manner the business of insurance in the state, except that the provision of the chapter or article shall not apply to secret or fraternal societies, lodges, or councils which are under the supervision of a grand or supreme body, who secure members through the lodge system exclusively, and pay no commission nor employ any agents, except in the organization or the supervision of the work of local subordinate lodges or councils; nor to companies, societies, or associations organized under the authority or patronage of any church or religious denominations, for the exclusive purpose of insuring the property of churches or religious denominations, and the personal property of the pastors or ministers thereof, against loss or damage by fire, lightning, or storm. Ky. St. 1903, § 641.

#### INSURANCE POLICY.

See "Policy of Insurance."

#### INSURE.

In the construction of an instruction that the inspection of cars and appliances must be sufficient to "insure" safety of passengers against accident, the word was construed not to have been used in the limited sense that the carrier was an insurer, but in the sense of "to secure" or "to attain." Leonard v. Brooklyn Heights Co., 67 N. Y. Supp. 885, 890, 57 App. Div. 125.

A condition in a fire policy providing that every person insuring in such company must give notice of any other insurance, etc., does not refer solely to the moment of entering into the contract of insurance, but a person may be properly said to be insuring his property during all the time the policy continues in force; so that, where it is provided that the policy shall be void in case the person "insuring his property" effects other insurance without giving notice to the insurer, the policy is rendered void by other insurance effected after its issuance. Warwick v. Monmouth County Mut. Fire Ins.

Co., 44 N. J. Law (15 Vroom) 83, 86, 43 Am. Rep. 402.

#### INSURED.

Assured distinguished, see "Assured."

In a policy of marine insurance providing that, all sums due the company from "the insured" when such loss becomes due being first deducted, and all sums becoming due being first paid or secured to the satisfaction of the company, the loss should be paid within a certain time, the "insured" means not the party who procures the insurance, but the party for whose benefit the insurance is made. He, and he only, can properly be said to be the insured, for he is ultimately to pay the premium, and to have the benefit if a loss occurs. Hurlbert v. Pacific Ins. Co. (U. S.) 12 Fed. Cas. 1009, 1011.

In an insurance policy providing that it shall be void in case of any fraud or false swearing by the insured, either before or after the loss, touching any matter relating to the insurance, and that the word "insured" shall be held to include the legal representative of insured, the term will not include a mere agent of the insured, such as the husband of insured. Metzger v. Manchester Fire Assur. Co., 63 N. W. 650, 651, 102 Mich. 334.

Whenever the word "insured" occurs in a standard fire insurance policy, it shall be held to include the legal representative of the insured. Rev. St. Wis. 1898, § 1941-60.

The person indemnified by a contract of insurance is called the "insured." Civ. Code Mont. 1895, § 3390; Rev. Codes N. D. 1899, § 4445; Civ. Code S. D. 1903, § 1797.

The "insured" is the person on whose life a policy of insurance is effected. Rev. St. Tex. 1895, art. 3090a.

#### INSURER.

See "Co-Insurer."

The person who undertakes to indemnify another by contract of insurance is called the "insurer." Civ. Code Mont. 1895, § 3390; Rev. Codes N. D. 1899, § 4445; Civ. Code S. D. 1903, § 1797.

#### INSURRECTION.

An insurrection is a rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state; a rebellion; a revolt. Allegheny County v. Gibson, 80 Pa. 397, 417, 35 Am. Rep. 670 (citing Worcester, Dict.); Spruill v. North Carolina Mut. Life Ins. Co., 46 N. C. 123, 127.

Insurrection consists in any combined resistance to the lawful authority of the state,

with the intent of denial thereof, when the same is manifested or intended to be manifested by acts of violence. Pen. Code Ga. 1895, § 55.

The term "insurrection" means an armed assembly of persons having intent to resist or subvert lawful authority. Code Miss. 1892, § 1506.

"Riot, insurrection, and civil commotion" were held to import occasional local or temporary outbreaks, of unlawful violence, which, though temporarily destructive in their effects, did not rise to the proportions of organized rebellion against the government. *Boon v. Aetna Ins. Co.*, 40 Conn. 575, 584.

In common parlance, there is little or no difference between "mutiny" and "insurrection." *McCargo v. New Orleans Ins. Co.* (La.) 10 Rob. 202, 313, 43 Am. Dec. 180.

The term "insurrection," as used in a statute making it a capital offense for any free person to aid or assist in any insurrection or rebellion, or intended insurrection or rebellion, of slaves, is synonymous with the term "rebellion" as there used. *State v. McDonald* (Ala.) 4 Port. 449, 455.

The open and active opposition of a number of persons to the execution of the laws of the United States, of so formidable a character as to defy for the time being the authority of the government, constitutes an "insurrection," even though not accompanied by bloodshed, and not of sufficient magnitude to render success probable. Thus, if any person or persons have willfully obstructed and retarded the mails, and their attempted arrest for such an offense has been opposed by such a number of persons as would constitute a general uprising in that particular locality, and has threatened for the time being the civil and political authority, there is an insurrection; and he who, by speech, writing, or other inducement, assists in setting it on foot, or carrying it along, or giving it aid or comfort, is guilty of a violation of the law. *In re Charge to Grand Jury* (U. S.) 62 Fed. 828, 830.

## INT.

"Int.," as used in a note reciting, "Int. @ 6 % p. a.," is to be construed as an abbreviation for "interest." *Belford v. Beatty*, 34 N. E. 254, 255, 145 Ill. 414.

## INTAKEN.

Where a charter party provided for a certain rate of freight on a certain amount of iron ore "intaken," the original word "delivered" in the charter party being stricken out and the word "intaken" written in, and

the master, at the port of loading, being without opportunity of weighing, demanded a certain number of tons, which were promised him, and he issued a bill of lading therefor, the contract requires the payment of freight on the amount taken aboard as evidenced by the bill of lading, and not the amount "delivered" at the port of delivery. *Gullicksen v. Chicora Fertilizer Co.* (U. S.) 49 Fed. 876, 877.

"Intake weight," as used in a charter party which provides that freight is to be paid upon the unloading and right delivery of the cargo on "intake weight," means the freight on the whole cargo taken on board, and would bind the charterer to pay the same, even though a portion of the cargo was damaged, without the ship's fault, by an excepted peril, and sold on the voyage, if the remaining portion is rightly delivered. *Harrison v. One Thousand Bags of Sugar* (U. S.) 44 Fed. 686, 687; *Id.*, 50 Fed. 116.

## INTANGIBLE PROPERTY.

As used in opinions holding that, where the valuation and assessment of capital stock is required by statute, the provisions include all of the tangible and intangible property of the corporation, the word "intangible" includes not only the value of franchises, but also any other property rights which the companies or associations may own and which are taxable. *Western Union Tel. Co. v. Norman* (U. S.) 77 Fed. 13, 26.

## INTEGRAL.

The term "integral," as used in a claim for an improvement in galvanic batteries, stating that the negative element and top or cover of the jar are formed of a single integral piece of molded material, involves the idea of a cup and cover molded in one piece, and cannot be construed as relating to a whole composed of parts specially distinct. *Holtzer v. Consolidated Electric Mfg. Co.* (U. S.) 60 Fed. 748, 749.

## INTEGRITY.

See "Want of Integrity."

Within Code Civ. Proc. § 1350, providing that no person is competent to serve as an executor who is wanting in integrity, "integrity" means soundness of moral principle and character, as shown by one person dealing with others in the making and performance of contract, and fidelity and honesty in the discharge of trusts. It is used as a synonym for "probity," "honesty," and "uprightness" in business relations with others. *In re Bauquier's Estate*, 26 Pac. 178, 88 Cal. 302.

## INTELLIGENCE.

"Intelligence" or information is not an article of commerce, in any proper meaning of that word. Neither are they subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. Neither are they commodities to be shipped or forwarded from one state to another and there put up for sale. The information furnished by mercantile agencies to subscribers of their rating books is like other personal contracts between parties; it is individual in its character, and has no relation to the general public. The mercantile agency is not a common carrier. It is no intermediate instrument to disseminate its information, but it is a collector, storer, and holder of it, to be given directly to those who wish to purchase or pay for it. *State v. Morgan*, 48 N. W. 814, 320, 2 S. D. 32.

### INTELLIGENCE OFFICE.

"Intelligence offices" are offices for the obtaining of employment for female domestic servants or other laborers. *Keim v. City of Chicago*, 46 Ill. App. 445, 446.

### INTELLIGENT.

In construing Code Civ. Proc. § 1059, providing that, in order to serve as a juror, a person must be "intelligent," it was said that "no particular degree of intelligence is or could be prescribed. It is always desirable that the trial jury in a criminal case should be composed of men of intelligence sufficient to understand and appreciate and to dispose properly of the particular case on trial. The grade of intelligence to comply fairly with this requirement must necessarily be different in different cases. It would not be the same in all cases. A plain, simple case involving no complicated questions of fact and no intricate questions of law would not call for the same degree of intelligence as a case in which the questions of fact were considerably involved and the questions of law were difficult to appreciate and understand. Whether in any case persons called and examined as jurors are so intelligent as to meet this requirement of the statute must therefore be necessarily determined by the trial court, and must rest in the good judgment and sound discretion of the trial judge. *People v. McLaughlin*, 37 N. Y. Supp. 1005, 1009, 2 App. Div. 419.

### INTELLIGIBLE—INTELLIGIBLY

In construing the statute permitting all matters of defense to be given in evidence under the general issue on the defendant filing a notice of all matters in avoidance, and of any defense, "stating in general terms,

and without unnecessary prolixity, and in a manner 'intelligible' to a person of ordinary understanding, the true ground and substance of the defense relied upon," the court said: "The expression 'in general terms,' concisely, comprehensively, and the expression 'without unnecessary prolixity,' i. e., unnecessary minuteness of detail, is unmeaning, for that is equally a fault in a special plea, although not demurrable in either; and the expression 'intelligible to a person of ordinary understanding' evidently refers to the kind of language, and was doubtless intended to prevent the use of technical phrases. They all refer to the manner of stating the defense, and do not excuse an omission of substance." *Merrill v. Everett*, 38 Conn. 40, 48.

"Intelligible," as used in Code, c. 50, § 180, providing that the form of entries in the docket of a justice shall be regarded as immaterial "if the truth is stated so as to be intelligible," means intelligible to a person of ordinary intelligence, and not so plain that "a fool who runs may read." *Davis v. Trump*, 27 S. E. 397, 398, 43 W. Va. 191, 64 Am. St. Rep. 849.

The requirement that an indictment shall set forth the offense in "plain and intelligible words" is not satisfied by an indictment from which no offense against the law of the state can be deduced except by a process of inference and elimination. *Jennings v. State*, 7 Tex. App. 350, 358.

Code Civ. Proc. § 2235, requires the petition in summary proceedings to "intelligibly" designate the person or persons against whom the proceeding is instituted, and to specify who are principals or tenants and who are undertenants or assigns. Held, that the term "John Doe and Richard Roe, Undertenants," was a sufficient compliance with the statute, though the petition did not aver that the names were fictitious, and used in ignorance of the true names. Where the fact that the names were fictitious was stated in the precept, and there was no pretense that the parties interested did not know for whom the precept was intended, the word "intelligibly" does not mean that the names of the defendants should be used in the petition. It is sufficient if the persons against whom the proceeding is instituted are intelligibly designated therein. *Ash v. Purnell*, 11 N. Y. Supp. 54, 55, 16 Daly, 189.

## INTEMPERANCE.

See "Habitual Intemperance."

Intoxicated distinguished, see "Intoxicated—Intoxication."

"Intemperance" does not necessarily imply drunkenness. It is defined to be the use of anything beyond moderation, but the

word "intoxicated" means to become inebriated or drunk. *Mullinix v. People*, 76 Ill. 211, 213.

An occasional use of alcoholic liquors or opium by one insured in a life insurance company is not to be deemed "intemperance," but such person must indulge in them to such an extent as would be considered an excess. *Mowry v. Home Life Ins. Co.*, 9 R. I. 346, 355.

Death from "intemperance," within the meaning of a life policy releasing the insurer from liability for the death of insured caused by intemperance, includes death from a cause occasioned or produced by the excessive use of intoxicating liquors by insured, and therefore the insurers are not liable for a death occasioned by the act of insured in escaping from those having him in charge while he is in a fit of delirium and running into the open air and through the streets, in inclement weather, without clothing. *Miller v. Mutual Ben. Ins. Co.*, 34 Iowa, 222.

#### INTEMPERATE.

See "So far intemperate as to impair health."

The word "intemperate," when used to characterize a person, may mean that he is excessive either in meat or drink, or that he is impassionate or ungovernable. Thus an allegation in a pleading alleging that a mortgage was obtained by undue influence from the husband of the pleader is bad for uncertainty, unless the sense in which the word "intemperate" is used is made to appear. *In re Murdock (Md.)* 2 Bland, 461, 463, 20 Am. Dec. 381.

The term "intemperate," as used in a statute prohibiting the furnishing of liquor to a person of known intemperate habits, means any immoderate or excessive use of intoxicating liquors. *Zeigler v. Commonwealth (Pa.)* 14 Atl. 237, 238.

#### INTEMPERATE HABITS.

An "intemperate habit" is a habit pursued to excess. *Zeigler v. Commonwealth (Pa.)* 14 Atl. 237, 238.

Act May 13, 1887, § 17, providing that the offense of selling intoxicating liquors to a person of "known intemperate habits" shall be punished, means only when the person's intemperance has become so conspicuous as to form a habit, and that habit is known, not merely to his family or to a night watchman, but to his friends and neighbors, and the community in which he lives. *Commonwealth v. Zelt*, 21 Atl. 7, 9, 138 Pa. 615, 11 L. R. A. 602.

"Intemperate habits," within the meaning of Code, § 4205, making it criminal to

sell liquors to a person of intemperate habits, cannot be predicated of a person who occasionally drinks to excess, but it is not necessary to show that he is drunk every day. If sobriety is the rule, and an occasional intoxication be an exception, he is not within the statute; but, on the other hand, if the habit is to drink to intoxication when occasion offers, and sobriety or abstinence is an exception, the charge of intemperate habits is sustained. *Tatum v. State*, 63 Ala. 147, 149.

The expression "intemperate habits," as used in Rev. Code, § 3618, prohibiting the selling, giving away, etc., of intoxicating liquors to persons of known intemperate habits, means frequent use of intoxicating liquors to an excess, producing either drunkenness, or any change, mental or physical, from a natural condition of sobriety. *Smith v. State*, 55 Ala. 1, 3.

A man of "intemperate habits," within the meaning of the statute prohibiting the sale of intoxicating liquors to such a man, is "one who is in the habit of getting drunk now and then, or getting under the influence of liquor every once in a while." *Elkins v. Buschner (Pa.)* 16 Atl. 102, 104.

#### INTEND.

To "intend" is to fix the mind upon; to have a design; to purpose. *People v. Vanderpool*, 1 Mich. N. P. 264, 267.

"To 'intend' must be understood to mean the same with 'design' or 'contemplate.'" *State v. McDonald (Ala.)* 4 Port. 449, 455.

"Intends" refers to future contemplated action. *Greeley v. Greeley*, 73 Pac. 295, 296, 12 Okl. 659.

The word "intended" in Gen. St. p. 477, providing that an injunction may be granted against the malicious erection, by an owner or lessee of land, of any structure upon it intended to annoy or injure any property or adjacent land in respect to the use or disposition of the same, imports, when construed with the word "malicious," that there must be a motive to injure the adjoining proprietor. "The statute concerns itself wholly with the motive; therefore it inquires for that; that found to be malicious, the statute disregards the incident, and puts an immediate end to the wrong by injunction. Where one, from pure malice, shuts air and light from his neighbor's dwelling, this statute obviously intends to give the injured persons more effective and speedy relief than comes from successive and long-delayed actions at law for damages." *Harrison v. White*, 48 Conn. 106, 108.

The use of the word "intended," in an instruction in ejectment that, if the jury believed that certain land warrants were lo-

cated or intended to be located on the land claimed by plaintiffs, the verdict should be for the plaintiffs, was construed to have been used as contrasting a chamber survey with an actual survey, and not as indicating a mere mental purpose to appropriate the land, as contradistinguished from an actual appropriation; and therefore the instruction is correct, as a chamber location is valid. *McBarron v. Gilbert*, 42 Pa. (6 Wright) 268, 278.

Under Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], punishing any person in the postal service who secretes, embezzles, or destroys a letter intrusted to him or coming into his possession, "intended to be conveyed by mail," such letter is one which is intrusted to or comes to the possession of some postal employé, to be transmitted by means of the mail or mail agencies of the United States to the person to whom, under whatever name, it is addressed, or, which is the same thing, to some person authorized to receive it from the mail, before or after it reaches the particular place to which it is directed. It cannot be that a letter is intended to be conveyed by mail, within the meaning of the statute, when the postal authorities, acting in co-operation with the sender, intend, after the letter is put in the mail, to resume possession of it themselves, or to permit the sender to do so, before it reaches the hands of any carrier, messenger, or other postal employé, for delivery to the proper person. *United States v. Matthews* (U. S.) 35 Fed. 890, 895, 1 L. R. A. 104; *United States v. Denicke* (U. S.) 35 Fed. 407, 408.

#### As about.

An affidavit that the defendant intends to abscond is not a compliance with the requirement of the "stay act" of 1861, § 2, that there should be an affidavit that the defendant is about to abscond. The word "about" expresses the present purpose of fulfillment while "intend" merely imports an inclination to do an act, the performance of which, depending on circumstances, implies no fixed design. *Guilleaume v. Miller* (S. C.) 14 Rich. Law, 118, 120.

#### As calculated.

Act Cong. June 8, 1872, § 148, as amended by Act March 3, 1873, § 2, providing for the punishment of a person depositing in the mails any article or thing "designed or intended for the prevention of conception or procuring of abortion," should not be considered as intended to describe the intent, which must be an element of the crime against the United States, but simply as descriptive of the article made contraband, and the phrase must be understood to indicate as contraband in the mail any article or thing designated in a manner calculated to secure its use by any one for the purpose of pre-

venting conception or procuring abortion, whether the article would in reality accomplish the result represented, or whether the party depositing desired or expected such a result, being immaterial. *United States v. Bott* (U. S.) 24 Fed. Cas. 1204, 1205.

#### As likelihood.

Gen. St. c. 124, § 2, provides that a person may be arrested on mesne process in an action of tort where the plaintiff, etc., makes oath that he has reason to believe that the defendant is likely to remove beyond the jurisdiction of the court to which the writ is returnable. An oath stated that the person who made it had reason to believe that the defendant "intends" to leave the state. Held, that the word "intends," as used in the oath, should not be construed as synonymous with the requirements of the statute, and that the oath was insufficient. "A person may 'intend' to do, but there is no likelihood that he will do; and one person may safely swear that he has reason to believe that another 'intends' to do an act which he has no reason to believe it likely that the other will do." *Wood v. Mellus*, 90 Mass. (8 Allen) 434.

#### INTENDED.

A memorandum attached to a contract which provided for the shipping of a certain number of cattle on each steamer of a certain line, the memorandum being as follows: "This contract to include all steamers of the Beaver Line 'intended' to load at New York this season"—means intended at the time the contract was delivered. It cannot reasonably be supposed that the intention of the parties was that the contract should be materially enlarged or restricted by the indefinite future changes of intention by one party, without the other's assent, at any time up to the close of the shipping season. *Canada Shipping Co. v. Acer* (U. S.) 26 Fed. 874, 876.

#### INTENDED FOR EXPORT.

See "Export—Exportation."

#### INTENDED FOR SALE.

"Intended for sale," as used in St. 1858, c. 48, prescribing the form of complaint, that intoxicating liquors are kept at a certain place, intended for sale, contrary to law, means, when referring to the forfeiture of the liquors, intended for sale by any one, without regard to the person, but when referring to the conviction of a person for keeping such liquors, it means intended for sale by him in violation of law. *State v. Learned*, 47 Me. 426, 428.

# **INTENDED TO BE RECORDED.**

The words "intended to be recorded," used in a deed in reference to a power of attorney under which the deed purports to have been made, imply a covenant on the part of the grantor to procure the power to be recorded within a reasonable time. *Penn v. Preston* (Pa.) 2 Rawle, 14, 18.

# **INTENT.**

See "Felonious Intent"; "Fraudulent Intent"; "Larcenous Intent"; "Legislative Intention"; "Rational Intent"; "With Intent."

"The word 'intent,' referred to an act, denotes a state of mind with which the act is done." *Shotwell v. Nicollet Nat. Bank*, 45 N. W. 842, 844, 43 Minn. 389.

"Intent" means the doing or not doing of an act with the purpose or desire of accomplishing a certain known effect or result. *In re Binninger* (U. S.) 3 Fed. Cas. 412, 416.

"Intent," as used in an indictment charging that defendants conspired "for the unlawful, malicious, and felonious purpose, and with fraudulent and malicious 'intent and purpose,'" to obtain, etc., is equivalent to design. *State v. Grant*, 53 N. W. 120, 121, 86 Iowa, 216.

The word "intent," as used in an indictment charging the commission of an assault with intent to murder, is equivalent to the word "purpose," as used in the statute defining murder. *Carder v. State*, 17 Ind. 307, 308.

As used in speaking of an "intent" to do an act "it only implies the purpose of doing such act." *Johnson v. State*, 14 Ga. 55, 59.

An "intent"—that is, a purpose, an aim, a design—is, in jurisprudence, whatever may be said of it in metaphysics, as much an act as is a physical act performed. The one is the exertion of the power of the mind, the other the exertion of the power of the body. *First Nat. Bank v. Swan*, 23 Pac. 743, 745, 3 Wyo. 356.

## **Attempt distinguished.**

The only distinction between an "intent" and an "attempt" to do a thing is that the former implies the purpose only, while the latter both the purpose and the natural effort to carry that purpose into execution. Therefore a mere "intent" to commit a particular offense does not involve an "attempt" to do it. *State v. Bullock*, 13 Ala. 413, 416; *Prince v. State*, 35 Ala. 367; *Witherby v. State*, 89 Ala. 702, 703; *Hart v. State*, 38 Tex. 382, 383; *Atkinson v. State* (Tex.) 30 S. W. 1064, 1065.

"Intent," as used in a criminal statute, denotes a state of the mind with which the act is done. It is neither synonymous nor substantially the same as "attempt," since an attempt is rather an act of moving towards or doing the thing, than the purpose of doing it. An attempt is the overt act itself: thus, an assault "is an attempt to strike, and is very different from a mere intent to strike." *State v. Martin*, 14 N. C. 329, 330.

There is a marked distinction between "attempt" and "intent." The former conveys the idea of physical effort to accomplish the act, the latter the state of mind with which the act is done or contemplated. Neither mere words or threats, nor preparation to commit a crime, are sufficient to constitute an attempt. It is essential that there shall be some overt act which will apparently result in the crime unless interrupted by circumstances independent of the doer's will, and such is its meaning in the rule that, to make out the crime of assault with intent to commit rape, there must be, first, an attempt, and, second, intent, to accomplish sexual intercourse, forcibly and against the will of the woman. *Hollister v. State*, 59 N. E. 847, 848, 156 Ind. 255.

In the crime of assault with intent to commit rape, the "intent" is the fixed purpose of the mind in connection with the assault. It is an essential element of the offense, and, while it is supposed that some word or expression would suffice as a substitute for the word "intent," an indictment charging that the defendant did make an assault, and did then and there unlawfully attempt, etc.—that is, do some act—it was not sufficient, for an act is not intent, though it may be evidence of it. *State v. Goldston*, 9 S. E. 580, 581, 103 N. C. 323.

The word "intent," as used in an indictment charging a person with stabbing another with "intent to murder," is equivalent to "attempt to kill and murder," the words used in the statute defining the crime, though a difference exists in the terms taken separately, for the distinction between them is lost when we consider them in the connections in which they occur in the statute and in the indictment. An assault implies an attempt to do the violence, and the intent to murder characterizes the criminality of the act. An assault with an attempt to murder implies nothing less. *State v. Bullock*, 13 Ala. 413, 416. See, also, *Johnson v. State*, 14 Ga. 55, 59.

## **Implied from circumstances.**

The word "intent," in a statute providing that conveyances made with intent to hinder creditors shall be void, does not import actual intent to defraud; but if the deed by itself, in its operation and effect, hinders, delays, and defrauds creditors, the intent

to do so is imputed to the parties. The words of the act are very similar to those employed in 13 Eliz., which declared deeds, etc., made with intent to hinder, delay, or defraud creditors, to be void, which have always been construed to render void all deeds, etc., which by their terms have that operation and effect, without reference to what may have been the real purpose in the mind of the debtor. *Whedbee v. Stewart*, 40 Md. 414, 423.

One of the essential elements of an assault with intent to commit murder is the intent, and this is a mental process, and as such generally remains hidden within the mind where it was conceived, and is rarely, if ever, susceptible of proving by direct evidence. It must be inferred or gathered from the outward manifestation, shown by the words or acts of the party entertaining it, and the facts or circumstances surrounding are attendant upon the commission of the assault with which it is charged to be connected. *Botsch v. State*, 61 N. W. 730, 43 Neb. 501.

An intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused. *Spalding v. People*, 49 N. E. 993, 997, 172 Ill. 40 (citing Crim. Code, div. 2, § 9).

"Intent," as used in Pen. Code, § 177, providing that a person who willfully, with intent to commit a felony, or to injure, disfigure, or disable, inflicts on the person of another an injury which seriously disfigures his person, or destroys or disables any member or organ of his body, or seriously diminishes his physical vigor by such injury, is guilty of maiming, may be the purpose and disposition at the time to do, without lawful authority or necessity, that which the statute forbids, and it may be presumed from the infliction of the injury. *State v. Hair*, 84 N. W. 893, 894, 37 Minn. 351.

#### Knowledge implied.

Knowledge is necessary to intention, and a finding that a person was intoxicated to such a degree that he did not know or realize the fact that he was assaulting a person, and did not know at the time he was doing so that he was biting such person's thumb, is equivalent to a finding that the injury was committed unintentionally. *Northwestern Benev. Soc. v. Dudley*, 61 N. E. 207, 208, 27 Ind. App. 327.

"Intent to injure or defraud," as used in 13 Stat. 116, making it criminal to embezzle, abstract, or willfully misapply the funds of a bank with intent to injure and defraud the bank, means a general guilty intent, which may be established by proof that the act was knowingly committed. *Unit-*

*ed States v. Taintor* (U. S.) 23 Fed. Cas. 7, 9.

"Intent," as used in Act March 25, 1881 (Laws 1881, p. 240), making it a crime to administer drugs to a pregnant woman with intent to cause a miscarriage, does not imply or require a knowledge of the existence of the pregnant condition. Intent is a purpose or state of mind, and knowledge is not necessary to the existence of such state. To justify an inference of an intent to cause a miscarriage, some knowledge of the physiology of the human body and of the effect of certain medicines on a pregnant female must be presumed or proved, but an intent to produce a miscarriage may exist without absolute knowledge of pregnancy. For example, if there exists in the mind a fully formed belief that pregnancy exists, there may evidently exist as fully formed an intent to cause a miscarriage; and if there be a mere suspicion that pregnancy exists, there may be an intent to cause a miscarriage if the suspected condition is in existence. In either case the intent is formed. *Powe v. State*, 2 Atl. 662, 48 N. J. Law (19 Vroom) 34.

#### Motive distinguished.

Intent is the purpose to use a particular means to effect a certain definite result. Motive is the moving power which impels to action for a definite result. In the popular mind, "intent" and "motive" are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. When a crime is clearly proven to have been committed by a person charged therewith, the question of motive may be of little or no importance, but criminal intent is always essential to the commission of crime. *People v. Molineux*, 61 N. E. 286, 290, 168 N. Y. 264, 62 L. R. A. 193.

"Intent" and "motive" are not identical, and intent often exists where a motive is wholly wanting. When a man does an act or omits to do an act, with knowledge of the consequences, he intends the consequences just as truly as he intends to do or to omit the thing done or omitted. *Warren v. Tenth Nat. Bank* (U. S.) 29 Fed. Cas. 287, 289.

#### Negligence distinguished.

"The difference between 'intent' and 'negligence,' in a legal sense, is ordinarily nothing but the difference in the probability under the circumstances, known to the actor and according to common experience, that a certain consequence or class of consequences will follow from a certain act." *White v. Duggan*, 2 N. E. 110, 111, 140 Mass. 18, 54 Am. Rep. 437 (citing *Commonwealth v. Pease*, 137 Mass. 576).

#### Premeditation implied.

"Intent" means that which is intended; purpose, aim, design, intention; and essen-



tially implies premeditation. *Perugi v. State*, 80 N. W. 593, 597, 104 Wis. 230, 78 Am. St. Rep. 865; *Ernest v. State*, 20 Fla. 383, 388.

"Intent" to kill is defined as a steady resolve and deep-rooted purpose or design, formed after carefully considering the consequences. *State v. Conly*, 41 S. E. 534, 541, 130 N. C. 683.

Where the jury acquits a person of an assault with intent to commit murder in the first degree, they negative the existence of premeditation and deliberation, both of which are employed in the signification of the term "intent." "Webster defines 'intent' to mean a design, a purpose; intention meaning drift, aim. Burrill defines it to be 'the presence of will in the act, which consummates a crime.' It is the existence of intelligent will, the mind being fully aware of the nature and consequences of the act which is about to be done, and, with such knowledge and with full liberty of action, willing and electing to do it." *Smith v. State*, 70 Tenn. (2 Lea) 614, 619.

#### INTENT TO COMMIT RAPE.

See "Assault with Intent to Commit Rape."

To constitute an intent to commit rape, he must have had a purpose not only to have sexual intercourse with the prosecutrix, but he must have intended also to use whatever degree of force might be necessary to overcome her resistance and to accomplish his object. *Walton v. State*, 15 S. W. 646, 647, 29 Tex. App. 163.

#### INTENT TO DEFRAUD.

See, also, "Defraud."

The Ohio statute of fraudulent conveyances, which provides that every gift, grant, or conveyance of lands, tenements, etc., made or obtained with "intent to defraud creditors" of their just or lawful debts or damages, or to defraud or deceive a person or persons who shall purchase such lands, shall be deemed utterly void and of no effect, is so construed that there must be an intent on the part of both the grantor and grantee in such conveyance; hence the statute would not affect a conveyance made to a bona fide purchaser or mortgagee, even though there was a fraudulent intent on the part of the grantor or mortgagor. *Astor v. Wells*, 17 U. S. (4 Wheat.) 466, 488, 4 L. Ed. 616.

"Intent to evade or defraud," as used in 4 Stat. 409, providing that, if an invoice be made up with an intent to defraud the revenue, the goods contained in the entry made on such invoice shall be forfeited to the United States, is synonymous with "knowingly making any false invoice," as used in Act

March 3, 1863, which provides that, if any owner of any merchandise shall knowingly make any entry thereof by means of any false invoice, the merchandise shall be forfeited. Twelve Hundred and Nine Quarter Casks of Wine (U. S.) 24 Fed. Cas. 398, 404.

#### INTENT TO HINDER OR DELAY.

Whether or not the provision that "all conveyances made . . . with intent to hinder" or "delay . . . creditors . . . shall be void," as provided by Rev. St. 1894, § 6845 (Rev. St. 1881, § 4920), means with a fraudulent intent to hinder, it is evident that it was not the purpose of that provision to deny the right of persons to contract for delay, and to be bound by their own stipulations which delay or hinder them in the collection of their credits. *Smith v. Wells Mfg. Co.*, 46 N. E. 1000, 1003, 148 Ind. 333.

#### INTENT TO KILL.

See "Assault with Intent to Kill."

As used in P. L. 1900, p. 45, declaring that any person who shall commit an assault with intent to kill shall be guilty of a high misdemeanor, the expression "intent to kill" is not synonymous with "intent to murder," in that there is lacking the element of premeditation and deliberation, essential to an intent to commit murder. *State v. Barker*, 52 Atl. 284, 286, 68 N. J. Law, 19.

#### INTENTION.

See "Having No Intention"; "Malicious Intention."

"Intention" is defined as the fixed direction of the mind to a particular object, or a determination to act in a particular manner, and it is distinguishable from "motive," that which incites or stimulates to action, and from "attempt," which is an inchoate effort towards the action. In legal contemplation, "intention" means the purpose or design with which a willful act is done, characterizing the act. Yet it is properly inferred that one who does an act willfully intends the natural and proximate consequence of the act, although unforeseen. *Willis v. Jolliffe* (S. C.) 11 Rich. Eq. 447, 489.

"A man, it seems, intends that consequence which he contemplates and which he expects to result from his act, and he therefore must be taken to intend every consequence which is the natural and immediate result of any act which he voluntarily does. In this respect the legal sense of the term 'intention' does not differ from its ordinary and usual meaning." *People v. Petheram*, 31 N. W. 188, 195, 64 Mich. 252 (citing *State v. Malloy*, 34 N. J. Law [5 Vroom] 410).

A notice that it is appellant's "intention" to bring up for review an order denying a motion for a new trial is sufficient, under Code provision requiring a notice to the effect that appellant appeals from the order. *Taylor v. Smith*, 49 N. Y. Supp. 41, 42, 24 App. Div. 519.

"Intention" is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused. *Hurd's Rev. St. Ill. 1901*, p. 645, c. 38, § 281.

#### As animus.

"Intention," as used in a finding of court stating that a plaintiff had fully and sufficiently proved his intention deduced in a certain libel and other pleadings admitted on his behalf, did not mean, in the ordinary sense, "animus." The sense is that the whole ground of the charge had been proved as laid out; that is, that the whole of the words had been proved. *Evans v. Gwyn*, 5 Q. B. 844, 846.

#### As declared intention.

The intention of the parties which will control in interpreting the meaning of a contract entered into between them is not the secret design which may dwell in a party's mind, and as to whose existence alone he can speak, but that intention which was either expressly declared by the parties, or which flows, patent to all, from the nature and character of the act—the clear purpose to be served. *Catasauqua Bank v. North*, 160 Pa. 303, 28 Atl. 694, 696.

#### As a desire.

"Intention to return" to a residence, such as the law recognizes, must be something more than a mere feeling or sentiment or a desire; some ultimate purpose not having a present fixed object. This has been repeatedly held; also that mere intention does not constitute a residence. It must be a present, fixed, continuous intention, and have relation to a definite place to which the person has a right to return. *Jericho v. City of Burlington*, 29 Atl. 801, 803, 66 Vt. 529.

"Intentions," when used in a will, does not necessarily imply a command, but is dependent on the language of the will, and, where a will attempted to dispose of all real estate, will be held mandatory. *Meehan v. Brennan*, 45 N. Y. Supp. 57, 53, 16 App. Div. 395.

#### As a fact to be proved.

"Intention" is a fact. *Clift v. White*, 12 N. Y. (2 Kern.) 519, 538. Hence a witness may be asked with what intent he did a given act. *Seymour v. Wilson*, 14 N. Y. (4 Kern.) 567. A man who buys and obtains possession of goods on credit, intending not

to pay for them, is then and there guilty of fraud. The wrong is fully completed, and no longer exists in intention merely, and a cause of action instantly accrues thereon in favor of the vendor to recover for the wrong and injury sustained. The state of a man's mind at a given time is as much a fact as is the state of his digestion. *Swift v. Rounds*, 35 Atl. 45, 46, 19 R. I. 527, 33 L. R. A. 561, 61 Am. St. Rep. 791.

"A man's intention is a matter of fact, and may be proved as such." *Fisk v. Inhabitants of Chester*, 74 Mass. (8 Gray) 506; *Kelly v. Cunningham*, 83 Mass. (1 Allen) 473; *Commonwealth v. Walker*, 108 Mass. 309, 312.

#### Intent equivalent.

According to Mr. Bishop, in his *New Criminal Procedure*, vol. 2, p. 81, the word "intention" has been accepted as a substitute for "intent" in an indictment. The learned commentator adds in a note that if the indictment was defective from this cause it was cured by a statute upon the subject, but none the less he says that the substituted word is not error. Consulting the definition of the word as defined in the different dictionaries, we find that "intention" is as strong a word in meaning as "intent." It expresses a stretching or bending of the mind toward an object even more forcibly than the word "intent." It is from the same root, and has as direct and strong a meaning. If one shoots with the "intention" of killing, he must be held as guilty as if he had shot with "intent" to kill. A word of meaning at least equivalent beyond all question with another can be used as a substitute, and an indictment for shooting with intent to kill was not insufficient in using the word "intention." *State v. Broussard*, 31 South. 637, 638, 107 La. 189.

"Intent," as used in Act 1811, 1 Rev. St. c. 35, § 12, providing that a person guilty of an assault with intent to rape shall be punished, etc., should be construed as synonymous with "intention," and hence an indictment charging an assault under the statute, and using the word "intention" instead of "intent," is sufficient. *State v. Tom*, 47 N. C. 414, 417.

In charging an assault with intent to commit a crime, the use of the word "intention" instead of the word "intent" is not fatal, but it is otherwise as to the use of "attempt." *State v. Hearsey*, 23 South. 372, 373, 50 La. Ann. 373.

#### Meant synonymous.

In a suit for slander an instruction was given that if the jury believed it was the "intention" of the defendant to charge the plaintiff with perjury, etc. Error was alleged in that the jury, who had been instruct-

ed that if they believed that the defendant "meant" to charge the plaintiff with perjury, then, etc. Held, that there was no substantial difference between the two words, and the latter is not more referable to the hearer than the former. The words are practically synonymous, and should be so construed. *Studdard v. Linville*, 10 N. C. 474, 477.

#### **As promise.**

An "intention" is but the purpose a man forms in his own mind; a "promise" is an express undertaking or agreement to carry the purpose into effect. The intention may begin and end with the person who forms it; a promise, supported by a good consideration, can only be rescinded by the act of both parties to it, for to make a binding promise there must be a promisee as well as a promisor. The expression of an intention to do a thing is not a promise to do it. Conversations made by a bankrupt after his discharge, in which he declares his intention to pay a certain debt, do not amount to a promise binding on the bankrupt. *Steward v. Reckless*, 24 N. J. Law (4 Zab.) 427, 430. See, also, *Shockey v. Mills*, 71 Ind. 288, 292, 36 Am. Rep. 196.

#### **INTENTIONAL EXPOSURE.**

"Intentional exposure," as used in an accident policy providing that it did not cover voluntary exposure to unnecessary danger, implies some degree of knowledge and comprehension of the danger incurred, and a purpose to take the risk. If the danger be concealed and unknown to the party who ultimately suffers from it, it cannot be such that he has voluntarily exposed himself to it. To constitute such exposure, one must have intentionally done some act which ordinary prudence would pronounce dangerous. *Burkhard v. Travellers' Ins. Co.*, 102 Pa. 262, 48 Am. Rep. 205; *Miller v. American Mut. Acc. Ins. Co.*, 21 S. W. 39, 92 Tenn. 167, 20 L. R. A. 765; *Union Casualty & Surety Co. v. Harroll*, 40 S. W. 1080, 98 Tenn. 591, 60 Am. St. Rep. 873.

#### **INTENTIONAL INJURY.**

"Intentional," as used in an accident policy excepting intentional injuries inflicted by the insured or any other person, etc., implies the exercise of the reasoning faculties, consciousness, and volition. *Berger v. Pacific Mut. Life Ins. Co.* (U. S.) 88 Fed. 241, 242.

An "intentional" injury implies positive and aggressive conduct, and not merely negligent omission of duty; so that a charge of gross and wanton negligence does not, ex termino, import any actual or implied intention to do harm. To say that an injury re-

sulted from the neglect and willful conduct of another is to affirm that the same act is the result of two exactly opposite mental conditions. It is to affirm in one breath that an act was done through inattention, thoughtlessly, heedlessly, and at the same time purposely and by design. *Cleveland, C. & St. L. Ry. Co. v. Tarrt* (U. S.) 64 Fed. 823, 826, 12 C. C. A. 618; *Id.*, 99 Fed. 369, 372, 39 C. C. A. 568, 49 L. R. A. 98.

"Intentional injuries," in an insurance policy providing that the insurer shall not be liable for intentional injuries, means such injuries as are caused by intentional act of the party himself, and not by the intentional act of third persons. *Button v. American Mut. Acc. Ass'n*, 65 N. W. 861, 92 Wis. 83, 53 Am. St. Rep. 900; *Fischer v. Travellers' Ins. Co.*, 19 Pac. 425, 77 Cal. 246, 1 L. R. A. 572.

The word "intentional," in a life and accident policy insuring against death or injury by external, violent, and accidental means, or by an intentional injury inflicted by another, refers alone to the person inflicting the injury, and if, as to the person injured, the injury was unforeseen, unexpected, or not brought about through his agency designedly, or was without his foresight, or was a casualty or mishap not intended to befall him, then he may recover. *American Acc. Co. of Louisville v. Carson*, 36 S. W. 169, 170, 99 Ky. 441, 34 L. R. A. 301, 59 Am. St. Rep. 473.

"Intentional injuries," as used in a life policy providing that the insurer shall not be liable in case insured's death results from intentional injuries, includes injuries intentionally inflicted by another, although they were unintentional on the part of the insured. *Orr v. Travelers' Ins. Co.*, 24 South. 997, 998, 120 Ala. 647. See, also, *De Graw v. National Acc. Soc.*, 4 N. Y. Supp. 912, 51 Hun, 142.

"Intentional injuries," within the meaning of a life policy exempting the insurer from liability for death caused by intentional injuries inflicted by the insured or any other person, characterizes murder. *Travelers' Ins. Co. v. McConkey* (U. S.) 8 Sup. Ct. 1360, 1363, 127 U. S. 661, 32 L. Ed. 308.

#### **INTENTIONAL NEGLIGENCE.**

In a statute providing that the directors of a corporation, in case of "intentional neglect" to make certain reports required by the act, shall be personally liable for all debts contracted during the period that such neglect shall continue, and also making the neglect to make such reports a misdemeanor on the part of all such directors as were present and acting at any time during the neglect, all of the directors are liable for the debts, whether present and acting or not.

The consequence of failure to report is not confined to the personal, intentional neglect of each director, but to the intentional neglect of the board of directors, and a director guilty of no personal neglect becomes liable for the debts of the corporation in case a majority of the directors should intentionally neglect to report as required. *Van Etten v. Eaton*, 19 Mich. 187, 194, 195.

"Intentionally neglect," as used in Comp. Laws, § 2840, providing that if the directors of certain corporations intentionally neglect to file annual reports of the condition of the corporation they shall be liable for all debts of the corporation contracted during the period of neglect, cannot be construed as the equivalent of "neglect" without the word "intentionally." Where the directors had no active intention to violate the law in neglecting to file the report, but did not think of it, the subject of filing the reports not occurring to them, they did not "intentionally neglect" to file them. *Breitung v. Lindauer*, 37 Mich. 217, 222.

#### INTENTIONAL NEGLIGENCE.

Some law-writers, some judges, and some courts habitually use the terms "willful negligence," "intentional negligence," and "malicious negligence," but most of them very properly repudiate such expressions as contradictory and absurd. *Lockwood v. Belle City St. Ry. Co.*, 65 N. W. 886, 870, 92 Wis. 97.

#### INTENTIONAL VIOLATION.

"Intentional violation," as used in a city charter providing that the ordinances of the corporation should not be obligatory on the persons or property of nonresidents of the town who are citizens of the state, unless in case of intentional violation, means a violation which the party either knows or has good reason to believe will follow the act done. Ordinarily it is not necessary to show a specific intent or mala mens. To be intentional the violation must, of course, be with knowledge of the ordinance. *City of Knoxville v. King*, 75 Tenn. (7 Lea) 441, 448.

#### INTENTIONALLY.

An instruction by the court, in an action brought against a railroad company for an injury to one of its employes, as to the liability of the company in case the act was "willfully or intentionally" done, means either a specific intention to do the plaintiff an injury, or a grossly reckless management of its appliances after the plaintiff's position was discovered by the company or its agent. To make the management of the appliances a grossly reckless management, the position of the plaintiff with reference to them must have been known to defendant's agent in

charge of the appliances sufficiently long before the injury to have enabled him and those under him to have prevented the injury. If such management was grossly reckless after the plaintiff's position was discovered in time to have prevented the injury, such recklessness is equivalent to "willful or intentional mischief." *Shumacher v. R. R. Co.* (U. S.) 39 Fed. 174, 180.

"Intentionally," as used in an instruction, in an action for killing a dog, that if the jury find that defendant "intentionally and wantonly" shot the dog they might render certain damages, etc., should be construed as synonymous with "purposely and recklessly," or "without proper regard for the rights of the plaintiff." *Wright v. Clark*, 50 Vt. 130, 136, 28 Am. Rep. 496.

When the facts in a given case show that the injury of which the plaintiff complains is the result of the negligent act or conduct of the defendant, then the fact that such negligence may be said to be of such a degree as to be considered "gross negligence" cannot support a charge that the injury was willfully or intentionally inflicted by the party accused. *Cleveland, C. & St. L. Ry. Co. v. Miller*, 49 N. E. 445, 451, 149 Ind. 490.

#### As premeditated design.

The word "intentionally" is not synonymous with the words "with premeditated design," as used in the statute defining murder in the first degree as a killing perpetrated with a premeditated design, for the words "with premeditated design" involve a greater degree of deliberation and forethought than the word "intentionally." *State v. Brown*, 12 Minn. 538, 543 (Gil. 448, 455); *State v. Hoyt*, 13 Minn. 132, 149 (Gil. 125, 134).

#### As willfully, or voluntarily.

The terms "willfully" and "intentionally" in law are synonyms. *Bindbeutel v. Street Ry. Co.*, 43 Mo. App. 468, 470.

The word "intentionally," in an instruction that if the jury believes that any witness has intentionally, corruptly, and willfully sworn falsely to any material point his testimony may be disregarded, is synonymous with "willfully," and therefore the insertion of the word in the instruction which was asked by a party without containing such word was not erroneous. *Chicago City Ry. Co. v. Ollis*, 61 N. E. 459, 192 Ill. 514.

"Intentionally," as generally used by text-writers, in cases, and in the statement of the rule that where one intentionally, by acts or declarations, represents a certain state of facts to exist, and thereby procures a change of conduct in another, he cannot afterwards be heard to assert a contrary state of facts, etc., means "willfully" or "voluntarily." The words "willfully," "intentionally," and "voluntarily" seem to be used in

terchangeably in this connection. *Gillett v. Wiley*, 19 N. E. 287, 290, 128 Ill. 810, 9 Am. St. Rep. 587.

## INTER PARTES.

An instrument of writing which is expressed to be made between certain parties, between the persons who are named in it as executing it, is technically called an instrument "inter partes." *Smith v. Emery*, 12 N. J. Law (7 Halst.) 53, 60.

## INTERCHANGE.

"Interchanged," as used in Rev. St. art. 4535, requiring every railway company to receive all freight and passengers coming to it from a connecting line, and going to points on its line or beyond, and to transport the same to its destination or to connecting lines, and providing that the charges for the business required to be interchanged should be no greater pro rata per cent. per mile for freight, or passengers, and baggage than is charged to any other line for transporting like freight, passengers, and baggage, does not include the transferring of freight from one railroad to another by a third road. *Gulf & I. Ry. Co. v. Texas & N. O. Ry. Co.*, 56 S. W. 328, 329, 93 Tex. 482.

## INTERCHANGEABLY.

Parties are said to have "interchangeably" set their hands and seals; that is, the parties of each part have signed one counterpart each, and they have exchanged them. *Roosevelt v. Smith*, 40 N. Y. Supp. 881, 883, 17 Misc. Rep. 323.

## INTERDICTION OF COMMERCIAL INTERCOURSE.

An "interdiction of commercial intercourse" between two countries, *ex vi termini*, means an entire cessation for the time being of all trade whatever. Partial trade between two countries, whether originating in the act of one government or the other, may frequently take place, but cannot, when it does, with any propriety be termed an "interdiction of commercial intercourse." *The Edward*, 14 U. S. (1 Wheat.) 261, 272, 4 L. Ed. 86.

## INTERESSE TERMINI.

"Interesse termini" is the right to the possession of a term at a future time, and, upon an ordinary lease to commence instant, the lessee at common law has an interesse termini only until entry. *Austin v. Huntsville Coal & Min. Co.*, 72 Mo. 535, 542, 37 Am. Rep. 446; *Morrison v. Chicago & N. W. Ry. Co.*, 91 N. W. 793, 117 Iowa, 587.

## INTEREST.

See "Appealable Interest"; "Agency Coupled with an Interest"; "As His Interest may Appear"; "Conflicting Interests"; "Direct Interest"; "Limited Interest"; "Money at Interest"; "Pecuniary Interest"; "Public Interest"; "Remaining Interest"; "Vested Future Interest."

"Interest means concern, advantage, good; share, portion, part, or participation." *Fitch v. Bates* (N. Y.) 11 Barb. 471, 473 (citing Webster).

A person interested is one having an interest; i. e., a right of property, or in the nature of property, less than title. *Filbert v. Filbert*, 9 Pa. Co. Ct. R. 149, 150 (citing And. Law Dict. 562).

The expression "interest of," as used in an instruction that a railroad company would not be liable for injuries resulting from the willful and intentional acts of its servants, unless such acts were done in the interest of the company, would naturally convey the idea that, to render the company liable, the act must be done with the purpose or intention to promote the interest of, or in furtherance of the business of, the employer. *Southern Ry. Co. v. Wildman*, 24 South. 764, 766, 119 Ala. 565.

Within the meaning of the rule that hearsay evidence is not admissible, unless on a question of "general and public interest," the term "interest" does not mean that which is interesting from gratifying curiosity or a love of information or amusement, but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected. *Reg. v. Inhabitants of Bedfordshire*, 4 El. & Bl. 535, 541.

A statute requiring that in the exercise of a right given to a company to purchase certain property and the leases thereof, and requiring that the tenants who should sustain any loss in respect of any "interest for good will," etc., should be entitled to compensation, meant that the company was to make compensation to the tenant in the same manner as an ordinary purchaser taking a yearly tenancy with the incidents commonly attending it, and therefore a tenant who had an established business, but who merely rented from year to year, was entitled to compensation for good will, though as against the landlord, who might have terminated the tenancy, he would have had no such legal right. *Ex parte Farlow*, 2 Barn. & Ald. 341.

## In assessment.

A statute giving any one interested in a tax assessment the right to appear before

the board of equalization construed to mean any one having property on the assessment roll. *Dundee Mortg. & Trust Inv. Co. v. Charlton* (U. S.) 32 Fed. 192, 194.

"Person interested," as used in section 178 of the New York statute relating to the opening of streets in New York City, which provides that the assessment for benefit is to be made upon owners, lessees, parties, and persons, respectively, who may be interested in or entitled to the lands benefited and lying within the apparent limits, includes an occupant of the lands. The section includes every possible interest in the lands benefited. *Gilbert v. Havemeyer*, 4 N. Y. Super. Ct. (2 Sandf.) 506, 509.

"Persons interested," as used in Laws 1885, c. 483, § 13, relating to inheritance taxes, requiring the giving of a notice by the appraiser to the persons interested, means those whose estates are assessable. In *re Wolfe*, 21 N. Y. Supp. 515, 521, 66 Hun, 389.

#### In catchings.

The "interest in catchings" of a whaler, within the meaning of a marine policy on the owner's interest in the "catchings of the whaler, about two-thirds of which is to apply to this policy, the crew's share, about one-third, not being covered hereby," includes merely the share of the catchings reserved to the owner in accordance with the lays agreed on in the shipping articles, without reference to the state of the accounts of the crew with the vessel at the time of the loss. *Swift v. Mercantile Mut. Ins. Co.*, 113 Mass. 287, 288.

#### In construction of railway.

Within the meaning of the statute authorizing towns and cities to issue bonds in aid of railroads, when such towns or cities are along the line of said railroad or interested in a construction thereof, it is essential for the determination of whether a town is interested or not in the construction of a road to know where the line was to be located. The mere fact that the line was to be located in the county in which the town was situated is not sufficient to show that such town was interested, since the road might run into the county and still be too remote for any practicable purposes. *Oswego County Sav. Bank v. Town of Genoa*, 59 N. Y. Supp. 829, 839, 28 Misc. Rep. 71.

#### In corporation.

It is well settled that the "interest of a stockholder" in a corporation is the immediate right to receive his share of the dividends as they are declared, and the remote right to his share of the effects on hand at the dissolution of the corporation. *State v. Mitchell*, 58 S. W. 365, 306, 104 Tenn. 336 (citing *Union Bank v. State*, 17 Tenn. 19

*Yerg.*) 500; *Cook, Stock, Stockh. & Corp. Law*, § 12; *Plimpton v. Bigelow*, 93 N. Y. 592).

#### In crop.

Under an act giving a landlord a lien on the crop, where the rent consists of an interest or share in the crop, it is held that the words "interest" and "share" are equivalent. *Phillips v. Douglass*, 53 Miss. 175.

#### In documentary evidence.

The interest which a party to an action has in books or papers in the possession of third parties, the production of which on the trial may be compelled, means that, if the documents are material evidence for the party demanding them, such party has an interest in them. *Simon v. Ash*, 20 S. W. 719, 720, 1 Tex. Civ. App. 202.

#### In estate or fund.

The expression "person interested," where it is used in connection with an estate or fund, includes every person entitled, either absolutely or contingently, to share in the estate or the proceeds thereof, or in the fund, as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee, or otherwise, except as a creditor. *Code Civ. Proc. N. Y.* 1899, § 2514, subd. 11.

The phrase "person interested," when used with reference to an estate or fund, includes every person entitled either absolutely or conditionally to share in the same or the proceeds thereof, except a creditor. *Rev. Codes N. D.* 1899, § 6166.

The expression "person interested," as used by the statute in connection with an estate, includes a person entitled contingently to share in the estate as legatee. In *re Hunt's Estate*, 82 N. Y. Supp. 538, 540, 84 App. Div. 159.

Under *Code Civ. Proc.* § 2514, subd. 11, a "person interested" in an estate or fund is every person entitled either wholly or contingently to share in the estate or the proceeds thereof. In *re Killan's Estate*, 65 N. E. 561, 172 N. Y. 547, 63 L. R. A. 95.

*Gen. St. c. 44, art. 2*, provides that any "person interested" may file his petition to subject to a court of equity all such transfers of a debtor in contemplation of insolvency as are elsewhere in the act declared to inure to the benefit of creditors generally. Held, that the words "person interested" include the debtor's surety, who may maintain his action against his principal, who seeks to prefer another creditor than the person to whom the surety is bound. *McKee v. Scobee*, 80 Ky. 124, 127.

Under a statute relative to assignments for the benefit of creditors, and providing that exceptions may be taken and preserved

by any party in interest, the term "party in interest" includes a creditor seeking to have his claim allowed, even in proceedings for the removal of the assignee, and the assignee is a party in interest in the same proceedings. *State ex rel. Millett v. Field*, 37 Mo. App. 83, 97.

#### **In estate of decedent.**

Code 1873, § 2497, authorizing any person "interested in the estate" of a decedent to petition the court for the removal of an administrator, etc., does not include a party against whom an administrator has brought suit to recover a claim due the estate of his decedent. The interest contemplated by the statute is a right to benefits from the estate, which prompts the person to act for preserving its assets, increasing their value, and directing their disposition and appropriation. *Chicago, B. & Q. R. Co. v. Gould*, 20 N. W. 464, 466, 64 Iowa, 343.

Code Civ. Proc. § 2647, authorizing a "person interested in the estate" of a decedent to present a petition to set aside the probate of decedent's will of personalty, includes the next of kin of testator, though they are not legatees. *In re Bradley's Will*, 23 N. Y. Supp. 1127, 1129, 70 Hun, 104.

As used in Laws 1837, c. 460, § 4, relating to proof of wills and providing that a "person interested in the estate" of the deceased may petition for letters of administration, the phrase quoted would include an attorney in fact appointed by the executrix named in the will for the purpose of bringing the will to probate and having the same duly proved and asking for and receiving letters of administration. *Russell v. Hartt*, 87 N. Y. 19, 22.

An administrator de bonis non is a party interested in the estate; and a person aggrieved, if his predecessor fail on demand to pay over the balance in his hands due on the estate, within Gen. St. c. 65, § 61, providing that all bonds required by law to be taken, or by order of the probate court, may, in case of any breach of the conditions therein, be prosecuted in the name and for the benefit of any person interested therein. *Balch v. Hooper*, 32 Minn. 158, 20 N. W. 124, 125.

The petition of a surviving co-trustee is sufficient to give the surrogate jurisdiction to compel the executor or administrator of a deceased testamentary trustee to account, under Code Civ. Proc. § 2608; for, though the section does not in express terms mention "co-trustee," they are embraced within the term "person interested in the estate." *In re Kreischer's Estate*, 51 N. Y. Supp. 802, 804, 30 App. Div. 313.

Rev. Code, § 2005, providing that an executor who has been exempted by the will from giving bond may be required to give

one on the application of the heirs or legatees, or other "persons interested in the estate," should be construed to include creditors of the estate. *Smith v. Phillips*, 54 Ala. 8, 11; *Phillips v. Smith*, 62 Ala. 575, 578.

Under a statute authorizing "persons interested" in an estate to file a petition to revoke letters testamentary, it is held that a debtor to the estate is not a person interested therein. *Drexel v. Berney* (N. Y.) 1 Dem. Sur. 163, 166.

A statute provided that, when any person appointed a trustee shall decline or resign, etc., the judge of probate shall, after notice to all persons interested, appoint a new trustee, etc. Testator, after making several bequests, devised one half of the residue of his property to A. and the other half to two trustees, to hold the same in trust for B., the wife of G., during her life, and on B.'s death to convey the same to B.'s children. The trustees both declined the trust. Held, that A. was not a "person interested," within the meaning of the statute, since his interest was entirely distinct from the trust. *Greene v. Borland*, 45 Mass. (4 Metc.) 330, 332.

The words "person interested," as used in Code, § 2715, providing that a creditor or person interested in an estate may present to the surrogate's court proof that an executor has failed to return an inventory within the time prescribed by law, include every person entitled absolutely or contingently to share in the estate of the testator, except as a creditor. *Creamer v. Waller* (N. Y.) 2 Dem. Sur. 351, 353.

In Laws 1889, c. 406, § 2, providing that in case the interest of a widow in the real estate of a deceased husband, in addition to her dower right and together with a certain sum, should be of less value than \$1,000, there should be set apart for her use personal property which, together with the real estate, amounts to \$1,000 in value, "interest" refers to the widow's interest in the real estate of her deceased husband, exclusive of her dower right or interest, and means nothing else than the use of \$1,000 worth of real estate during her life given her by another section of the statute. *In re Tipple*, 13 N. Y. Supp. 263, 265, 2 Con. Sur. 508.

#### **In highway.**

Rev. St. tit. 24, § 24, which provides that an application to the superior court for a highway shall, unless the parties shall agree on the judgment to be rendered, be referred by the court to a committee, to be heard by them at such time and place and with such notice to "those interested" therein as said court shall order, includes all who may be affected by the contemplated highway and all whose interests may be adverse to those

of the town on the question of damages. It is not confined to those who are already before the court as parties to the record. *Shelton v. Town of Derby*, 27 Conn. 414, 421.

Pub. St. c. 112, § 129, providing that, before making alterations in a highway, the county commissioners shall hear all "parties interested," does not include a person whose only interest is that of the public generally, but only those parties who are interested in the property to be affected by the decision. *Chandler v. Railroad Com'rs*, 5 N. E. 509, 513, 141 Mass. 208.

#### **In insured property.**

A loss occurred under a policy which provided: "If the assured, or any other person or parties interested, shall have existing during the continuance of this policy any other contract for insurance, whether valid or not, against loss or damage by fire on the property hereby insured, not consented to by this company, then this insurance shall be void." A person having an interest in the property under a contract of sale, without the knowledge or consent of the insured, obtained a policy covering his interest, and the first company claimed that thereby its policy was invalidated. In considering this claim the court said: "It was not the understanding or intention that any other person who might have a separate interest in the property, and not connected in interest with the plaintiff, and having no interest in his insurance, might avoid the plaintiff's contract by obtaining an insurance on his own interest in the property without the plaintiff's knowledge or consent. Such a construction would render the contract exceedingly harsh, unreasonable, and oppressive, and the parties will not be deemed to have so contracted, if the language used by them fairly admits of a different interpretation. By this rendering the parties interested are considered to mean those interested with the plaintiff in his contract, instead of outside persons, who might have some distinct and separate interest in the property. *Acer v. Merchants' Ins. Co.* (N. Y.) 57 Barb. 68, 83.

#### **In municipal contract.**

In the acts of assembly providing that a member of councils shall not have an interest in a public contract in the city of Philadelphia, "interest" does not mean anything but pecuniary interest. A member of the councils, who was a salaried employé of a firm contracting with the city, has no interest in the contract; his salary being fixed, and not fluctuating with the amount of sales. *Dunlap v. City* (Pa.) 13 Wkly. Notes Cas. 98, 99.

Interest is such relation to the matter in issue as creates a liability to pecuniary loss or gain from the event of a suit; and hence,

where a mayor employed an attorney to bring proceedings on behalf of the city, but avoided personal liability therefor, he was not "interested," so as to prevent him voting for such attorney's compensation, under provisions of a charter providing that no alderman shall vote on any question in which he shall have a direct personal interest. *Smedley v. Kirby*, 79 N. W. 187, 188, 120 Mich. 253.

#### **In office.**

An officer-elect, who is not qualified by reason of certain statutes to enter on the discharge of the duties of the office until a certain time, has no "interest," within Rev. St. 1894, § 1146 (Rev. St. 1881, § 1132; *Horner's Rev. St.* 1897, § 1132), prohibiting persons having an interest in the office from being relators in an information to oust the incumbent. *Scott v. State*, 52 N. E. 163, 151 Ind. 556.

#### **In patent.**

The term "interested," as used in Patent Act 1836, § 14, which provides that damages for infringements may be recovered by an action on the case, to be brought in the name or names of the person or persons interested, means an exclusive interest in the patent at the time when the infringement is committed. *Moore v. Marsh*, 74 U. S. (7 Wall.) 515, 522, 19 L. Ed. 37.

#### **In petition to Legislature.**

St. 1899, c. 380, providing that any town "interested" in a petition to the Legislature may employ counsel to represent it on any hearing of the petition before a legislative committee, should be construed to include the interest of a town in a petition before the Legislature to divide it. "It is not necessary to undertake to divide the meaning of the word 'interested,' as used in the statute, further than is involved in the determination of the present case. The division of a town is a matter which concerns all of its inhabitants, whether taxable for property or not, and in this sense a town may be said to be interested in a petition before the Legislature to divide it, within the meaning of the statute. *Connolly v. Inhabitants of Beverly*, 24 N. E. 404, 151 Mass. 437.

#### **In reversion.**

An averment in a complaint that the plaintiffs were interested in the reversion, the prayer for judgment being that judgment might be rendered for the complainants, as such reversioners, to recover possession, may mean that they were reversioners, or that they were interested in the estate in some other way, but, when taken in connection with the prayer for judgment, is construed to mean that plaintiffs were interested as



the reversioners. *Peck v. Peck*, 85 Conn. 390, 391.

#### In water rates.

Const. art. 14, § 1, requires water rates to be fixed by the governing boards of municipalities annually by ordinance, and subjects any board failing to fix rates within such time to process to compel action at the suit of any party interested. Held, that the party interested is a party who has an interest in having the rates fixed, and who would be injuriously affected if they were not fixed; and hence the furnisher of water is included within the phrase. *Fitch v. Board of Sup'rs of City and County of San Francisco*, 54 Pac. 901, 122 Cal. 285.

#### In will.

The phrase "persons interested in a will," as used in Code Civ. Proc. § 2653a, providing that any person interested in a will admitted to probate in the state may cause the validity of the probate to be determined in an action in the Supreme Court, refers only to a person who is interested in the maintenance of the will, and not to one claiming in hostility to it. *Lewis v. Cook*, 44 N. E. 778, 150 N. Y. 163.

The creditor of an heir is not an "interested person" within Code 1896, § 4287, permitting any person interested therein, or any person who, if the testator had not died intestate, would have been an heir or distributee, to contest the will. *Lockard v. Stephenson*, 120 Ala. 641, 644, 24 South. 996, 74 Am. St. Rep. 63.

Within the meaning of Code, § 1987, giving the right to contest a will to a "person interested therein" or one who, if the testator had died, would have been heir or distributee of his estate, does not include a creditor of the deceased person. *Montgomery v. Foster*, 8 South. 349, 91 Ala. 613.

Laws 1895, p. 327, authorizing any "person interested" to contest by bill in equity the probate of a will, does not include a non-resident alien. *Jele v. Lemberger*, 45 N. E. 279, 281, 163 Ill. 338.

Under Code Civ. Proc. §§ 1861-1867, providing that an action to establish a lost will may be maintained by any one interested in the establishment thereof, one claiming to be a legatee under an alleged codicil giving an alleged legacy to such person, unless the equivalent thereof had been settled on the legatee by the testator during his lifetime, was entitled to maintain an action, and the fact that such settlement might have been made was a matter of defense. *Donlon v. Kimball*, 70 N. Y. Supp. 252, 253, 61 App. Div. 31.

#### INTEREST (In Property).

See "Absolute Interest"; "Adverse Interest"; "Contingent Interest"; "Entire Interest"; "Equitable Estate or Interest"; "Executory Interest"; "Inchoate Interest"; "Insurable Interest"; "Joint Interest"; "Leviable Interest"; "Sole Interest"; "Vested Interest."

All my interest, see "All."

Any interest in or concerning land, see "Any."

Change in interest, see "Change."

Leasehold interest, see "Leasehold."

Other interest, see "Other."

"Interest," as used in Rev. St. U. S. § 4283, declaring that the owner of a vessel is only liable for loss of goods to the extent of his interest in the vessel and her freight, refers to the extent or amount of ownership the party has in the vessel, such as his aliquot share if he is only a part owner, or his contingent interest if that is the character of his ownership. Whatever the extent or character of his ownership is—that is to say, whatever his interest in the ship is—the amount or value of that interest is to be the measure of his liability. It would not include insurance which the party recovers for the loss of his vessel. *Place v. Norwich & N. Y. Transp. Co.*, 6 Sup. Ct. 1150, 1157, 118 U. S. 468, 30 L. Ed. 134.

Where a cargo was destroyed in order to prevent a total loss of the vessel and cargo, the "interest of a shipowner" in a general fund for the purposes of a general average, for the purpose of paying the loss of the cargo destroyed, means the extent or amount of ownership in the vessel or cargo, whether whole or partial, and does not include insurance received by him. *Deming v. The Rapid Transit (U. S.)* 52 Fed. 320, 322; *The City of Norwich*, 6 Sup. Ct. 1150, 1157, 1172, 118 U. S. 468, 30 L. Ed. 134.

In a marriage settlement, which deeded certain property in trust and directed that the trustees should permit "the said H. [the intended wife] to have, receive, take, and enjoy all the interest, rents, and profits of the property conveyed to and for her use and benefit," and gave to the wife the power to dispose of the property during her life or by her will, "interest" was equivalent to the word "estate" or "property." *Ladd v. Ladd*, 49 U. S. (8 How.) 10, 29, 12 L. Ed. 967.

Comp. Laws, § 4692, declaring that no estate or interest in lands other than leases for a term not exceeding one year shall be created, granted, assigned, surrendered, or declared, unless by operation of law or deed of conveyance in writing, means every case possible in which an interest in realty is devoted by any act of the public concerned, and excludes the idea that there can be any

waiver of an interest. *Whiting v. Butler*, 29 Mich. 122, 144.

The natural and ordinary meaning of the term "interest in lands" includes the entire right held in lands, and as used in an instrument conveying the grantor's interest without qualification it operates to convey all the right of the grantor. *Ragsdale v. Mays*, 65 Tex. 255, 257.

The statute of frauds, requiring all contracts for the sale of real estate or any "interest in or concerning lands," does not include a contract between the vendor and vendee that the latter would accept a deed to a less tract of land than the amount specified in the contract of sale, on consideration that the vendor repay the difference in value, as such a contract is entirely separable from the contract for the sale of the land. *Haviland v. Sammis*, 25 Atl. 394, 62 Conn. 44, 38 Am. St. Rep. 330.

As used in the treaty between the United States and Great Britain at the close of the Revolutionary War, the fifth article of which is as follows: "It is agreed that all persons who have any interest in confiscated land, either by debt, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights"—the words "interest in land \* \* \* by debt" mean an interest held as a security for money at the time of the treaty. *Owings v. Norwood*, 9 U. S. (5 Cranch) 844, 847, 3 L. Ed. 120.

The term "estate and interest in lands" as used in the chapter relating to frauds, shall be construed to express every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent, in lands. *Cobbe's Ann. St. Neb.* 1903, § 5971.

#### Contingent interest or remainder.

Code, § 2418, authorizing a transfer of any interest or claim to real estate, embraces a contingent, as well as a vested, interest; and this, though the interest was a naked possibility, the vesting of which was wholly uncertain. A contingent remainder, therefore, was an interest or claim within the statute, and might be conveyed, though it was uncertain as to the person. *Young v. Young*, 17 S. E. 470, 471, 89 Va. 675, 23 L. R. A. 642.

Rev. St. 1889, § 2395, providing that conveyances of land, or of any estate or interest in land, may be made by deed, should be construed to include a contingent remainder. *Godman v. Simmons*, 20 S. W. 972, 974, 113 Mo. 122.

A contingent remainder may be conveyed under Code, § 2418, as an interest or claim to real estate. *Young v. Young*, 17 S. E. 470, 471, 89 Va. 675, 23 L. R. A. 642.

#### Covenants as to improvements.

An "interest in land," as used in Rev. St. 1874, c. 82, § 2, making an interest in land liable to be subjected to a mechanic's lien, cannot be construed to mean that the interest which the lessee obtains by a covenant in the lease, by which he was to be repaid the appraised value of buildings and improvements made on leased premises by him, is an interest in land, so that a mechanic's lien could attach thereto. The lessee acquired no interest in the land itself, but had a right of action against his lessors for the value of his improvements; but this gave him no lien on the premises capable of being enforced against the grantees to the lessors, or any interest in rem to which a mechanic's lien could attach. *Watson v. Gardner*, 10 N. E. 192, 197, 119 Ill. 312.

Where a landlord, who had demised premises for a term of years at a certain sum per year, agreed with his tenant to lay out a certain sum in making improvements upon them, the tenant undertaking to pay an increased rent of a certain sum during the remainder of the term, was not a contract for an "interest in or concerning land," within the statute of frauds. No additional interest in the land is given to the tenant, for his interest was the same as before; nor is there any additional interest in the land given to the landlord. *Donellan v. Read*, 23 E. C. L. 215, 217.

#### Estate synonymous.

The word "interest" often is used to express or represent an "estate," as, for instance, an interest in a tract of land is often used as meaning the same thing as an estate in a tract of land. These two words are not infrequently used as convertible terms. *Hurst v. Hurst*, 7 W. Va. 289, 297.

The term "interest," as used in a statute subjecting a city to the payment of damages occasioned by the destruction of buildings to prevent the spreading of a conflagration, and providing that any person interested in the building may apply for a precept, and that the jury may assess the damages which the owners of such building and all persons having an estate and interest therein have sustained, really imports some share in the building itself, and was intended probably, if not to be regarded as synonymous with "estate," to include any degree of interest or claim therein which might not technically fall within any of the subdivisions of estates. It may well, however, be regarded as synonymous, as the term "estate," when used in reference to land, signifies simple interest therein, and both terms are in common use in the transfer of titles, as may be seen in the various forms of conveyance. The word "interest" is also frequently used by the Legislature in respect to real estate.

City of New York v. Stone (N. Y.) 20 Wend. 139, 142.

#### **Equitable interest.**

"Interest," as used in a fire insurance policy, providing that it shall be void if any change take place in the "interest" of the insured, is a broader term than the word "title," and includes both equitable and legal rights. *Gibb v. Philadelphia Fire Ins. Co.*, 61 N. W. 137, 138, 59 Minn. 267, 50 Am. St. Rep. 405; *Germond v. Home Ins. Co.* (N. Y.) 2 Hun, 540, 541; *Southern Cotton Oil Co. v. Prudential Fire Ass'n*, 29 N. Y. Supp. 128, 129, 78 Hun, 373; *William Skinner & Sons Shipbuilding & Dry Dock Co. v. Houghton*, 48 Atl. 85, 91, 92 Md. 68, 84 Am. St. Rep. 485; *State, to Use of Hafkemeyer, v. McKellop*, 40 Mo. 184, 185.

Such, also, is its use in Attachment Act, § 20 (Revision, p. 45), which provides that the word "lands" in this act shall be construed to include tenements, hereditaments, all real estate, and any interest therein. *Leathwhite v. Bennet* (N. J.) 11 Atl. 29, 30.

The words "estate or interest," as used in Rev. Codes N. D. § 5904, providing that actions to quiet title may be maintained by a plaintiff who has an estate or interest in real property, include both legal and equitable estates and interests. *Dalrymple v. Security Loan & Trust Co.*, 83 N. W. 245, 248, 9 N. D. 306.

Code Civ. Proc. § 1186, provides that mechanics' liens provided for in the chapter are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the work was done, materials furnished, etc.; also to any lien, mortgage, or other incumbrance of which the lienholder had no notice, and which was unrecorded at the time the building was commenced, work done, materials furnished, etc. Section 1192 declares that every building or other improvement mentioned in the chapter constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed under the chapter, unless such owner or person having or claiming an interest therein shall give notice, etc. Held, that the words "owner or person having an interest," as used in section 1192, mean one having a legal estate less than a fee, or such an equity as may be enforced by securing a transfer of a legal estate. It does not include the person referred to in section 1186 as having a lien, mortgage or incumbrance. The right of mortgagees and incumbrancers with reference to those to whom the provisions of the Code concede a lien are fixed and determined

by section 1186. *Williams v. Santa Clara Min. Ass'n*, 5 Pac. 85, 90, 66 Cal. 193.

In a provision in an insurance policy that the policy shall be void if any change other than by the death of the insured take place in the interest, title, or possession of the subject of insurance, where the policy covered oil which the insured sold to a third person, part of which was delivered, and afterwards warehouse receipts were sent for the balance and the price paid, such sale constituted a change in interest within the meaning of the policy. *Southern Cotton Oil Co. v. Prudential Fire Ass'n*, 29 N. Y. Supp. 128, 129, 78 Hun, 373.

#### **Improvements on public lands.**

"Interest in or concerning lands," as used in the statute of frauds, requiring a sale of an "interest in or concerning land" to be in writing, cannot be construed to include improvements on the public lands. *Zickafosse v. Hulick* (Iowa) *Morris*, 175, 178, 39 Am. Dec. 458.

#### **Inchoate right of dower.**

An inchoate right of dower is such an "interest in land" as will enable the wife to maintain an action to establish such contingent right and relieve a cloud fraudulently attempted to be created on it. *Madigan v. Walsh*, 22 Wis. 501, 504.

#### **Lease of furnished house.**

Where, as the consideration for a defendant's promise, plaintiff was to become tenant to the defendant of the house and furniture together, if certain things should be performed—that is, if the furniture should be sent into the house in a reasonable time—is an agreement for an "interest in land." *Mechelen v. Wallace*, 34 Eng. Com. Law, 35, 36.

#### **Leasehold.**

Lessees are persons interested in the land injured by changing the grade of the street, to whom a compensation should be made therefor, under Laws 1888, c. 845, § 12. *In re Grade Crossing Com'rs*, 44 N. Y. Supp. 844, 848, 17 App. Div. 54.

As used in Rev. St. c. 59, § 2, providing that no action shall be brought on any contract for the sale of any "interest in or concerning land" for a longer term than one year, unless such contract or some note or memorandum thereof be in writing, should be construed to include the remainder of a tenant's term, which is for a longer term than one year. *Chicago Attachment Co. v. Davis Sewing Mach. Co.*, 31 N. E. 438, 441, 142 Ill. 171, 15 L. R. A. 754.

"Interest in lands," as used in the statute of frauds, requiring a contract for the

sale of an interest in lands to be in writing, should be construed to include an agreement to build by a specified time a store, and when finished to rent it, together with an adjoining wharf, for a certain period at a specified annual rent. *Eaton v. Whitaker*, 18 Conn. 222, 229, 44 Am. Dec. 586.

As used in Act April 13, 1846, providing that, before entry under the right of eminent domain can be lawfully made, security must be given, etc., to the owner or "party interested," etc., should be construed to include a tenant of the land sought to be condemned. *Pennsylvania R. Co. v. Eby*, 107 Pa. 166, 172.

#### **Liability to loss.**

A person has an absolute interest in property, within the terms of a fire policy, where his interest is such that, if the property is destroyed by fire, he must necessarily sustain the loss. It is an "interest," not a title, of which the conditions of the policy speak. *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 20, 76 Am. Dec. 581.

#### **Liability of stockholders.**

The double liability of the stockholders of a bank is not an "interest," which it, as an insolvent debtor, can by its deed of assignment pass to its assignee, or in any manner vest the enforcement thereof in him. *Runner v. Dwiggins*, 46 N. E. 580, 581, 147 Ind. 238, 36 L. R. A. 645.

#### **Liability under warranty deed.**

St. 1874, c. 321, § 1, providing that any person "having an interest" in property on which a lien has been claimed may, at any time before final judgment in a suit brought to enforce such lien, release his interest in such property or in any portion thereof from such lien, by giving a bond with condition to pay a sum fixed as the value of the property or interest so released, cannot be construed to include a former owner of land subject to a mechanic's lien, which he has conveyed with a warranty against incumbrances. He might become liable on the covenants of his deed if a lien was sustained, and was thus remotely interested in the questions involved in a suit to enforce it; but he had no interest in the land which he could convey or on which the lien would operate. *Glendon County v. Townsend*, 120 Mass. 346, 348.

#### **License of beneficial privilege.**

As used in a provision of a statute of frauds declaring that all "interest in land" should be in writing, etc., such phrase does not include a license to enjoy a beneficial privilege on the land. *Taylor v. Waters*, 7 Taunt. 374, 378.

A right to take water from a well, by reason of the occupation of a dwelling house

and for the more convenient occupation thereof, is an interest in land. *Tyler v. Bennett*, 5 Adol. & E. 377, 378.

#### **Lien or mortgage.**

The word "interest" is the broadest term applicable to claims in or upon real estate, in its ordinary signification among the men of all classes. It is broad enough to include any right, title, or estate in or lien upon real estate. One who holds a mortgage upon a piece of land for half its value is commonly and truly said to be interested in it. *Ormsby v. Ottman* (U. S.) 85 Fed. 492, 497, 29 C. C. A. 295.

As used in an insurance policy, providing that if the interest of the assured in the property be untruly stated, or otherwise than unconditional and sole ownership, the word "interest" and "title" are not synonymous, but "interest" means the interest which is insured, so that, if a mortgage lien on the property is secured, it means an unconditional interest in the mortgage. *Hanover Fire Ins. Co. v. Bohn*, 67 N. W. 774, 776, 48 Neb. 743, 58 Am. St. Rep. 719.

The term "interest," as used in Act March 14, 1859, § 3, providing that, where a sheriff is about to sell property on execution, any person having "any interest therein" may claim the property, and that the sheriff in such case shall require a bond of the plaintiff in execution, means any right, whether legal or equitable, which may be acquired to personal property, and embraces a beneficiary in a deed of trust. *State, to Use of Hafkemeyer, v. McKellop*, 40 Mo. 184, 185.

Code Civ. Proc. § 1192, provides that every building or other improvement constructed upon any lands with the knowledge of its owner, or any person having "an interest in the lands," shall be held to have been constructed at the instance of such owner or person, and the interest owned or claimed shall be subject to any mechanic's lien filed in accordance with the provisions of the chapter, etc. Held, that the words "an interest in the lands" should not be construed to include the rights of a mortgagee. *Williams v. Santa Clara Min. Ass'n*, 5 Pac. 85, 91, 68 Cal. 193.

Code Civ. Proc. § 192, declares that every building or improvement constructed on any lands with the knowledge of the owner, or a person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person claiming such interest, and the interest owned or claimed shall be subject to any lien filed, unless such owner or person, within three days after he shall have obtained knowledge of the construction, alteration, or repair, etc., give notice that he will not be responsible for the same, etc. Held, that the

words "interest in the land" meant an estate or interest in the land which might be sold and conveyed, and did not include a mere lien, which would thereby become subject to another subsequent lien in the sense that the latter should acquire precedence over the former. *Williams v. Santa Clara Min. Ass'n*, 5 Pac. 85, 81, 66 Cal. 193.

The phrase "instrument by which any estate or interest in real property is created, transferred, mortgaged, or assigned, or by which the title to any real property may be affected," in Real Property Law, § 240, defining the term "conveyance" as including all such instruments, does not include a contract simply providing that the owner of the building may make final payment for repairs thereon by giving a mortgage as therein provided for, if the owner so desires, and binding the contractor to accept such mortgage in lieu of such final payment. *Davidson v. Fox*, 73 N. Y. Supp. 533, 585, 65 App. Div. 262.

#### Agreement to open a road.

The phrase "interest in land," in the clause of the statute of frauds requiring contracts affecting an interest in land to be in writing, does not include an agreement to remove a fence, so as to open a road to its original width. *Talmadge v. Rensselaer & S. R. Co.* (N. Y.) 13 Barb. 493-498.

#### Possession and right of control.

Code Civ. Proc. § 829, provides that on the trial of an action a party shall not be examined as a witness in his own behalf against a person deriving his title or interest from a deceased person concerning a personal transaction between the witness and decedent. Held, in an action for conversion, that where the property was in the possession of defendant's husband at the time of his death, and defendant derived her possession through him, her possession constituted an interest within the statute, and hence plaintiff could not testify concerning a conversation with decedent relating to the property; and this, though defendant was present at such conversation. *Byerer v. Smith*, 66 N. Y. Supp. 968, 969, 55 App. Div. 405.

In an opinion the court stated that "the delivery of a note to the wife vested the interest in the husband." Held, that the word "interest" should be construed to mean the right to and control over the wife's choses in action which the husband has during coverture. *Low v. Porter*, 14 N. J. Law (2 J. S. Green) 516.

An "interest in land," within the statute of frauds, requiring a contract for the sale of an interest in land to be in writing, should be construed to include the possession of land. Possession is prima facie evidence of title, and no title is complete without it. An agree-

ment to sell and deliver possession, as well as the improvements on land, is an agreement to sell an interest in the land. *Howard v. Easton* (N. Y.) 7 Johns. 205, 207; *Smart v. Harding*, 15 C. B. 652, 658.

#### Pre-emption right.

"Interest in land subject to sale on execution" does not include the right which a pre-emptor has in the land before the time when he fulfills the conditions prescribed by law and thereby obtains the title. *Bray v. Ragsdale*, 58 Mo. 170, 172.

#### Right of entry for breach of condition.

The phrase "estate or interest in real property descendible to heirs," in 2 Rev. St. p. 57, § 2, making such estate devisable, does not include the right of the grantor to re-enter for breach of the condition subsequent. *Uppington v. Corrigan*, 45 N. E. 859, 360, 151 N. Y. 143, 87 L. R. A. 794.

#### Right of way for boulevard.

Under Loc. Acts 1889, No. 888, § 15, authorizing the park commissioners to acquire by legal proceeding "any land or interest in lands which may be found necessary for the opening of any park, or enlargement or extension of any park or boulevard, which may be hereafter laid out," etc., a right of way for a boulevard may be condemned across railroad tracks, as it was known to the Legislature that a certain boulevard, already established under a previous act, of necessity crossed the right of way of numerous railroad companies, and the term "interest in lands" should be so construed as to give effect to the act and to further the very evident intent of the Legislature. *Commissioners of Parks & Boulevards of City of Detroit v. Michigan Cent. R. Co.*, 90 Mich. 885, 389, 51 N. W. 447, 448.

#### Sale of timber.

Standing timber is an interest in the land that may be acquired by deed. *Globe Lumber Co. v. Lockett*, 30 South. 902, 903, 106 La. 414.

"Interest in lands," as used in a statute providing that every contract for the sale and interest in lands shall be void unless in writing, includes an agreement for the sale of growing trees, with a right to enter on the land at a future time and remove them. *Green v. Armstrong* (N. Y.) 1 Denio, 550, 553; *Vorebeck v. Roe* (N. Y.) 50 Barb. 302, 306; *Kingsley v. Holbrook*, 45 N. H. 313, 319, 86 Am. Dec. 173; *Miller v. Zu Fall* (Pa.) 6 Atl. 350, 352.

#### As a share or portion.

The word "interest," as used in Rev. St. 1881, § 2483, fixing the widow's interest

in her husband's real estate generally at one-third thereof, means share, portion, some of the parts, but not all. *Pearson v. Pearson* (Ind.) 35 N. E. 288, 289.

#### **Shares in mine.**

Shares in a mine worked on the cost book principle do not constitute an "estate or interest in land," within the meaning of the fourth section of the statute of frauds, requiring such contracts to be in writing. *Powell v. Jessopp*, 18 C. B. 836, 854.

#### **Tax title.**

Under Comp. Laws, § 5449, authorizing any one who claims an estate or interest in real property to bring an action to quiet title, the word "interest," as used, is broad enough to authorize one claiming to be the owner of real estate to initiate proceedings to test the validity of an adverse claim, and so includes the interest held by a purchaser of land under a tax sale, though such interest is only a lien. *Clark v. Darlington*, 63 N. W. 771, 772, 7 S. D. 148, 58 Am. St. Rep. 835.

#### **Tenancy by the curtesy.**

Act April 11, 1835, giving authority to institute suits for partition to parties interested in real estate, notwithstanding there may be a life estate in part or parts of the property, with remainders over in fee, does not include a tenant by the curtesy, since such party has the right of exclusive possession for life. *Seiders v. Giles*, 21 Atl. 514, 515, 141 Pa. 93.

#### **Title synonymous.**

In construing the term "interest" in a fire insurance policy, providing that, if the interest of assured became other than the unconditional, unincumbered, and sole ownership, the policy should be void, the court said that "it is a matter of nice discrimination to determine whether the word 'interest,' as used in the condition, is synonymous with the word 'title,' or whether it means that and something besides. The authorities generally establish the rule that, where the condition is against any change in the legal title, an executory contract of sale is not a violation of the condition." The court intimated that the connection in which the word was used, being coupled with the idea of sole ownership, which related only to title, indicated that the word "interest" was used as synonymous with "ownership" or "title"; but it was held that, even if it were conceded that "interest" was used in any other sense than that of "ownership" or "title," an executory contract of sale, under which no deed had been passed nor possession been given, was not a change in assured's interest, forfeiting the policy. *Arkansas Fire Ins. Co. v. Wilson*,

55 S. W. 933, 935, 67 Ark. 553, 77 Am. St. Rep. 129.

As used in an insurance policy, the terms "interest" and "title" are not synonymous. A mortgagor in possession and a purchaser holding under a deed defectively executed have both of them absolute as well as insurable interests in the property, though neither of them has the legal title. "Absolute" is here synonymous with "vested," and is used in contradistinction to "contingent" or "conditional." *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 116, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17.

#### **Title by occupation.**

A title by occupation is an interest in real estate, and such an interest as is the subject of conveyance by deed. This doctrine is maintained in *Merritt v. Judd*, 14 Cal. 59, 60. Our courts having recognized the interest acquired by occupancy of public land as a legal estate, it necessarily follows that the title or interest in the land, however defined, carries with it the title to the structure annexed to the soil. *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.*, 24 Pac. 920, 921, 15 Colo. 29, 22 Am. St. Rep. 373.

#### **Town bonds.**

Code Civ. Proc. § 982, providing that an "action to establish a lien or other interest in real property" must be tried in the county in which the subject of the action or some part thereof is situated, cannot be construed to include an action to recover the amount due on town bonds, the validity of which is denied, though a judgment for plaintiff would be chargeable on the real property in the town. *Becker v. Town of Cherry Creek*, 24 N. Y. Supp. 19, 20, 70 Hun, 6.

#### **Water right.**

"Interest," as used in Gen. Laws, c. 1, § 20, providing that the words "land, lands, or real estate" shall include lands, tenements, hereditaments, and all rights thereto and interests therein, should be construed to include the water power or rights in a reservoir of water, for they are an interest in the land upon and by which they are created. *Winnipiseogee Lake Cotton & Woolen Mfg. Co. v. Town of Gifford*, 10 Atl. 849, 850, 64 N. H. 337.

"Interest in lands," as used in the statute of frauds, providing that the sale of an interest in lands must be in writing to be valid, etc., includes the right to enter upon lands and to erect and maintain a dam as long as there shall be employment for the water power thus created. *Mumford v. Whitney* (N. Y.) 15 Wend. 380, 390, 30 Am. Dec. 60.

**INTEREST (In Suit or Action).****As authorizing appeal.**

It is a well-established rule in chancery that a person, to be a party in interest entitling him to appeal, must be interested in the property involved in the issue. It is not sufficient that he may be interested in the question litigated, or that by the determination of the question litigated he may be a party in interest to some other suit growing out of the decision of the question litigated. *Elcan's Adm'r v. Lancasterian School* (Va.) 2 Pat. & H. 53, 69.

Prac. Act Ill. § 88, giving the Supreme Court jurisdiction to hear an appeal directly from the trial court in proceedings in which "the state is interested as a party or otherwise," should be construed to mean a substantial interest, as a monetary interest, and not to include a proceeding in the nature of quo warranto to try the title of a person to an office into which it was alleged he had intruded. *McGrath v. People*, 100 Ill. 464, 465.

Rev. St. c. 44, § 28, which provides that any person interested in any order, sentence, decree, or decision of any probate court, and considering himself injured thereby, may appeal, means persons who have some legal interest which may by the decree of the court be either enlarged or diminished. It does not include a person who claims an interest wholly adverse to the interest of the deceased on whose estate the probate court is administering. *Hemenway v. Corey*, 16 Vt. 225, 226.

Rev. St. c. 89, § 1, providing that a review of an action by an administrator with the will annexed against an alleged debtor of the estate may be obtained on petition by a party in interest who was not a party to the record in the action, does not include the widow of the testator, who is named in the will as residuary legatee. There is no doubt that she is directly interested in the suit, but it does not follow that she is a "party in interest," in the legal sense of that phrase, since a residuary legatee has, as such, no title to any item of the assets of the estate, nor is personally liable in any way for any damages or costs incurred by the executor until distribution. *Johnson v. Johnson*, 16 Atl. 661, 81 Me. 202.

Creditors of an heir of a testator are not parties interested in the estate of testator, and therefore cannot appeal from a decision of the register admitting to probate a will giving to the wife and children of such heir the share which he would otherwise have taken. In re *Shepard's Estate*, 32 Atl. 1040, 1041, 170 Pa. 323.

Swan & C. Rev. St. pp. 574, 575, § 48, providing that the court may, on a petition of the widow or other person interested, review the

allowance made to the widow, and increase or diminish the same, should be construed to include a person interested as a creditor in the estate of the widow after her death for services and expenses in supporting and taking care of her. *Sherman's Ex'r v. Sherman*, 21 Ohio St. 621, 634.

Act Oct. 18, 1840, providing that a party interested is entitled to a review of a decree confirming the report of an auditor to whom an executor's account had been referred, should be construed to include the surety of a surviving executor. In re *Smith's Estate* (Pa.) 12 Phila. 87.

A town is a party in interest, and entitled to sue out a writ of error to the Supreme Court to review a judgment depriving it of the right to exercise its franchise over part of the territory originally granted to it by the Legislature as a municipal subdivision of the state for the government of local affairs therein. *Winne v. People*, 52 N. E. 377, 177 Ill. 268.

**As authorizing bringing of suit.**

Except as to the unadministered estate, an administrator de bonis non is not "a person interested personally or in any official capacity," within the meaning of Rev. St. c. 72, § 10, authorizing such a person to sue on a probate bond. *Meservey v. Kalloch*, 53 Atl. 876, 877, 97 Me. 91.

A receiver, with the sole and exclusive right to receive money due on a note, is the "party really interested," within the meaning of Rev. Code, § 2523, authorizing such party to sue in his own name, whether the note sued on was the property of the state or of a township. *Yerby v. Sexton*, 48 Ala. 311, 316.

**As authorizing intervention.**

Comp. Laws, § 4889, which declares the parties can intervene only when they have an "interest in the matter in litigation," means such an interest as is created by a claim to the demand or some part thereof which is the subject of the suit, or a claim to a lien upon the property or some part thereof which is the subject of the litigation. *Yetzer v. Young*, 52 N. W. 1054, 1055, 3 S. D. 263.

An assignee for the benefit of creditors, in the absence of peculiar facts, has no such interest in the matter in litigation as entitles him to interfere to defend a purely personal action against his assignor. The subject of litigation is not property at all. Such interest must be that created by claiming it or demanding some part thereof, or a claim to a lien upon property or some part thereof, which is the subject of litigation. *McClurg v. State Bindery Co.*, 53 N. W. 428, 429, 3 S. D. 862, 44 Am. St. Rep. 799.

**As criterion of proper parties.**

The word "interest," when used as a criterion of the proper parties to a suit, means interest in its object, and not interest in its subject-matter. *Hare v. Headley*, 28 Atl. 452, 453, 52 N. J. Eq. (7 Dick.) 496 (citing *Calv. Parties*, pp. 9, 10); *Penn v. Bahnson*, 15 S. E. 586, 587, 89 Va. 253.

Code Civ. Proc. § 448, providing that all the parties to the action who are "united in interest" must be joined as plaintiffs or defendants, should be construed to include an executrix and her coexecutor, in an action to construe a will as to her rights under its provisions in the testator's estate, though such coexecutor had no pecuniary interest in the litigation. *Benner v. Benner*, 12 N. Y. Supp. 472, 473, 58 Hun. 609.

The court construed the phrase "any person interested," in Ky. St. §§ 4856, 4861, using the words "any person interested" in defining who are proper and necessary parties in probate proceedings, to include any person who claims title under an heir of the testator. *Davies v. Leete*, 64 S. W. 441, 111 Ky. 659.

**As disqualification to take deposition.**

The words "interested party," in the statute providing that a deposition may be taken before any justice of the peace not interested in the event of the cause, have a settled meaning in the law, and refer to such an interest as will disqualify a person from being a witness. The fact that a justice of the peace is the son-in-law of one of the parties does not make him an interested party, within the meaning of the statute. *Chandler v. Brainard*, 31 Mass. (14 Pick.) 285, 288.

A surety on a bond for costs in an action is interested therein to such extent that he is incompetent to take and return a deposition of a witness. *Floyd v. Rice*, 28 Tex. 341, 342.

An "interested person," within the meaning of a statute providing that no agent, attorney, or person interested in a cause shall write or draw up the deposition of any witness to be used in such cause, means an interest in the cause, and does not include the interest resulting from relationship by marriage to one of the parties. *Heacock v. Stoddard* (Vt.) 1 Tyler, 344.

An "interested person," within the meaning of Rev. St. c. 107, § 2, providing that a justice of the peace or notary public may take a deposition to be used in a pending case in which he is not interested, includes relations within the sixth degree. *Call v. Pike*, 66 Me. 350, 352.

Gen. St. tit. 1, § 141, providing that the party, his attorney, or any person interested, shall not write, draw up, or dictate any

deposition, should be construed to include a magistrate who was the law partner of the defendant's counsel, and was himself counsel for the defendant in another case. *Dodd v. Northrop*, 37 Conn. 216, 217.

**As disqualifying judge, etc.**

The term "interest," when applied to a justice of the peace being disqualified from hearing a case by reason of interest, means any interest, however small; the only exception known being in cases where there is a necessity that the person so interested should act, in order to prevent a failure in the administration of justice. *Pearce v. Atwood*, 13 Mass. 324, 340.

Within the meaning of Const. 1874, art. 7, § 20, which disqualifies a judge to sit in a cause in which he has an interest, it is not the kind of interest which one feels in public proceedings or public measures which disqualifies. It is a pecuniary or property interest, or one affecting the individual rights of the judge. The judge must have such an interest in the suit that, in the event of its decision, he will either gain or lose in a pecuniary way, in order to disqualify him. *Foreman v. Town of Marianna*, 43 Ark. 324, 329.

The term "interested in a result," as being a disqualification for a judge to act as presiding judge on the trial, means a pecuniary interest; and hence a judge of the Supreme Court is not disqualified from acting as presiding judge on the trial of a defendant charged with defaming the Supreme Court. *State v. Sutton*, 52 Atl. 116, 74 Vt. 12.

Code, § 560, providing that no judge of any court, chancellor, county commissioner, or justice may sit in any "cause or proceeding in which he is interested," means a cause or proceeding in which he has a direct or immediate interest, and not one in which his interest is remote or contingent. *Ellis v. Smith*, 42 Ala. 349, 353.

Const. art. 5, § 11, providing that no judge shall sit in any case where he may be interested, and that he is disqualified to try the cause, etc., does not necessarily mean that the judge should be a party to the proceedings. It is sufficient if he is in any wise interested in the subject-matter of the suit. The provision should receive a liberal construction. *Casey v. Kinsey*, 23 S. W. 818, 5 Tex. Civ. App. 3. It does not disqualify a judge in a misdemeanor case because his compensation is a fee to be paid by the defendant, if convicted. *Bennett v. State*, 4 Tex. App. 72.

It is a well-settled rule of the common law that, if a judge has any (the slightest) interest in the cause, he is disqualified from sitting in it; yet he was not by the common law disqualified from sitting in a cause in



which he had been of counsel. He may also, on an appeal, decide or take part in the decision of a cause determined by him when sitting in another tribunal. It must follow from this as a matter of course that the fact that the presiding judge had been of counsel in the case did not necessarily render him interested in it; and much less would it follow merely from his having been of counsel in another cause involving the same title. *Taylor v. Williams*, 26 Tex. 583, 586.

Rev. St. 1879, § 1041, providing that no judge who is "interested in any suit," or related to either party, or who shall have been of counsel in any suit or proceeding pending before him, shall without the express consent of the parties thereto sit on the trial or determination thereof, does not mean being a party to the record. Where a judge is a party to the record, the statute does not apply, and he cannot sit in the case, even by consent of parties. *City of Kansas v. Knotta*, 78 Mo. 356, 359.

Const. art. 5, § 11, disqualifying a judge from sitting in cases in which he is interested, should be construed to apply to the judge of a court who owns taxable property in a city, in an action against such city to cancel bonds issued by it. *City of Austin v. Nalle*, 22 S. W. 668, 670, 85 Tex. 520.

The word "interested," as used in the Code, disqualifying judges for interest, embraces only interest that is direct, proximate, substantial, and certain; and the mere contingent possibility that some future supposable financial condition of a municipality might in a slight degree affect a judge as a taxpayer will not strip him of all his personal judicial qualities. *Higgins v. City of San Diego*, 58 Pac. 700, 702, 126 Cal. 303 (citing *City of Oakland v. Oakland Water Front Co.*, 118 Cal. 249, 50 Pac. 268).

A judge owning stock in a bank intervening in a proceeding before him, involving the validity of bonds held by the bank, is interested within the meaning of the statute, and disqualified. *Adams v. Minor*, 121 Cal. 372, 373, 53 Pac. 815.

#### **As disqualifying sheriff.**

Rev. St. c. 14, § 97, providing that the sheriff shall serve all writs and precepts and perform all other duties of sheriff when he shall not be a party or "interested in the case," does not preclude a sheriff from serving writs in an action of replevin brought against his deputy for property attached by the latter, since the contingent interest of the sheriff, which may arise out of the suit afterwards, is not a sufficient interest to make him an interested party within the meaning of the statute. *Browning v. Bancroft*, 46 Mass. (5 Metc.) 88, 89.

Within *Wagner's St. Mo. c. 284, § 3*, which provides that the coroner shall execute

writs and precepts and perform all other duties of the sheriff when the sheriff shall be a party, or when it shall appear to the court out of which the process issued, or to the clerk thereof in vacation, that the sheriff is interested in the suit, etc., would not include the interest of a sheriff who owned stock in a corporation, so as to disqualify such sheriff to execute the process in an action in which such corporation is a party. *Hardwick v. Jones*, 65 Mo. 54, 59.

#### **As disqualifying witnesses.**

The interest which will disqualify a witness must be some legal, certain, and immediate interest in the result of the cause or in the record. *Inhabitants of China v. Southwick*, 11 Me. (2 Fairf.) 341, 342.

The interest which will disqualify a witness must be some legal, certain, and immediate interest, however minute, in the result of the cause or in the record as an instrument of evidence, acquired without fraud. *Schillinger v. McCann*, 6 Me. (6 Greenl.) 364, 368.

"Interest," as used in Code 1849, § 398, declaring that no person offered as a witness shall be excluded by reason of his interest in the event of the action, means some legal, certain, and immediate interest, however minute, in the result of the cause, or in the record as an instrument of evidence. *Fitch v. Bates* (N. Y.) 11 Barb. 471, 473.

"The true test of the interest of a witness, so as to render him incompetent to testify as to transactions with deceased persons, is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a personal, certain, and vested interest, and not an interest uncertain, remote, and contingent." *Jones v. Larrabee*, 47 Me. 474, 476 (quoting *Greenl. Ev.*); *Rix v. Hunt*, 44 N. Y. Supp. 988, 994, 16 App. Div. 540; *Miller v. Montgomery*, 78 N. Y. 282, 285; *Perine v. Grand Lodge A. O. U. W.*, 50 N. W. 1022, 1024, 48 Minn. 82; *Zerbe v. Reigart*, 42 Iowa, 229, 232; *McClure v. Otrich* (Ill.) 8 N. E. 784, 786.

"Interest," as used in the law of evidence, which disqualifies a witness in criminal cases on the ground of interest, means an interest in the event of the suit, so that the verdict could be given in evidence in an action in which such witness is a party. *People v. Howell* (N. Y.) 4 Johns. 296, 302.

Interest, such as will disqualify a witness to testify in a case, means a direct interest in the event of the suit; that is, the party, in order to be disqualified, must be immediately benefited or injured by the event of the suit, or the verdict to be obtained must be capable of being used as evidence for or against the witness in another action

in which he may afterwards be a party. *Hayes v. Grier* (Pa.) 4 Bin. 80, 83.

A person is interested in the result of a suit in either of three cases: First, where actual gain or loss would result simply and immediately from the verdict and judgment; second, where the witness is so situated that a legal right or liability would immediately result from the verdict and judgment; third, where the witness would be liable over to the party calling him in respect of some breach of contract or duty on the part of the witness involved in the issue. *Morgan v. Johnson*, 13 S. E. 710, 87 Ga. 382.

The maker of a note is an interested witness in an action by the indorsee against the indorser. *Ferris v. Saxton*, 4 N. J. Law (1 Southard) 1, 16.

The husband of one of the parties, who is not interested in the result otherwise than that his feelings may be enlisted in favor of the success of the wife, is not interested, so as to be disqualified. *Fogal v. Page*, 13 N. Y. Supp. 656, 658, 59 Hun, 625.

A witness is not shown to have been interested in the result of an action by the fact that he stated that he had a lawsuit with defendant, and that he had been advised by counsel that if plaintiff, for whom he testified, won her case, he would win his. *Rix v. Hunt*, 44 N. Y. Supp. 988, 994, 16 App. Div. 540.

It cannot be construed to include the sisters of the plaintiff in an action to compel specific performance of an agreement by plaintiff's father to devise lands in consideration of their purchasing such land and conveying it to the deceased for a home during his life, such sisters having deeded their interest in the land to plaintiffs without consideration, and their evidence was admissible as to conversation with their father relating to the agreement and the will. *Korminsky v. Korminsky*, 21 N. Y. Supp. 611, 612, 2 Misc. Rep. 138.

A provision excepting from the general abrogation of the old common-law rule one interested in the events of an action against a legatee, so far as any communication between such witness and the deceased person under whom the legatee claims is concerned, rendered a surety on the bond of an executor incompetent to testify as to transactions between himself and the testator in an accounting by the executor in which objections were filed by legatees. *Miller v. Montgomery*, 78 N. Y. 282, 285.

A person living as a member of plaintiff's household on the land in controversy and aiding in her support is not a party interested in the action, so as to be incompetent to testify in regard to a transaction with the deceased father of defendant. *Jones v. Emory*, 20 S. E. 206, 115 N. C. 158.

The wife of a complainant in a bill for a specific performance of a parol contract to devise realty has a direct interest in the subject-matter of the suit, and is a party in interest within the meaning of the Michigan statute providing that parties in interest cannot testify in regard to conversations held between the party and deceased. *Laird v. Laird*, 115 Mich. 352, 353, 73 N. W. 382.

In an action by an incorporated bank, the incorporators are substantially the parties in interest, and a stockholder of the bank cannot be compelled to testify as a witness by the adverse party, under the rule that a party to the suit or a party in interest cannot be required to testify. *Bank of Oldtown v. Houston*, 21 Me. (8 Shep.) 501, 507.

In an action against a trustee to compel an accounting and for a devastavit, the acting executor of the will, under which title to the trust funds passed to the trustee, who was not a party to the action, was not rendered incompetent to testify, as a party interested, though the title to the trust fund nominally passed through the hands of the executor to the trustee. *Putnam v. Lincoln Safe Deposit Co.*, 83 N. Y. Supp. 1091, 1094, 87 App. Div. 13.

A legatee of an estate in which there are debts outstanding and unpaid is a person interested in the event of a suit by the executor to set aside a fraudulent conveyance, and cannot be examined as a witness. *Brigham v. Gott*, 3 N. Y. Supp. 518, 521, 51 Hun, 636.

#### As entitling party to notice.

Persons summoned as trustees are not "parties interested," who must be notified of a motion for affirmance of judgment on exceptant's failure to enter the question in the Supreme Court. *Erlund v. Manning*, 36 N. E. 59, 160 Mass. 444.

By Rev. St. art. 1375 et seq., it is provided that a person moving for a new trial in the case therein specified should serve process on the other parties interested. Under this statute it is held that the word "parties" is used, as contradistinguished from the word "persons," a party being a party to the suit, so that service of process need only be made on the parties in the original suit, and a purchaser on execution under the judgment and his grantees need not be served. *Glaze v. Johnson*, 65 S. W. 662, 664, 27 Tex. Civ. App. 116.

"Persons interested," as used in the charter of a railroad company, providing a procedure by which the company may acquire land or materials by condemnation, and which requires notice of such proceedings to be given to the persons interested, includes "not only the person in whom is vested the legal title which the company proposes to acquire, \* \* \* but also other individuals having some independent right or interest

therein, not amounting to an actual legal estate, such as an easement of a right of way, inchoate rights of dower or curtesy, or incumbrances, such as judgments or mortgages, which are charges or liens on the legal estate." *National Ry. Co. v. Easton & A. R. Co.*, 36 N. J. Law (7 Vroom) 181, 184.

A mere naked trustee of an equitable trust is not a necessary party to proceedings to condemn lands, under the charter of a railroad requiring notice of such proceedings to be given to owners and persons interested. *McIntyre v. Easton & A. R. Co.*, 26 N. J. Eq. (11 C. E. Green) 425.

### INTEREST (On Money).

See "Accruing Interest"; "Annual Interest"; "Compound Interest"; "Conventional Interest"; "Future Interest"; "Illegal Interest"; "Lawful Interest"; "Legal Interest"; "Maritime Interest"; "Simple Interest"; "Usual Interest"; "With Interest"; "Without Interest." All interest, see "All."

Interest is the compensation which is paid by the borrower of money to the lender for its use, and generally by a debtor to his creditor in recompense for his detention of the debt. *Hale v. Forbis*, 3 Mont. 395, 405 (citing Bouv. Law Dict.); *Gardner v. Gardner*, 23 S. C. 588, 593; *Sorensen v. Central Lumber Co.*, 98 Ill. App. 581, 582; *Davis v. Rider*, 53 Ill. 416, 417; *Stone's River Nat. Bank v. Walter*, 104 Tenn. 11, 15, 55 S. W. 301, 302; *Whittemore v. Beekman* (N. Y.) 2 Dem. Sur. 275, 280; *Williams v. Scott*, 83 Ind. 405, 408; *Gardner v. Gardner*, 23 S. C. 588, 593; *Hubbard v. Callahan*, 42 Conn. 524, 528, 19 Am. Rep. 564; *Maddox v. Lewis*, 84 S. W. 647, 648, 12 Tex. Civ. App. 424; *Howard v. Bates County* (U. S.) 43 Fed. 276, 277.

Interest at common law is the legal damages or penalty for the unjust detention of money. *Madison County v. Bartlett*, 2 Ill. (1 Scam.) 67, 69; *People v. Same*, Id.

Interest is the price agreed to be paid for the use of money. *Hovey v. Edmison*, 22 N. W. 594, 601, 3 Dak. 449; *Bledsoe v. Nixon*, 69 N. C. 89, 91, 12 Am. Rep. 642.

Interest is a payment made for the privilege of using another's money. *Lawrence v. Thom*, 64 Pac. 339, 341, 9 Wyo. 414.

"Interest" is the name applied to the compensation which the law gives to a creditor, who is entitled to recover the sum of money loaned to his debtor in default. *Wilson v. Morgan*, 27 N. Y. Super. Ct. (4 Rob.) 58, 72 (citing Domat, bk. 3, tit. 5, § 1).

"Interest" is defined to be a profit or recompense allowed to be taken from the borrower by the lender as a charge for the loan. *State v. Multnomah County*, 10 Pac. 635, 639, 13 Or. 287.

Interest is the premium allowed by law for the use of money. *Gaar v. Louisville Banking Co.*, 74 Ky. (11 Bush) 180, 189, 21 Am. Rep. 209.

Webster defines "interest" as "a premium paid for the use of money and a profit per cent. derived from money lent or property used by another person or other debts remaining unpaid." *Hubbard v. Callahan*, 42 Conn. 524, 528, 19 Am. Rep. 564.

Interest is the compensation which may be demanded by the lender from the borrower, or the creditor from the debtor, for the use of money. *Shannon's Code Tenn.* 1896, § 3492.

Interest is the compensation allowed for the use or forbearance or detention of money, or its equivalent. *Rev. Codes N. D.* 1899, § 4061; *Civ. Code S. D.* 1903, § 1414; *Rev. St. Okl.* 1903, § 844.

Interest is the compensation allowed by law or fixed by the parties for the use or forbearance or detention of money. *Civ. Code Cal.* 1903, § 1915; *Civ. Code Mont.* 1895, § 2583; *Rev. St. Tex.* 1895, art. 3097; *People v. Sutter St. Ry. Co.*, 62 Pac. 104, 105, 129 Cal. 545, 79 Am. St. Rep. 187. See, also, *Hoare v. Allen* (Pa.) 2 Dall. 102, 103, 1 L. Ed. 307; *Borders v. Barber*, 81 Mo. 636, 646.

Interest has been defined to be a compensation allowed to a creditor for delay of payment by the debtor, and is impliedly due whenever a liquidated sum is unjustly withheld. *Kelsey v. Murphey*, 30 Pa. (6 Casey) 340, 341.

Interest is in the nature of damages for improperly withholding a debt beyond the time when it ought to be paid. *Farmers' Bank v. Reynolds* (Va.) 4 Rand. 186, 188.

Interest is a legal and uniform rate of damages allowed, in the absence of any express contract, when payment is withheld after it has become the duty of the debtor to discharge the debt. *Waller v. Kingston Coal Co.*, 43 Atl. 235, 238, 191 Pa. 193 (citing *Kelsey v. Murphy*, 30 Pa. 340; *Minard v. Beans*, 64 Pa. 411).

Interest is a sum paid for the use of money. It is allowed, not only on strict legal grounds, where there is a contract for the payment of interest, or by way of legal damages, where there is a tortious detention of a debt, but upon considerations of right and natural justice, when a party is entitled to the payment of money which, owing to various causes, he cannot obtain. *Williams v. American Bank*, 45 Mass. (4 Metc.) 317, 320.

The term "interest" cannot be predicated of any other than a loan of money, actual or presumed, and is defined to be a certain profit for the use of the loan. It implies that

the thing loaned has an established value, so that the lender, on its return, with the compensation fixed by law for the use and risk, may receive a certain profit. This is true only of money, which is legally supposed to have a fixed, unchangeable value in itself, and to be consequently the true measure of the value of all other property. A fixed rate per cent. on money, therefore, in contemplation of law, is supposed to give the lender a certain profit, because the thing loaned is of the same value at the end of the term as at its commencement. *Dry Dock Bank v. American Life Ins. & Trust Co.*, 3 N. Y. (3 Comst.) 344, 355.

Interest is a compensation, usually reckoned by percentage, for the loan, use, or forbearance of money. In this country the allowance of interest is sanctioned by the statutes of all the states, and has been held to be entirely a creature of statute, and only allowed where so authorized. The value of the use of money, or the rate of interest which a lender is entitled to receive for the use of his money, is an entirely different thing from the value of money as coined by the general government, and as used for the purposes of currency or as a circulating medium. The idea that the statutes of all the different states which regulate the rates of interest therein are a violation of that provision of the Constitution of the United States which confers upon Congress the power to coin money and regulate the value thereof is too fanciful to be regarded as serious. *Beach v. Peabody*, 58 N. E. 679, 680, 188 Ill. 75.

The expression "interest on money," as used in Const. art. 3, § 15, which provides that the Legislature shall not pass local or special laws regulating the "interest on money," are equivalent to the words "interest for the loan or forbearance of money," and refer exclusively to the question of lawful interest between borrower and lender, debtor and creditor, as distinguished from usury. *Kittle v. Shervin*, 7 N. W. 861, 864, 11 Neb. 65.

"Interest," as used in the by-law of a building and loan association, providing that any stockholder who fails to pay his or her monthly installments or "interest," shall pay a fine of 10 per cent. per month on the amount of the indebtedness, does not refer to interest due on any loan from a corporation to a stockholder. *Occidental Building & Loan Ass'n v. Sullivan*, 62 Cal. 394, 398.

"Interest," as used in a bond to pay the interest of a fund for one's lifetime support, should be construed in its usual sense of a compensation for the forbearance of money, and not otherwise to create a trust. The obligor was liable for the interest at a specified rate, and not at the rate received by him from his investment of the money. *Granger v. Pierce*, 112 Mass. 244-246.

#### **Deduction of in advance.**

"Interest" is compensation for the use of money. If the amount of interest is deducted in advance, the borrower never uses the interest so paid. It renders the borrower no service, performs no purpose, pays no debts, buys no property, satisfies no wants, and accomplishes nothing, as far as the borrower is concerned, for which he should be compelled to pay interest. *McCall v. Herring*, 42 S. E. 468, 472, 116 Ga. 235.

#### **As fund itself.**

A "bequest of interest" of a fund, without limitation, is a bequest of the fund itself. In *re Bruch's Estate*, 39 Atl. 813, 814, 185 Pa. 194 (citing *Garret v. Rex* [Pa.] 6 Watts, 14, 31 Am. Dec. 447; *Campbell v. Gilbert* [Pa.] 6 Whart. 72; *Appeal of Pennsylvania Ins. Co. for Insurances on Lives and Granting Annuities*, 83 Pa. 312).

When the interest of a fund is bequeathed to a legatee, or in trust for him, without any limitation as to continuance, it amounts to a bequest of the principal also. *Craft v. Snook's Ex'rs*, 18 N. J. Eq. (2 Beasl.) 121, 122, 78 Am. Dec. 94.

#### **As incidental to debt.**

Interest is but an incident to the debt that bears it; a rent that the debtor pays for the use of his creditor's money. *Brewster v. Wakefield*, 1 Minn. 352, 355 (Gil. 260, 263), 69 Am. Dec. 343.

Interest is a mere incident which the law attaches to a debt which is not paid at the time it falls due and ought to be paid. *Bank v. Hart*, 67 N. C. 264, 265.

Interest is to be regarded as incidental to the debt. Principal is always debt, and the debt. Interest is an accessory or incident to the principal. The principal is a fixed sum. The accessory is a constantly accruing one. The former is the basis or substance from which the latter arises, and on which it rests. *Howe v. Bradley*, 19 Me. 36. Interest on the principal debt is not, within the meaning of the Constitution, a part of the debt until it is due, and is not within the constitutional limitation. *Epping v. City of Columbus*, 43 S. E. 803, 808, 117 Ga. 263.

Interest bears the same relation to money that rent does to land, wages to labor, and hire to a chattel. It is considered as a necessary incident, the natural growth of money, and American courts incline to give it with the principal, while the English treat it as something distinct and independent, and only to be had by virtue of some positive agreement. *Woerz v. Schumacher*, 56 N. Y. Supp. 8-11, 37 App. Div. 374.

#### **As interest after maturity.**

Interest, being a creature of contract, is recoverable strictly as interest only during

the continuance of the contract, and as provided by its terms, before breach, and not after. It does not include the amount stipulated to be paid in a note, after the note becomes due; that is, where the note stipulates for the payment of a certain rate of interest after the note becomes due, the amount so stipulated to be paid is not interest in the strict sense of the term. *Mason v. Callender*, 2 Minn. 350, 363 (Gil. 302, 315), 72 Am. Dec. 102 (followed in *Bailly v. Weller*, 2 Minn. 384 [Gil. 338]).

The word "interest" has no such restricted signification that it must cease to be interest when the principal debt becomes due. *Hubbard v. Callahan*, 42 Conn. 524, 528, 19 Am. Rep. 564.

"Interest," as known to the common law, is defined as "a compensation, usually reckoned by a percentage, for the loan, use, or forbearance of money." *Abb. Law Dict.*; 11 Am. & Eng. Enc. Law, 379. This does not embrace the compensation for the detention of money beyond the time at which it was agreed to be paid; that is to say, after the maturity of the debt. Therefore the parties to a contract for the payment of money might lawfully stipulate that, on the failure of the debtor to pay at maturity, he should pay for its detention a rate in excess of what the law would allow as interest. The sum so agreed to be paid for the detention of the money is treated, not as interest, but as a penalty for failing to pay at maturity, and the legality of such a stipulation is upheld by practically unanimous authorities; but under Rev. St. art. 3097, defining "interest" as the compensation allowed by law or fixed by parties to a contract for the use or forbearance or detention of money, a stipulation that, on failure to repay a loan at maturity, the debtor shall pay for its detention a rate in excess of the legal rate of interest, is void. *Parks v. Lubbock*, 51 S. W. 322, 323, 92 Tex. 635.

#### Interest coupons.

"Interest," as used in Act Cong. March 3, 1887, c. 373, 24 Stat. 552, amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 514], providing that, in order that the United States Circuit Court should have jurisdiction of a cause, the subject-matter in dispute must exceed, exclusive of interest and costs, the sum or value of \$2,000, means compensation for the use of money or for its detention. Where interest coupons are attached to county bonds, such coupons constitute "interest," within the meaning of the act; it being none the less interest because it takes the form of a coupon. The coupons are in their legal essence no less interest, the product of the use of money borrowed, than if incorporated alone in the body of the bond itself. *Howard v. Bates County* (U. S.) 43 Fed. 276, 277.

#### As interest per annum.

An averment in a declaration that notes sued on were payable with interest at 6 per cent. per annum was authorized, where the notes as offered in evidence read merely, "Interest at 6 per." *Fitzgerald v. Lorenz*, 54 N. E. 1029, 1030, 181 Ill. 411.

The phrase, "interest at five per cent." from a certain date, as used in a claim for a mechanic's lien, will be construed to mean 5 per cent. per annum, under Rev. St. c. 74, § 79, providing that whenever a certain rate of interest is claimed, and no period of time is stated from which rate is to be calculated, it will be calculated by the year. *Hayes v. Hammond*, 44 N. E. 422, 424, 162 Ill. 133.

#### As legal interest.

A contract to pay "interest" generally means the legal standard of interest. *Archibald v. Thomas* (N. Y.) 8 Cow. 284, 290.

#### As penalty.

Interest is defined to be a penalty for not paying promptly the amount which is due. *Appeal of Plumly* (Pa.) 16 Atl. 728, 730.

Interest, where not contracted for, is in the nature of a penalty. *McKibben v. Peters*, 40 Atl. 288, 290, 185 Pa. 518.

The term "interest," as used in Const. art. 4, § 22, which forbids the passing of any local or special law regulating the rate of interest on money, does not include money paid under section 177 of the revenue act, which provides that unpaid taxes shall bear interest after the 1st day of May at the rate of 1 per cent. per month until paid. *People v. Peacock*, 98 Ill. 172, 177.

Interest is merely compensation for the use or forbearance of money, and is distinguished from penalty, which is a punishment. Thus a statute providing that taxes shall bear interest at the rate of 7 per cent. per annum does not constitute a penalty; such rate being the legal rate. *Sparks v. Lowndes County*, 25 S. E. 426, 427, 98 Ga. 284.

In the tax laws of Washington the words "penalty" and "interest" have well-defined meanings, and have never been used interchangeably. Thus in Sess. Laws 1889-90, p. 565, § 97, providing that taxes shall become delinquent on the 1st day of January, and that a penalty of 10 per cent. shall immediately accrue, and shall thereafter be charged up against such delinquent taxes, and all such unpaid taxes shall bear interest at the rate of 10 per cent. per annum until paid or forfeited. So, also, in the laws of 1891, 1893, and 1895, such or similar provisions are given. So that, as used in Laws 1899, p. 290, c. 141, § 8, which provides that the interest and penalties and delinquent taxes shall be paid into the current

expense fund of the county, and the tax laws then in force did not provide for a penalty, the word "penalty" was not synonymous with "interest," but related to the penalty effected under the prior statute. *City of New Whatcom v. Roeder*, 61 Pac. 767, 769, 22 Wash. 570.

Act 1891, § 152, provides that a penalty of 10 per cent. shall in November be added to those taxes which became delinquent during such month, and that a further penalty of 6 per cent. shall be added to all taxes that became delinquent at the preceding April and November settlements. Section 183 provides that on a certain date in December county auditors shall charge lands for which the taxes are delinquent with the amount of the delinquent taxes, with "interest and a penalty of 10 per cent." on such taxes. The word "interest" is used in the act in various other sections, but nowhere is there any rate of interest provided or any declaration of a charge of annual interest. Held, that the general interest law, providing a rate of 6 per cent. per annum for the forbearance of money, "and on an account stated from the day of settlement," did not apply to interest required by section 183 to be charged against the land, but that the "interest" referred to was the same thing as the 6 per cent. "penalty" provided for in section 152, for the charging up of which against the land there was no other provision. *Evansville & T. H. R. Co. v. West*, 87 N. E. 1009, 1011, 139 Ind. 254.

#### Premium.

By "interest" is understood the compensation for the use or detention of money; thus the term includes a 5 per cent. payment designated as the "premium," on a note, and required in addition to the regular interest specified. *Seastrunk v. Pioneer Savings & Loan Co. (Tex.)* 34 S. W. 466, 467.

#### Principal correlative.

The terms "principal" and "interest" are correlative. Each implies and excludes the other. That which is principal cannot be interest. Yet we contract for compound interest, and this necessarily is an agreement that the installment of interest which is compound shall be made a principal and bear interest. But the term "principal" applies to the new sum only in relation to the interest upon it, and it is still true that this principal itself accrued upon the contract sued upon as interest. If we were to speak of it with reference to the original principal, or in regard to the mode in which it accrued or the obligation became part of the debt, we should call it "interest." Hence Const. art. 6, § 5, giving superior courts jurisdiction of cases in which the demand, exclusive of interest, amounts to \$300, does

not give them jurisdiction of an action on a note originally for less than \$300, but which by compounding the interest has created a new principal, amounting to more than \$300. *Christian v. Superior Court of San Diego County*, 54 Pac. 518, 519, 122 Cal. 117.

#### As profits.

Where a testator stated it to be his will and desire that, after the payment of funeral expenses and just debts, his wife should have the interest and profits annually accruing from the sum of \$4,000, which she might loan out or otherwise invest, the words "interest" and "profits" were used as synonymous terms. *First Nat. Bank v. Lee (Ky.)* 66 S. W. 418, 414.

A testator directed that trustees should invest, for the benefit of his children, the estate devised, and should receive the interest and income of such estate for the use of the children during their life, with remainders over after death. Under an offer of the United States government to give its 4 per cent. bonds in exchange for an equal amount of outstanding 6 per cents., known as "5-20's," and pay accrued interest, together with three months' additional interest on the latter, the trustees exchanged 5-20's for 4 per cents. It was held that the interest on the 5-20's and all the interest on the 4 per cents. belonged to the life tenants, but that the additional three months' interest on the 5-20's belonged to the remaindermen as an accretion of the capital. In the course of its opinion the court said: "Interest is defined to be compensation for the use of money, and income as gain from invested property. Now, it is very evident that the so-called three months' additional interest received upon the 5-20 bonds after they were surrendered and refunded cannot in any proper sense be denominated interest or income, as being paid for the use of money or gain from invested property, for the reason that said bonds had lost their identity and were merged into another security, bearing another and different rate of interest; otherwise, the beneficiaries would receive double interest upon the same funds, viz., 6 per cent. on the 5-20 bonds and 4 per cent. upon the 4 per cent. consols, making in all 10 per cent. upon the trust funds for the same period of time; whereas there was but one investment in 5 per cent. consols after the surrender and refunding of the 5-20's. *Scovel v. Roosevelt (N. Y.)* 5 Redf. Sur. 121, 124.

#### INTEREST COUPONS.

Interest coupons, attached to municipal bonds, are evidences of debt in the nature of promissory notes, so that a national bank may deal in them. *Newport Nat. Bank v.*

Board of Education of Newport (Ky.) 70 S. W. 186, 187 (citing *First Nat. Bank v. Bennington* [U. S.] 9 Fed. Cas. 97, 98).

Interest coupons are instruments of a peculiar nature. The title to them passes from hand to hand by mere delivery. A transfer of possession is presumptively a transfer of title, and especially is this true when the transfer is made to one who is not a debtor—to one who is under no obligation to receive them or to pay them. *Curtiss v. McCune* (Neb.) 94 N. W. 984, 986.

#### INTEREST IN COMMON.

An interest in common is one owned by several persons, not in joint ownership or partnership. Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership for partnership purposes, or unless declared in its creation to be a joint interest, or unless acquired as community property. *Civ. Code Cal.* 1903, §§ 685, 686; *Civ. Code Idaho* 1901, § 2350.

An interest in common is one owned by several persons, not in joint ownership or partnership. Every interest created in favor of several persons in their own right, including husband and wife, is an interest in common, unless acquired by them in partnership for partnership purposes, or unless declared in its creation to be a joint interest. *Civ. Code Mont.* 1895, §§ 1107, 1108; *Rev. Codes N. D.* 1899, §§ 3285, 3286; *Civ. Code S. D.* 1903, §§ 201, 202.

#### INTEREST IN FEE.

"Interest in fee," as used within *Rev. St. N. Y.* p. 137, providing that every grant of an interest in fee shall be subscribed and sealed by the grantor or his agent, includes the grant in fee of the right to bring water through pipes across the land of one for the benefit of another. *Nellis v. Munson*, 15 N. E. 739, 108 N. Y. 453.

#### INTEREST POLICY.

There has been an effort at distinction between what are called interest policies and wager policies, which has not always been very happy; for policies have been upheld which look like mere wagers, and policies have been held for wagers which would go only to indemnify the assured. The rule of distinction was, perhaps, too arbitrary, and did not always operate justly; and it is perhaps to this cause, as well as to change in the usages of business, that later relaxation of older rules is to be attributed. An interest policy is one which shows by its form that the assured has a real, substantial interest; in other words, that the contract of insurance embodied by

the policy is a contract of indemnity, and not a wager. A wager policy is one which shows on the face of it that the contract it embodies is really not an insurance, but a wager; a pretended insurance founded on an ideal risk, where the assured has no interest in the thing insured. *Sawyer v. Dodge County Mut. Ins. Co.*, 37 Wis. 503, 539.

#### INTEREST TO BECOME PRINCIPAL.

A provision in a note that interest not paid at maturity is to become part of the principal is to be construed as requiring the payment of interest on all unpaid interest after maturity. This conclusion "comports with the general signification of the language as ordinarily used and understood." Thus in *Chesterfield v. Cromwell*, 1 Eq. Cas. Abr. 287b, Lord Keeper Wright admitted the general rule that interest could not carry interest, but held in some cases it would be injustice not to regard the interest as principal. In the case of *Howard v. Farley* (N. Y.) 19 Abb. Prac. 126, 129, Morrell, J., says: "If the interest is demanded when due, it becomes principal from that time." In all these cases "interest regarded as principal" means simply that the interest shall bear interest like the principal. *Meyer v. Graeber*, 19 Kan. 165, 166.

#### INTERESTED.

See "Beneficially Interested."

All who may feel interested, see "All."

Any person interested, see "Any."

Parties or persons interested, see "Interested"; "Interest (In suit or action)."

A power of attorney to convey "all lands to or in which I am or may be in any way entitled or interested," refers to a title or interest existing at the time of exercising the power. *Carson v. Smith*, 12 Minn. 546, 569 (Gil. 458, 483).

*Pub. St. c.* 141, § 16, providing that a trustee shall be exempt from giving sureties on his bond when all the persons beneficially interested in the trust so request, means all the persons who have a present vested interest, and includes all persons who may possibly become interested in the future. *Dexter v. Cotting*, 21 N. E. 230, 149 Mass. 92.

#### INTERFERE—INTERFERENCE.

Laws 1887, c. 139, declaring that employers shall not interfere with a labor commissioner in obtaining the ages and places of birth of children in their employ, means active personal obstruction, and not refusal or neglect to furnish data. It partakes more of the nature of nonfeasance

than misfeasance. *State v. Donaldson*, 24 Atl. 528, 84 Me. 55.

An agreement of a silk mercer and his creditors, by which they were to continue to allow him to carry on the business, and if they should at any time during the continuance of the license "molest or interfere with" him, contrary to the agreement, he should be released and exonerated, means such sort of molestation and interference as the parties might lawfully resort to, having relation to their situation as creditors and debtors. *Gibbons v. Vouillon*, 8 C. B. 483, 498.

To compel men to refrain from labor solely from regard to the imputed holiness of a particular day is not, within the meaning of the Constitution, to "interfere" with and constrain the consciences of those who honestly disbelieve the asserted sanctity of the selected day. *Specht v. Commonwealth*, 8 Pa. (8 Barr) 312, 324, 49 Am. Dec. 518.

Const. 1868, providing that the Legislature shall not "interfere with the term of office" of any judge, does not include the power to abolish the office and thereby put an end to the term. *Board of Sup'rs of Van Buren County v. Mattox*, 30 Ark. 566, 567.

An interference with an easement of access from a street of an abutting property holder is pro tanto a termination of it, and it makes no difference in principle whether the right is partially or wholly destroyed. Such abutting property holder is entitled to compensation. *Ferguson v. Covington & C. El. R. & Transfer & Bridge Co.*, 57 S. W. 460, 462, 108 Ky. 662.

The use of the word "interference" in a circular published by the Secretary of the Interior and sent to bidders for government contracts for supplies for the use of the several departments, wherein it was stated that, in the preparation of bids for furnishing envelopes and stationery for the use of the Department of the Interior, any interference on the part of L., a former chief of the stationery and printing division, will not be to the interest of any person or firm represented, implies that L.'s employment would be regarded by the department as an intermeddling and an officious interference therewith, and that he was incompetent as a government official, as well as in his present occupation as a broker. *Lapham v. Noble* (U. S.) 54 Fed. 108, 109.

A contract for carrying on a lottery stipulated that, in the event of any interference by the legislative, judicial, or any other power, so that those conducting the lottery could not carry on the business, their obligation to make certain payments called for by the contract should cease. Held, that nothing

was an "interference," within the meaning of the contract, unless done by some legally constituted power, acting within the scope of duties assigned to it, and of such a character as to have the legal effect of preventing the conduct of the business. A judgment of ouster in quo warranto proceedings, from which an appeal was taken, and which was finally reversed, never took effect, so that any acts thereunder by officers of the law were unwarranted and mere trespasses, and did not amount to an interference by a legislative or judicial power. *State v. France*, 72 Mo. 41, 45.

#### In patent law.

The term "interference" is one well known in the patent law, and is defined to be the act or state of claiming a right to the same invention. *Milton v. Kingsley*, 7 App. D. C. 531, 540 (quoting *Webst. Dict.*).

Strictly speaking, an interference is declared to exist by the Patent Office whenever it is decided by the properly constituted authority in that bureau that two pending applications, or that a patent and a pending application, in their claims or essence, cover the same discovery or invention, so as to require an investigation into the question of the priority of invention between the two applications, or the application and the patent. Hence the word "interfere," as used in an assignment by which the parties intended to convey a class of discoveries, applications, and patents, which do or may interfere with certain patents and applications, will be considered in its technical sense. *Lowrey v. Cowles Electric Smelting & Aluminum Co.* (U. S.) 68 Fed. 354, 372.

"Interference," as used in Rev. St. § 4918 [U. S. Comp. St. 1901, p. 3394], of the law relating to patents, is essentially distinct from infringement, and two patents will be deemed to interfere only when they claim in whole or in part the same invention. *Dedrick v. Fox* (U. S.) 56 Fed. 714, 717.

"Interference," as used in Rev. St. U. S. § 4918 [U. S. Comp. St. 1901, p. 3394], providing that, where there are "interfering" patents, any person interested may have relief against the interfering patentee, means that two patents interfere only when they claim in whole or in part the same invention. *Nathan Mfg. Co. v. Craig* (U. S.) 49 Fed. 370.

Where a dominant broad claim to a patent was filed, and a subordinate specific claim to a junior patent was also filed, no "interference" exists, within the meaning of the statute relating to patents. *Stonemetz Printers' Mach. Co. v. Brown Folding Mach. Co.* (U. S.) 57 Fed. 601, 605 (citing *Pentlarge v. New York Bung & Bushing Co.* [U. S.] 20 Fed. 314).



## INTERLINEATION.

Interlineation is the act of writing between the lines of an instrument. An interlineation, if made after the execution of a deed, will avoid it, though not an immaterial point; nor is it to be presumed to have been made before. The presumption is to the contrary. *Morris' Lessee v. Vanderen* (Pa.) 1 Dall. 64, 67, 1 L. Ed. 38.

To "interline," says Webster, "is to write between lines already written, for the purpose of adding to or correcting what is written." An interlineation in a will raises a presumption that the interlineation was made after the will, or at least the clause in which it occurs, was written; but it does not follow that the same, when made, did not become a part of the will as much as any other portion. *Russell v. Eubanks*, 84 Mo. 82, 88.

## INTERLOCK.

"Interlock" means to unite, embrace, communicate with; to flow into one another; to unite by locking together; to lock one with another. Within the meaning of a statute providing that, when two or more railroads cross each other at a common grade, there shall be a system of interlocking, rendered safe, etc., it is held that the provision means no more than that the railroad attempting to cross the track of another railroad shall make such a connection with the other railroad as is approved by the commissioner of railroads and telegraphs, or, in other words, shall lock or unite the two tracks together at the crossing. *Lake Shore & M. S. Ry. Co. v. Cleveland, B., E. & O. Ry. Co.*, 7 Ohio S. & C. P. Dec. 558, 561, 5 Ohio N. P. 83.

The "interlocking system" is a tower built near the point of crossing of two roads, and in that tower are placed wires connected by levers with signals each way at a distance sufficient to insure the stoppage of a train before it reaches the point of crossing. The interlocking feature consists in a wire connection, by which a signal movement necessarily shows a signal on each road on each side of the crossing. *Jersey City, H. & P. St. Ry. Co. v. New York, S. & W. Ry. Co.*, 53 Atl. 709, 710, 62 N. J. Eq. 390.

## INTERLOCUTORY.

"Interlocutory," in law, means, not that which decides the cause, but that which only settles some intervening matter relating to the cause. *Mora v. Sun Mut. Ins. Co.* (N. Y.) 13 Abb. Prac. 304, 310; *Moza v. Same* (N. Y.) 22 How. Prac. 60, 62.

### INTERLOCUTORY APPLICATION.

An interlocutory application is a request made to the court, or to a judge in cham-

bers, for its interference in a matter arising in the progress of a cause or proceeding; and it may either relate to the process of the court, or to the protection of the property in litigation pendente lite, or to any matter on which the interference of the court or judge is required before or in consequence of a decree or order. *Wooster v. Handy* (U. S.) 23 Fed. 49, 53 (citing 2 Daniell, Ch. Prac. c. 35, § 1).

### INTERLOCUTORY COSTS.

Both in law and equity there were interlocutory and final costs. Those that were interlocutory were such as were allowed, taxable, and payable during the progress of the cause from time to time as different stages were reached, and those that were final were such as were not allowable, taxable, or payable until the case had been finally determined; but in all cases the items were well ascertained, and usually were the subject of specific regulations, fixing small sums for particular services of the clerk, attorney, or other officers of the court. Those that were final were not necessarily for services performed in and about the ceremony, or trial, or final hearing, but were for services performed from the very commencement, all along through the case, and including the costs not strictly taxable as interlocutory, which were comparatively less, and were limited to those that were within the interlocutory proceeding itself. *Goodyear v. Sawyer* (U. S.) 17 Fed. 2, 6.

Costs allowed on a demurrer were not "interlocutory costs," within the meaning of the statute providing that no person shall be imprisoned for nonpayment of interlocutory costs, but are costs on the trial of an issue at law, and can only be collected by execution on the final judgment in the action. *Moza v. Sun Mut. Ins. Co.* (N. Y.) 22 How. Prac. 60, 62; *Mora v. Same* (N. Y.) 13 Abb. Prac. 304, 310.

### INTERLOCUTORY DECREE OR JUDGMENT.

An interlocutory decree is one which is made pending the cause and before a final hearing on the merits. *Chouteau v. Rice*, 1 Minn. 24, 26 (Gil. 8, 10); *Linn v. Arambould*, 55 Tex. 611, 617 (citing Freeman).

"An interlocutory decree is one which leaves the equity of the case, or some material question connected with it, for future determination. Where the further action of the court is necessary to give the complete relief contemplated by the court on the merits, the decree under which the further question arises is to be regarded, not as final, but as interlocutory." *Teaff v. Hewitt*, 1 Ohio St. 511, 520, 59 Am. Dec. 634; *McKinney v. Kirk*, 9 W. Va. 28, 29.

An interlocutory judgment on an issue as to the merits is a final determination of part of the issue, which leaves the rest of the issue to be thereafter adjudged. *Garner v. Harmony Mills*, 45 N. Y. Super. Ct. (18 Jones & S.) 148, 152.

An interlocutory decree is a decree rendered when the consideration of the particular question to be determined in the litigation or the further consideration of the cause in general is reserved until some future time. *Wooster v. Handy* (U. S.) 23 Fed. 49, 56 (citing 2 Daniell, Oh. Prac. c. 26, § 1); *Bissell Carpet Sweeper Co. v. Goshen Sweeper Co.* (U. S.) 72 Fed. 545, 554, 19 C. C. A. 25; *Ex parte Crittenden*, 10 Ark. (5 Eng.) 333, 367; *Dudley E. Jones Co. v. Munger Improved Cotton Mach. Mfg. Co.* (U. S.) 50 Fed. 785, 1 C. C. A. 668.

The further hearing is termed a "hearing on further directions," or "on the equity reserved." Where a decree is merely interlocutory, and directs an issue, or a case at law, or an inquiry to be made, or an account to be taken by the master, it usually contains a reservation of the further matters to be decided, and generally, also, of the costs, until after the event of the issue or case, or of the inquiry or grant, shall be known. *Ex parte Crittenden*, 10 Ark. (5 Eng.) 333, 367.

An "interlocutory decree" is generally applied to decrees in which some matter either of law or of fact is directed preparatory to a final decision. *Brush Electric Co. v. Electric Imp. Co.* (U. S.) 51 Fed. 557, 560; *Beebe v. Russell*, 60 U. S. (19 How.) 283, 15 L. Ed. 668; *Davie v. Davie*, 12 S. W. 558, 52 Ark. 224, 20 Am. St. Rep. 170.

An interlocutory judgment is one which determines some preliminary or subordinate point or plea, or settles some special question or default arising in the progress of the cause, but does not adjudge the ultimate rights of the parties, or finally put the case out of court. *Fuller v. Tuska*, 17 N. Y. Supp. 356, 357; *Merriam v. Chicago & E. I. R. Co.* (U. S.) 64 Fed. 535, 547; *Dusing v. Nelson*, 2 Pac. 922, 923, 7 Colo. 184; *Pfeiffer v. Crane*, 89 Ind. 485, 488; *Western Union Tel. Co. v. Locke*, 7 N. E. 579, 580, 107 Ind. 9; *Turner v. Browder*, 57 Ky. (18 B. Mon.) 825, 826; *Elliott v. Mayfield*, 3 Ala. 223, 226, 229; *Nacoochee Hydraulic Min. Co. v. Davis*, 40 Ga. 309, 320; *Holden's Adm'rs v. McMakin* (Pa.) 1 Pars. Eq. Cas. 270, 288.

An interlocutory judgment is one which does not decide on the merits. It is either ancillary to or executory of the final and complete adjudication of the case. *State v. Hart*, 20 South. 186, 191, 48 La. Ann. 1008.

An "interlocutory judgment" is an intermediate judgment, where the rights of the parties are settled but something remains to

be done, as when there is an accounting to be had, a question of damages to be ascertained, or a reference required to determine the amount of rent due for use and occupancy. *Cambridge Valley Nat. Bank v. Lynch*, 76 N. Y. 514, 516.

A judgment that provides for certain and definite action in a case before a final judgment may be an "interlocutory judgment," but when the court declares in effect that it will not proceed with the case, either under such judgment or in pursuance of the interlocutory order, without providing any definite act to be performed or the manner of performance, it can hardly be said to be an interlocutory order, especially where it amounts practically to a perpetual stay of the proceedings, because the fact to be ascertained is impossible of ascertainment before final judgment. *Breed v. Ruoff*, 66 N. E. 5, 6, 173 N. Y. 340.

#### Accounting or reference.

An interlocutory decree is one made in the progress of a cause, for the purpose of ascertaining some matter of fact or law preparatory to a final decree. *Delap v. Hunter*, 33 Tenn. (1 Sneed) 101, 104 (citing Barb. Ch. Prac. 326); *Richmond v. Atwood*, 52 Fed. 10, 21, 2 C. C. A. 596, 17 L. R. A. 615; *Maloney v. Jones* (Tenn.) 59 S. W. 700, 705. This is done by reference to the master, a commission, or jury in an interlocutory decree, by the terms of which the principles governing the rights of the parties are generally settled, but a more perfect ascertainment of the facts to which they apply is necessary for a final disposition of the case. *Delap v. Hunter*, 33 Tenn. (1 Sneed) 101, 104 (citing Barb. Ch. Prac. 326); *Maloney v. Jones* (Tenn.) 59 S. W. 700, 705.

Interlocutory decrees may be made to approach the final decree until the line of discrimination becomes too fine to be readily perceived; but an order sustaining the validity of a patent, directing a perpetual injunction against its infringement, and referring the cause to a master to take an account, is an appealable interlocutory decree. *Dudley E. Jones Co. v. Munger Improved Cotton Mach. Mfg. Co.* (U. S.) 50 Fed. 785, 1 C. C. A. 668; *Richmond v. Atwood* (U. S.) 52 Fed. 10, 21, 2 C. C. A. 596, 17 L. R. A. 615; *Bissell Carpet Sweeper Co. v. Goshen Sweeper Co.* (U. S.) 72 Fed. 545, 554, 19 C. C. A. 25.

The term "interlocutory decrees" includes all decrees previous to a final decree, which are incapable of enrollment, "although they discuss and decide the point or points in controversy. Particularly is this so as to such decrees which refer any matter to a master, where facts must be ascertained and a report must be made before the rights of the parties are completely and finally set-

ted." *Jenkins v. Wild* (N. Y.) 14 Wend. 539, 543.

A decree made after final hearing on the merits, declaring infringement of a trademark, awarding a perpetual injunction, and referring the cause to a master for an accounting, is an "interlocutory decree." *Raymond v. Royal Baking Powder Co.* (U. S.) 76 Fed. 465, 466, 22 C. C. A. 276.

The action of the chancellor in confirming a commissioner's report in proceedings to wind up the business of a partnership is only interlocutory, and the correctness of the report may be passed on at the final hearing, and a final judgment rendered. *Adkisson v. Dent*, 11 S. W. 950, 951, 88 Ky. 628.

Where a decree decides the right to property in contest, and directs it to be delivered up or sold, and the plaintiff is entitled to have it carried into immediate execution, it is a final decree to that extent, although it may be necessary by a further bill to adjust the account between the parties. *Forgay v. Conrad*, 47 U. S. (6 How.) 201, 206, 12 L. Ed. 204; *Thomson v. Dean*, 74 U. S. (7 Wall.) 342, 19 L. Ed. 24; *Davie v. Davie*, 52 Ark. 224, 12 S. W. 558, 20 Am. St. Rep. 170.

A decree is interlocutory which finds the general equities, where the cause is retained for reference, feigned issue, or consideration to ascertain some matter of fact or law. When again it comes under the consideration of court for final disposition, when the cause is retained for further action, it is interlocutory. *Kelley v. Stanbery*, 18 Ohio, 408, 421.

"A decree is said by Mr. Harrison (1 Harrison, Ch. 420) to be interlocutory when it happens that some material circumstance or fact necessary to be made known to the court is either not stated in the pleadings or so imperfectly ascertained by them that the court is unable to determine finally between the parties, and therefore a reference to or an inquiry before a master, or a trial of facts before a jury, becomes necessary to remove the doubts occasioned by that defect. The court in the meantime suspends its final judgment, until by the master's report or the verdict of the jury it is enabled to decide finally." *Kane v. Whittick* (N. Y.) 8 Wend. 219, 224; *Travis v. Waters* (N. Y.) 12 Johns. 500, 508.

#### **Construction of trust.**

The term "interlocutory decree," and not "final decree," characterizes decrees in a suit by a trustee against a beneficiary for a construction of the trust, in which only a part of the rights of parties are adjudicated. *Marks v. Semple*, 20 South. 791, 793, 111 Ala. 637.

#### **Damages unascertained.**

"The interlocutory judgments most usually spoken of," says Blackstone, "are those

incomplete judgments whereby the rights of the plaintiff are indeed established, but the quantum of the damages as sustained by him is not ascertained." Thus a judgment for so much of plaintiff's claim as is not denied by the affidavit of the defendant, under an order granting such judgment, with leave to plaintiff to proceed to trial for the other part of his claim, is an interlocutory, and not a final, judgment. *Stedman v. Poterie*, 21 Atl. 219, 220, 139 Pa. 100.

#### **Decision on demurrer.**

A judgment of a General Term of the City Court of New York, affirming a judgment of the Special Term overruling a demurrer to the complaint, does not finally put the case out of court, but leaves plaintiff to pursue the pleadings necessary to perfect his recovery, and is an interlocutory judgment. *Fuller v. Tuska*, 17 N. Y. Supp. 356, 357.

A decision of the court sustaining or overruling a demurrer is an order, and not an interlocutory judgment. *Cambridge Nat. Bank v. Lynch*, 76 N. Y. 514, 516; *Garner v. Harmony Mills* (N. Y.) 6 Abb. N. O. 212, 222, 223.

#### **Decree affirming interlocutory decree.**

An interlocutory decree includes a decree of the court of chancery affirming an interlocutory decree of the county court, from which chancery court decree an appeal is taken to the Court of Appeals. *Fretwell v. Wayt* (Va.) 1 Rand. 415, 417.

#### **Final decree or judgment distinguished.**

See "Final Decree or Judgment."

#### **Foreclosure.**

A judgment entered in a foreclosure action is final for all purposes of review, but in other respects it is interlocutory. *Nutt v. Cuming*, 49 N. E. 880, 881, 155 N. Y. 309.

A decree of foreclosure and sale is not final, in the sense which allows an appeal from it, so long as the amount due upon the debt must be determined and the property to be sold ascertained and defined. *North Carolina R. Co. v. Swasey*, 90 U. S. (23 Wall.) 405, 410, 23 L. Ed. 136.

#### **Interlocutory order distinguished.**

In using the language "interlocutory decree or order" or from which an appeal may be taken, it will be assumed that Congress had regard to the distinction between an interlocutory order and an interlocutory decree, and intended, by allowing an appeal from an interlocutory order granting or continuing an injunction, to describe those preliminary orders granting an injunction upon a hearing on affidavit involving no determination of the merits, being allowed at the discretion of the chancellor upon a balancing

of inconveniences. It is equally plain that by allowing an appeal from an interlocutory decree Congress intended to allow an appeal from a perpetual injunction ordered and allowed upon a final hearing of the merits, where the same decree refers the cause to a master for hearing. *Bissell Carpet Sweeper Co. v. Goshen Sweeper Co.* (U. S.) 72 Fed. 545, 554, 19 C. C. A. 25

### INTERLOCUTORY INJUNCTION.

An interlocutory or preliminary injunction is a provisional remedy granted before a hearing on the merits, and its sole object is to preserve the subject in controversy in its then existing condition, and, without determining any question of right, merely to prevent a further perpetration of wrong, or the doing of any act whereby the right in controversy may be materially injured or endangered, until a full and deliberate investigation of the case is afforded to the party. *Staples v. Rossi*, 65 Pac. 67, 68, 7 Idaho, 618.

### INTERLOCUTORY ORDER.

An interlocutory order is one which is made pending the cause and before a final hearing on the merits. *Chouteau v. Rice*, 1 Minn. 24, 26 (Gil. 8).

An interlocutory order is one where some material circumstance or fact necessary to be made known is either not settled or so imperfectly ascertained that the court, by reason of such defect, cannot determine finally between the parties. *Clagett v. Crawford* (Md.) 12 Gil. & J. 275, 281.

An interlocutory order is made to secure some end and purpose necessary and essential to the progress of the suit, and generally collateral to the issues formed by the pleadings and not connected with the final judgment. *Meyers v. Becker* (N. Y.) 29 Hun, 567, 573.

An interlocutory order is an intermediate step in the proceedings, looking to final action by the court upon the matter embraced in the petition upon which the order was passed. In does not of itself settle or conclude any right whatever, and is not, therefore, such an order as can be made the subject of an appeal. *Keifer's Heirs v. Reichert*, 48 Atl. 460, 461, 93 Md. 97.

The nature of any order, as a decree or final order, or as not final, depends entirely on the effect produced by the adjudication upon the rights and interests of parties. The usual distinction between interlocutory and other orders, depending on the stage of the cause on which they are made, is not the test for appellate purposes. *Barry v. Briggs*, 22 Mich. 201, 204.

#### Interlocutory decree distinguished.

See "Interlocutory Decree or Judgment."

### Order of default.

Where process on a petition had been served on only part of the defendants, and a formal order was made at the next succeeding term, taking for confessed the allegations of the petition against those defendants who had been served, such order was merely interlocutory, and did not prevent the filing of a meritorious and sufficient answer at or before the submission of the case for decision, particularly when the delay was so accounted for as to show that it was not to be attributed to willful negligence. *Alexander v. Quigley's Ex'rs*, 63 Ky. (2 Duv.) 399, 402.

### Order directing production of instrument.

An order directing the production of a written instrument for inspection or for use as evidence on a trial is not a final judgment. In *Pfeiffer v. Crane*, 89 Ind. 485, it is said: "A final judgment is the ultimate determination of the court upon the whole controversy in the action. An order of the court, made in the progress of the cause, requiring something to be done or observed, but not determining the controversy is an interlocutory order." *Western Union Tel. Co. v. Locke*, 7 N. E. 579, 580, 107 Ind. 9.

### Order granting injunction pendente lite.

The words "interlocutory order or decree," in the Constitution, must be taken in a technical sense, and the right of appeal is not enlarged, but secured, by the Constitution. An order for an injunction pendente lite, when such an order as a court of equity according to its established rules can issue, is not appealable. *Tatem v. Gilpin*, 1 Del. Ch. 18, 20.

### Change of venue.

An interlocutory order is one which does not dispose of the action. Blackstone defines such orders as those which are given in the middle of a cause, upon some plea, proceeding, or default which is only intermediate, and does not finally determine or complete the suit. Under these principals an order transferring an action from one court of the state to another is not a final, but an interlocutory, order, and hence not within the appellate jurisdiction of the Court of Appeals under the Kentucky statute. *Mercer v. Glass' Ex'r*, 12 S. W. 194, 195, 89 Ky. 199.

## INTERLUDE.

An "interlude" is "a short dramatic piece, and generally accompanied with music," though usually represented or performed between the acts of a longer performance. *Society for the Reformation of Juvenile Delinquents v. Duers* (N. Y.) 10 Abb. Prac. (N. S.) 216, 220.

## INTERMEDDLING.

"Intermeddling," is defined by Webster to mean "to meddle with the affairs of others in which one has no concern; to meddle officiously; to interpose or interfere in property; to intermix." As used in an injunction prohibiting the assignee from selling, assigning, conveying, or in any way or manner disposing of, encumbering, or intermeddling with, any of the property of the assignor, means to meddle with the property improperly—to do something to or with it that might affect the assignor's rights in the property. It would not include an action by the assignee against one who assumes to take the assigned property out of his possession. *McQueen v. Babcock* (N. Y.) 41 Barb. 337, 339.

A voluntary payment by a debtor of one state to a foreign administrator, when no ancillary letters had previously issued, would not be an offensive intermeddling with the assets in the state, which would make it a mispayment. *In re Shinn's Estate*, 30 Atl. 1026, 1029, 166 Pa. 121, 45 Am. St. Rep. 656.

## INTERMEDIARY.

The broker or intermediary is he who is employed to negotiate a matter between two parties, and who, for that reason, is considered as the mandatary of both. *Civ. Code La.* 1900, art. 3018.

## INTERMEDIATE ACCOUNT.

The expression "intermediate account" denotes an account filed with the surrogate for the purpose of disclosing the acts of the person accounting and the condition of the estate or fund in his hands, and not made the subject of a judicial settlement. *Code Civ. Proc. N. Y.* 1899, § 2514, subd. 9.

## INTERMEDIATE ORDER.

"Intermediate order," within a statute authorizing a decision of the court in an intermediate order in a criminal case, forming a part of the judgment roll to be reviewed, is not confined to orders made between the finding of the indictment and the preparation of the judgment roll in the first instance. The word "intermediate" means between the finding of the indictment and the completion of the judgment roll by the attachment of the case thereto, whenever it is filed. Hence, if all the papers which are by statute made a part of the judgment roll are not on file when it is first made up, they become a part of it when filed, and the word "intermediate" is limited only in this way. *People v. Priori*, 57 N. E. 85, 87, 163 N. Y. 99.

*Code*, § 3164, providing that an appeal shall lie from an intermediate order involv-

ing the merits and materially affecting the final decision, means an order such as will materially affect the final decision, and from which an appeal can be taken when the order is made; and hence no appeal lies from an order making findings of facts, when no judgment is entered. *Boyce v. Wabash Ry. Co.*, 18 N. W. 673, 676, 63 Iowa, 70, 50 Am. Rep. 730.

Rulings of the district court upon matters of law in the exclusion or admission of testimony involving the merits of the case have not been included in the words "decision or intermediate order," within the statute authorizing an appeal from any decision or intermediate order. *State v. O'Brien*, 43 Pac. 1091, 18 Mont. 1.

Where, after the obtaining of a judgment by two partners and an appeal therefrom by the defendant, one of the partners dies, and an order is granted substituting the personal representative of the deceased partner as plaintiff in his stead, such order is not an "intermediate order involving the merits and necessarily affecting the judgment," so that the provisions of *Code*, § 11, will bring it up for review on appeal from the judgment. *Hackett v. Belden*, 47 N. Y. 624, 628.

### Order denying new trial.

Accurately speaking, an order granted before entry of judgment is an intermediate order, while one granted thereafter is not; but an order denying a motion for a new trial is not an intermediate order, since the successful party had the right to have judgment entered before filing of motion for a new trial, so that the motion for a new trial does not affect the judgment. *Taylor v. Smith*, 49 N. Y. Supp. 41, 46, 24 App. Div. 519.

An intermediate order is one made between the commencement of an action and the entry of a judgment from which the appeal is taken. An order denying a motion for a new trial, made long after the entry of the final judgment appealed from, is not an intermediate order. *Hymes v. Van Cleef*, 15 N. Y. Supp. 341, 344, 61 Hun, 618.

An order denying a motion to set aside a verdict and for a new trial on the ground of misconduct of a juror, and an order denying a motion to resettle such order, made before judgment on the verdict has actually been entered, are both in letter and in spirit "intermediate orders affecting the final judgment." *Fox v. Matthiessen*, 49 N. E. 673, 155 N. Y. 177.

*Code*, § 346, providing that on an appeal from a judgment the court may review any intermediate order involving the merits and necessarily affecting the judgment, does not authorize a review on appeal of any order from which an appeal might have been taken,

and therefore does not apply to an order denying a motion for a new trial. *Brown v. Willoughby*, 5 Colo. 1, 8.

The phrase "decision of the court or intermediate order," in Rev. St. p. 339 (Cr. Prac. Act, § 893), providing: "An appeal to the Supreme Court may be taken by the defendant as a matter of right from any judgment against him, and upon appeal any decision of the court or intermediate order made in the case may be reviewed"—includes the order overruling the motion for a new trial, which must be made before judgment. *Territory v. Rehberg*, 6 Mont. 467, 469, 13 Pac. 132, 183.

## INTERMEDIATE TOLL

"Intermediate toll" is the toll for travel on a toll road, paid or to be collected from persons who pass thereon at points between the toll gates; the person so traveling not passing by, through, or around such toll gates. *Hollingworth v. State*, 29 Ohio St. 552, 553.

## INTERMITTENT EASEMENT.

An "intermittent easement" is one which is usable or used only at times. *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504, 514, 12 Am Rep. 147.

## INTERMIXTURE OF GOODS.

It is only in those cases where an intermixture of goods has been caused by the willful or unlawful act of one of the proprietors, and the several parcels have thereby become so combined or mingled together that they cannot be identified, that his interest in them is lost. *Smith v. Sanborn* 72 Mass. (6 Gray) 134, 135

## INTERNAL.

"Inward; interior; pertaining to its own affairs or interests; domestic, as opposed to foreign." *Webst. Dict.*

## INTERNAL AFFAIRS.

"Internal affairs," as used in 20 Stat. 101, providing that nothing therein shall authorize a municipal corporation in a territory to incur any debt or obligation, except such as shall be necessary to the administration of its internal affairs, means such business as municipalities of like character are usually required to engage in to fulfill their proper functions and to effectuate the objects of their charter. In the case of counties, these are ordinarily to provide a courthouse for the administration of justice, a jail for the confinement of prisoners, a poorhouse for the

sustenance of paupers, offices for the various officials of the county, and under some circumstances highways and bridges for the accommodation of the public; but under this authority a municipal corporation is not empowered to issue bonds to aid in the construction of a railway. *Lewis v. Pima County*, 15 Sup. Ct. 22, 23, 155 U. S. 54, 39 L. Ed. 67.

## INTERNAL COMMERCE.

Internal commerce is commerce "which is carried on between man and man in a state, or between different parts of the same state, and it does not extend to or affect other states." *Lehigh Valley R. Co. v. Commonwealth*, 12 Sup. Ct. 806, 807, 145 U. S. 192, 36 L. Ed. 672.

Internal commerce subject to state control, as contradistinguished from interstate commerce which is subject to federal control by the provisions of the Constitution, does not include the navigation of a public navigable river, such as the Hudson. *North River S. S. Co. v. Livingston (N. Y.)* 3 Cow. 713, 748.

## INTERNAL IMPROVEMENT.

The use of the words "internal improvements" to describe the improvements in an application for mandamus to compel a payment of bonds used to aid in the construction of works of "internal improvements" is not sufficiently specific, but the nature of such improvements must be set out. *State v. Thorne*, 4 N. W. 63, 64, 9 Neb. 458.

Where bonds issued by a township recite that they are issued to aid "internal improvements in the township," and the general legislation of the state shows that "internal improvements" means such public improvements as may legitimately be aided by taxation, a purchaser of such bonds may assume, without inquiry beyond the bonds and legislative act, that the bonds are within competency of the Legislature to authorize. *Guernsey v. Burlington (U. S.)* 11 Fed. Cas. 98, 99.

"Internal improvements" were formerly spoken of interchangeably with "public improvements," and the improvements on which the government, federal or state, embarked, were channels of travel and commerce, such as a construction of turnpikes and canals, and the improvements of rivers and harbors; but as used in Const. art. 9, § 5, providing that the state shall never contract any debts for works of internal improvement, the term "internal improvement" includes any kind of public works, except those used by and for the state in the performance of its governmental functions. *Rippe v. Becker*, 57 N. W. 331, 334, 56 Minn. 100, 22 L. R. A. 857.

The words "internal improvements," in Const. art. 8, § 10, providing that the state

shall not contract "any debts for work on internal improvements or be a party in carrying on such work," are not used in their broad meaning. They are capable of including substantially every act within the scope of governmental activity which changes or modifies physical conditions within the limits of the commonwealth; but, as the purpose of the Constitution was to form a government, we must presume that these words were used in a sufficiently limited sense to permit of the accomplishment of that fundamental purpose, at least to a reasonable extent. That some limitation of the broad meaning was intended has been recognized by all branches of the government and by the people in the unchallenged provisions for the state capitol, university, schools for blind, deaf, and feeble-minded, hospitals, penitentiaries, and the like, and extensive works on the improvement of grounds appurtenant thereto. On the other hand, we cannot doubt the use of these words in a sense to exclude works which, but for the prohibition, might have been within the legitimate field of the state government—works having at least some measure of public and governmental purpose; else the prohibition would have been needless. *State v. Froehlich*, 91 N. W. 115, 116, 115 Wis. 32, 58 L. R. A. 757, 95 Am. St. Rep. 894.

Const. art. 6, § 9, declaring that the county court shall have jurisdiction in every case that may be necessary to the "internal improvement and local concern" of the respective counties, relates to public internal improvements and local concerns for general county purposes, which appertain to the county at large as a body politic, and not to improvements for special local purposes, where the funds expended in making the improvement are raised by assessments imposed only on the particular property improved. *McGehee v. Mathis*, 21 Ark. 40, 54.

#### **Beet sugar factory.**

The term "internal improvements," in the statute authorizing a city to issue bonds to aid in the construction of any railroad or other work of internal improvement, was construed not to include a beet sugar manufactory, which did not manufacture sugar from beets for toll, although it was propelled by water power. *Getchell v. Benton*, 47 N. W. 468, 469, 30 Neb. 870.

#### **Bridge.**

The term "internal improvement," as used in Act Feb. 15, 1869, § 7, giving to precincts the privilege of voting to aid works of "internal improvement," should be construed to include a wagon bridge across the Platte river within such precinct, it being essentially a public enterprise undertaken for the benefit of the people at large; and it cannot be deprived of that character by the mere

fact of the commissioners having at the instance of the precinct required a legal charge for its use. *Fremont Bldg. Ass'n v. Sherwin*, 6 Neb. 48, 50; *Dodge County Com'rs v. Chandler*, 96 U. S. 205, 208, 24 L. Ed. 625.

"Internal improvements," as used in Act Feb. 15, 1869, providing that counties, cities, precincts, etc., may issue bonds in the aid of internal improvements, includes public bridges. *South Platte Land Co. v. Buffalo County Com'rs*, 7 Neb. 253, 260; *State v. Keith County Com'rs*, 20 N. W. 856, 857, 16 Neb. 508; *United States v. Dodge County*, 3 Sup. Ct. 590, 593, 110 U. S. 156, 28 L. Ed. 103.

"Internal improvements," as used in Const. art. 12, § 2, prohibiting counties from making donations to any railroad or other "work of internal improvement," unless a proposition to do so shall have been voted on, does not include bridges built by a county upon the line of highways which are wholly within the county. *De Clerq v. Haeger*, 10 N. W. 697, 12 Neb. 185.

#### **Gristmill.**

Act Feb. 15, 1869, authorizes the issue of bonds by a county or city to aid in the construction of any railroad or other work of internal improvement, etc. Held, that the word "improvement" as used in the act, should be construed to include a water gristmill erected for public use by a company, the rates of toll of which were to be determined by the county commissioners and be subject to regulation by the Legislature. The test for determining the character of an improvement of this kind is the use for which it was designated. If it is for public use, subject to the control and regulation of the Legislature, it would seem to come within the meaning of the words "internal improvement." *Traver v. Merrick County*, 15 N. W. 690, 692, 14 Neb. 327, 45 Am. Rep. 111.

"Internal improvements," as used in Act Neb. Feb. 15, 1869, authorizing the issuance of bonds to aid in the construction of railroads or other internal improvements, would not include a steam gristmill. *Osborne v. Adams County*, 3 Sup. Ct. 150, 109 U. S. 1, 27 L. Ed. 835; *State v. Adams County*, 20 N. W. 96, 15 Neb. 568; *Osborne v. Adams County Com'rs* (U. S.) 7 Fed. 441, 444.

"Internal improvements," as used in Act Kan. March 2, 1872, authorizing municipalities to issue bonds in aid of works of internal improvements, includes gristmills, whether run by water or steam, which are subject to state regulation. *Burlington Tp. v. Beasley*, 94 U. S. 310, 313, 24 L. Ed. 161.

#### **Irrigation system.**

"Internal improvement," as used in the Revised Statutes of the United States, granting for purposes of internal improvement to each new state thereafter admitted public

land of a certain amount, includes the construction of a system of reservoirs and canals for the purpose of irrigation and domestic use, or for changing the channels or streams so as to better control the water for such uses. "In Colorado water is so scarce, and its careful husbanding for artificial irrigation and other uses so important, that legislative action, wisely directed and properly guarded, may become the foundation of a domestic or internal improvement second to no other in its public importance. Hence such purposes are 'purposes of internal improvement,' within the meaning of the statute, so as to authorize the use by the state of money derived from the sale of such lands therefor." In re Senate Resolution Relating to Internal Improvement Fund, 21 Pac. 483, 12 Colo. 285.

Under Laws Neb. 1885, p. 268, c. 58, which provides that precincts, townships, or villages may issue bonds in aid of works of internal improvements, highways, bridges, railroads, courthouses, jails in any part of the country, and a drainage of swamp and wild lands, such municipalities have power to aid in the construction of canals for irrigation purposes, since, in view of the contemporaneous construction placed upon such statute, the term "works of internal improvement" is not to be limited to the kind enumerated immediately after such words in the statute. Keith County v. Citizens' Savings & Loan Ass'n (U. S.) 116 Fed. 13, 16, 53 C. C. A. 525.

#### **Petroleum pipe line.**

The term "internal improvements," in a constitutional provision authorizing the Legislature to confer on a corporation the right to exercise the power of eminent domain in making internal improvements, includes a petroleum pipe line. West Virginia Transp. Co. v. Volcanic Oil & Coal Co., 5 W. Va. 382, 388.

#### **Public buildings.**

Within the enabling act, providing that a per centage of the proceeds of the sale of agricultural public lands within the state, which shall be sold by the United States after the admission of the state into the Union, shall be paid to the state for making internal improvements, did not include public buildings, such as asylums, statehouses, etc.; the courts recognizing every other species of improvement of a public nature as being within the meaning of the phrase except those which are built for and used by the state in its sovereign capacity. Although the various state institutions referred to are "internal improvements," within the general significance of that phrase, nevertheless they do not fall within the category of such improvements contemplated by that term as used in legislative and constitutional enactments. In re Internal Improvement Fund, 48 Pac. 807, 808, 24 Colo. 247.

As a general proposition a courthouse is an "internal improvement." Lewis v. Sherman County Com'rs (U. S.) 5 Fed. 269, 271.

The expression "works of internal improvement," as used in Act Feb. 16, 1869, entitled "An act to enable counties, cities, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction of works of internal improvement in this state, and to legalize bonds already issued for this purpose," means only those works within the state in which the whole body of the people are supposed to be more or less interested and by which they may be benefited, and they more commonly have reference to the improvement of highways and channels of travel and commerce. The phrase would not include a courthouse. Dawson County v. McNamar, 4 N. W. 991, 993, 10 Neb. 276.

#### **Railroad.**

The words "internal improvements," within the meaning of a statute authorizing the corporate authorities of a city to borrow money for works of internal improvement, include a railroad company entering the city. City of Savannah v. Kelly, 2 Sup. Ct. 468, 471, 108 U. S. 184, 27 L. Ed. 696.

#### **Roads.**

The phrase "internal improvements," as used in our political dialect, has a variable signification, dependent on the agency by which the work is performed. "Internal improvements" by the federal government comprehend all works of that description within the territorial limits of the United States. "Internal improvements" by the state authorities are, of necessity, those improvements which are within the boundaries of the state, by which the public are supposed to be benefited, such as an improvement of the highways or channels of travel and commerce. As used in Act Feb. 1, 1850, conferring on the city of Wetumpka the power to issue certain bonds "for any purpose of internal improvement," it is not limited to works which are within the limits of the city, but would include within its meaning a plank road outside the city limits, which was erected for the purpose of improving the commerce of the city. City of Wetumpka v. Winter, 29 Ala. 651, 660 (approved and followed in City of Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611, 629, and Union Pac. R. R. v. Colfax County Com'rs, 4 Neb. 450, 456).

#### **Carrying on state institutions.**

"Internal improvements," as used in section 12 of Act Cong. March 3, 1875, commonly known as the "Colorado Enabling Act," providing for the creation of a fund to be paid to the state for the purpose of making such internal improvements within its borders as the Legislature might direct, means permanent improvements of real property



within the state and for the benefit of the public, which must be located within the state, be of a fixed and permanent nature, as improvements of real property, and such as are designed and intended for the benefit of the public. The current expense of carrying on state institutions is in no sense an internal improvement. In re Internal Improvements, 32 Pac. 611, 612, 18 Colo. 317.

#### **Water power.**

The term "internal improvement," as used in Const. art. 8, § 10, providing that the state shall never contract any debt for works of internal improvement, does not signify the making and repairing of highways by town authorities, nor the improvements of streets in cities and villages, but the building and carrying on of railroads, canals, and the like, forming great continuous highways throughout the length and breadth of the state, and which, uniting with similar works in sister or adjoining states, make up the grand channels of commerce, travel, and intercourse. *Clark v. City of Janesville*, 10 Wis. 136, 148.

"Internal improvement," as used in Gen. St. 1873, p. 448, c. 35, authorizing counties to issue bonds to aid in the construction of works of internal improvement, includes the work of improving the water power of a river for the purpose of propelling gristmills. *Blair v. Cuming County*, 4 Sup. Ct. 449, 111 U. S. 363, 28 L. Ed. 457.

#### **Waterworks, sewers, and lights.**

"Internal improvements," as used in Act March 26, 1890, entitled "An act authorizing cities and towns to construct internal improvements," under which the Legislature empowers cities to construct water, light, and sewerage systems, should be construed to mean waterworks, sewers, and light plants, since they are in fact "internal improvements" relating to the cities of the state, notwithstanding the term is not commonly applied to waterworks, etc. Ordinarily the term means improvements of highways and channels of travel and commerce. As used in this statute, however, it would be construed to refer to the works particularized therein. *Yesler v. City of Seattle*, 25 Pac. 1014, 1015, 1 Wash. St. 308.

#### **INTERNAL MANAGEMENT.**

What constitutes "internal management" of a corporation is defined by Stone, J., in *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151, 153; 20 Atl. 1039: "Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, then such action is

the management of the internal affairs of the corporation, and in case of a foreign corporation our courts will not take jurisdiction." The leasing by a corporation of the use of its property and franchise for an inadequate rental is, in respect to the depreciation of its stock thereby, a matter of the internal management of the corporation. *Madden v. Penn Electric Light Co.*, 37 Atl. 817, 818, 181 Pa. 617, 38 L. R. A. 638.

#### **INTERNAL POLICE.**

A term used to describe the jurisdiction of municipal law not surrendered to the federal government, which is the duty of the state to advance the safety, happiness, and prosperity of its people and provide for its general welfare by any and every act of legislation, or by the recognition and principles of the common law, which it may deem to be conducive to these ends. Where the power over the particular subject or the manner of its exercise is not restrained by or surrendered to the federal government, and all these powers relate mainly to municipal law, they are invested in the authority of the police of the state, and are not within the control of the federal government. *Cheboygan Lumber Co. v. Delta Transp. Co.*, 58 N. W. 630, 635, 100 Mich. 16.

#### **INTERNAL REVENUE ACT.**

"Internal revenue acts," within the meaning of 14 Stat. 171, providing that cases arising under the internal revenue acts shall not be affected by 4 Stat. 632, authorizing the removal of cases involving the revenue laws from the state to the federal courts, does not include 12 Stat. 294, imposing direct taxes upon the states. *Peyton v. Bliss* (U. S.) 19 Fed. Cas. 407, 408.

#### **INTERNAL WATERS.**

Internal waters are waters within the body of the country. *The Garden City* (U. S.) 26 Fed. 766, 773.

#### **INTERNALLY OR EXTERNALLY.**

The phrase "internally or externally," found in a fire policy providing that, in case of an increase of risk internally or externally, the policy should become void, did not include an increase of risk by removal from the house, but signified some increase of risk by internal or external changes in the house itself or its exposure, which manifestly increased the risk of fire, so that it is not the same risk insured. *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184, 190, 37 Am. Rep. 488.

#### **INTERNATIONAL.**

The word "international" is a generic term, pertaining to the relation between na-

tions, and when applied to business or to transactions of a private character it imports dealings of some sort in matters or with people of different nations, or which have some relation to them. It is in common use, and in its nature it is descriptive and ordinarily characterizes the business to which it pertains, rather than its origin or proprietorship. As used in a partnership name, the "International Banking Company," it is apparently descriptive of a banking business, and indicates that it is in some sense international, and presumptively the name denotes the nature of the business. Hence it is not capable of exclusive appropriation by a copartnership as a firm name or trademark. *Koehler v. Sanders*, 25 N. E. 235, 236, 122 N. Y. 65, 9 L. R. A. 576.

### INTERNATIONAL COMMERCE.

International commerce is commerce between states or nations entirely foreign to each other. *Louisville & N. R. Co. v. Railroad Com'rs of Tennessee* (U. S.) 19 Fed. 679, 701.

### INTERNATIONAL LAW.

"The law of nations is a system of rules which reason, morality, and custom have established among civilized nations as their public law." "International law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces as consonant with justice, from the nature of the society existing among independent nations, with such definitions and modifications as may be established by general consent." *Heirn v. Bridault*, 37 Miss. 209, 230 (citing 1 Bl. Comm. 43; 1 Kent, Comm. 1; *Wheaton, Internat. Law*, 46).

"The law of nations, or international law, is mainly of modern origin, growing out of increased commercial and social intercourse, and exists only among civilized states. It is very properly divided into public and private—public, that which regulates the political intercourse of nations with each other; private, that which regulates the comity of states in giving effect in one to the municipal laws of another relating to private persons, their contracts, etc." *Roche v. Washington*, 19 Ind. 53, 55, 81 Am. Dec. 376.

"International law" is a term which has not as yet, perhaps, been fully and accurately defined, or rather the specific matters to which it may extend its scope may not be fully settled. It includes the entire body of obligations which one nation owes to another in respect to its own conduct or the conduct of its citizens toward other nations or their citizens. *United States v. White* (U. S.) 27 Fed. 200, 201.

### INTERNATIONAL OFFENSE.

An "international offense" is an offense against the law of nations. *Winspear v. District Tp. of Holman*, 37 Iowa, 542, 544; *Cook v. Port of Portland*, 27 Pac. 263, 264, 20 Or. 580, 13 L. R. A. 533.

Counterfeiting the securities or treasury notes of a foreign nation is an offense against the law of nations. *United States v. White* (U. S.) 27 Fed. 200, 201.

### INTERPLEA.

An interplea is a claim that the pleader making it does not own the property in controversy, and that one of two persons does own it. *Bennett v. Wolverton*, 24 Kan. 284, 286.

An interplea is in the nature of an action of replevin ingrafted upon the suit by attachment. An interplea being in its essential characteristics an action of replevin, the legal title or right to the immediate possession must exist in the interpleader. *Rice, Stix & Co. v. Sally*, 75 S. W. 398, 400, 176 Mo. 107.

An interplea will not lie where the action of replevin will not. It is a claim for the recovery of the possession of the specific thing. Unlike the action of replevin, no money judgment in damages can be awarded in lieu of the specific property claimed. It is peculiarly a possessory action; the right to present possession of the property being the principal question in controversy. It involves the exclusive right of the claimant to the immediate possession of the chattel and the fact of the wrongful detention thereof by the defendant as against the claimant. *Spooner v. Ross*, 24 Mo. App. 599, 603; *Stadden Grocery Co. v. Lusk*, 63 S. W. 587, 95 Mo. App. 261.

The right to interplead in attachment is solely the creature of statute. Its very office and purpose are to determine the question of ownership of the specific chattel and the right of the sheriff to seize and hold it under his writ. It is so much a substitution for the action of replevin that, after its judicial determination, the interpleader cannot resort to replevin for the same property. Being, then, a substitution for the action of replevin, it must stand in contemplation of law as if it were lodged directly against the sheriff by name. *State ex rel. Reeves v. Barker*, 26 Mo. App. 487, 491.

Within the statutory provision that any person claiming property attached may interplead in the cause, the proceeding by the interplea is a separate proceeding from the attachment. In it the interpleader must recover upon the strength of his own title to the attached property. *Brownwell & Wight Car Co. v. Barnard*, 40 S. W. 762, 763, 139 Mo. 142.

**INTERPLEADER.**

See "Bill of Interpleader."

**INTERPOSE.**

In a strictly narrow sense, to "interpose a defense" in an action is to plead it or set it up by answer; but the phrase is not used in such sense in Laws 1850, c. 172, § 1, providing that no corporation shall hereafter interpose a defense of usury in an action. The phrase there means to set up a defense or insist upon it in any manner at any stage of the action. *Rosa v. Butterfield*, 33 N. Y. 665, 667.

Act April 6, 1850, which provides that corporations shall not interpose the defense of usury thereafter, is not to be restricted to the time of serving the plea or answer; that is, it is so construed as to prohibit corporations from setting up the defense of usury after the passage of this act, and would prohibit such a defense in an action which was already commenced at the time of the passage of the act, as well as in actions which were commenced thereafter. *Curtis v. Leavitt*, 15 N. Y. 9, 154, 155.

**INTERPRETATION.**

See "Comparative Interpretation"; "Liberal Interpretation"; "Strict Interpretation."

"Rutherford (2 Inst. 414) defines 'interpretation' as consisting in finding out or collecting the intention of a writer, either from his words, or from other conjectures, or from both; and he divides it into three sorts—literal, which is where we collect the intention from the words used only; rational, where the words do not express his intention perfectly, but either exist or fall short of it, so that we are going to collect it from probable or rational conjectures only; and mixed, where the words, though they do express his intention when they are rightly understood, yet are in themselves of doubtful meaning, and we are forced to have recourse to conjectures to find out in what sense they are used." *Tallman v. Tallman*, 23 N. Y. Supp. 734, 742, 3 Misc. Rep. 465.

In Spanish jurisprudence the interpretation of laws is divided into authentic, customary, and doctrinal. The authentic is that given by the legislator himself, who alone has the authority to resolve the doubts and fix the sense of words, and whose decision is obligatory on citizens and tribunals, and must be obeyed, both within and without courts of justice. The customary is that given by judges, consulting the spirit of the law, jurisprudence, usages, and equity, and has a certain force and authority when two or more decisions made by a superior tri-

bunal on a similar subject-matter are in conformity with each other. The doctrinal is the opinions given by jurists and other persons versed in law. *Houston v. Robertson's Adm'r*, 2 Tex. 1, 26 (citing *Deccionario de Legislacion*, p. 316).

Interpretation is the art of finding out the true sense of any form of words—that is, the sense which their author intended to convey—and of enabling others to derive from them the same idea which the author intended to convey. *Village of Rome v. Knox* (N. Y.) 14 How. Prac. 268, 272 (citing *Lieb. Herm.* 23); *Jones v. Proprietors of Morris Aqueduct*, 36 N. J. Law (7 Vroom) 206, 209; *People v. Commissioners of Taxes of City of New York*, 95 N. Y. 554, 559; *In re Sutro's Estate*, 72 Pac. 827, 139 Cal. 87.

"Interpretation" is the act of making intelligible what was before not understood, ambiguous, or not obvious. It is the method by which the meaning of the language is ascertained. Resort to interpretation is never to be had where the meaning is free from doubt. *Ming v. Pratt*, 56 Pac. 279, 280, 22 Mont. 262.

Common sense and good faith are the leading stars of all genuine interpretations. In arriving at the meaning of the parties to a contract, the language must be given a reasonable interpretation. *Colt v. Phoenix Ins. Co.*, 54 N. Y. 595. If the language involving the intent of the parties is uncertain, an interpretation which is unreasonable and places one of the contracting parties at the mercy of the other must give way to one which is equitable. *Russell v. Allerton*, 108 N. Y. 288, 15 N. E. 391. And if one of the contracting parties has by artifice or duplicity in the use of language misled the other respecting its meaning, the sense in which the latter understood it will prevail in the interpretation of the language. *Hilleary v. Skookum Root Hair Grower Co.*, 4 Misc. Rep. 127, 130, 23 N. Y. Supp. 1016 (citing *White v. Hoyt*, 73 N. Y. 505, 511).

"The principle enunciated by Horne Tooke in his *Diversions of Purley*, that a word has 'one meaning and one only,' has no application to cases arising under statutes where construction or interpretation is required, except, perhaps, in scientific matters. Worcester, in the preface to his *Dictionary*, says: 'Though there may be found in Johnson's *Dictionary* many instances in which a distinction is made where there is little or no difference, yet the principle stated by Horne Tooke, that "a word has one meaning and one only" cannot be attempted without numerous exceptions. Take, for example, some very common words, \* \* \* the nouns "law," "letter," "line," "post." Though the different senses in which these words are used may be in some measure in accordance with one original meaning of each, yet a

single definition of each of the words would afford but very inadequate explanation. The original or etymological meaning of many words has become obsolete, and they have assumed a new or more modern meaning. Many which retain their etymological meaning have other meanings annexed to them. Many have both a literal and etymological meaning, and many both a common and technical meaning, all of which need explanation.' The primary general sense of a word often ramifies into different senses, as Webster illustrates in the preface to his Dictionary. He says, in substance, that by attention to the different uses and application of the word we become able in most cases to arrive at a satisfactory explanation of the manner in which the same word comes to be used with different significations. Prof. Whitney says that 'both historically and with regard to present usage it is impossible to draw a hard and fast line between these two sides of the language, either with respect to words or to their individual senses.' *People v. City of Buffalo*, 11 N. Y. Supp. 814, 815, 57 Hun, 577.

#### Construction distinguished.

Interpretation is used for the purpose of ascertaining the true sense of any form of words, while construction involves the drawing of conclusions regarding subjects that are not always included in the direct expression. *Bloomer v. Todd*, 19 Pac. 135, 138, 3 Wash. T. 599, 1 L. R. A. 111.

#### INTERPRETER.

A person sworn by a court to interpret the testimony of a witness, when given in a language other than that commonly used in the court. *Amory v. Fellowes*, 5 Mass. 219, 226.

An "interpreter," whether in the trial of a case in court or as interpreter of a witness giving his deposition, must give his testimony under oath, and in either case an interpreter is a witness and distinguished from the person whose testimony he interprets. Thus his presence before a grand jury will not justify the setting aside of the indictment under a provision which provides for the setting aside of an indictment wherein a person is present other than the members of the grand jury and witnesses actually under examination. *People v. Lem Deo*, 64 Pac. 265, 266, 132 Cal. 199.

#### INTERROGATORIES.

The term "interrogatories," as used in a statute permitting the examination of witnesses upon interrogatories, should not be construed to mean interrogatories in writing. The usual technical meaning, however, of the word in the court of chancery, is a question in writing. Its ordinary meaning in

common discourse is a question. The word has no fixed, certain, and invariable meaning in common-law courts. *State v. Ludlow*, 5 N. J. Law (2 Southard) 772, 773.

#### INTERRUPT—INTERRUPTION.

See "Unavoidable Interruption."

In Rev. Code, § 3612, providing that any person who willfully interrupts or disturbs any assembly of people met for religious worship, etc., may be punished, etc., "interrupt" should not be construed to mean something done which takes the attention of the hearers away from the services or discourse of the minister; but the offense may be committed without necessarily stopping or hindering the progress of a worshipping assembly. The word "interrupts," in this connection, means "annoys" or "disturbs." *Brown v. State*, 46 Ala. 175, 186.

A school is as much "interrupted or disturbed" by preventing the assembly as by breaking it up after school is assembled, within the meaning of Pub. St. c. 241, § 7, providing a punishment for persons who willfully interrupt or disturb any public or private school. *Douglass v. Barber*, 28 Atl. 805, 18 R. I. 459.

#### Easement.

"By a long course of decisions the word 'interrupted,' when applied to acts done by a servient owner, has received a fixed meaning as indicating an obstruction to the use of the easement; some act of interference of its enjoyment, which, if unjustifiable, would be an actionable wrong." *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. Law (14 Vroom) 605, 621.

#### Prescription.

As used in the statement of the rule that a prescription, in order to be available, must have been uninterrupted, interruptions are of two kinds, natural and civil. The first, consisting in entering into and upon immovable things, in taking away such as were movable; while civil interruption is the interposition of a legal claim in a court of justice. *Innerarity v. Mims' Heirs*, 1 Ala. 660, 674.

The interruption which destroys a prescriptive right under St. 2 & 3 Wm. IV, c. 71, is an adverse obstruction, and not a mere discontinuance of use by the payor himself. *Carr v. Foster*, 3 Q. B. 581, 588.

As used in St. 2 & 3 Wm. IV, c. 71, §§ 3, 4, entitling a party prescriptively to the access of light to his premises if his enjoyment commenced 20 years next before the bringing of an action in which the right is contested, provided such enjoyment has not at any time been interrupted and the interruption acquiesced in for a whole year, the

word "interruption" is not to be confined to the case of intermediate obstructions or hindrances in the course of the period of enjoyment of 20 years, but may comprehend the case of an obstruction or hindrance at the latter part of the period of 20 years, so as to prevent the actual enjoyment for the full period of 20 years without interruption. *Flight v. Thomas*, 22 Adol. & El. 701.

#### Telephone service.

"Interrupted service," within the meaning of a telephone contract providing for rebate if the service is interrupted otherwise than by the negligence of the subscribers, must be construed to mean, not only a total cessation of a service once begun, but any service falling short of service reasonably suited to the purpose intended. An interruption of service, within the meaning of this contract, is an interruption of the kind of service contracted for—that is, of a service reasonably adapted to the purpose intended; and such a service could be interrupted by being displaced by a "bad, defective, or useless service." *Atlanta Standard Tel. Co. v. Porter*, 43 S. E. 441, 442, 117 Ga. 124.

### INTERSECT—INTERSECTION.

See "Space of Intersection."

In a charter of a railroad declaring that, if the road should intersect any highway, the company should restore it to its former condition, so as not to impair its usefulness, "intersect" means to cross, literally, to cut into or between; and therefore, where the road ran across a turnpike, the traveled path of which was in some places changed to make room for the railroad, there was no intersection within the terms of the statute. *State v. New Haven & N. Co.*, 45 Conn. 331, 344.

The word "intersect" conveys the idea of a junction of lines, and would be properly used in describing the place at which the boundary lines of different tracts of land cross each other, but would be inappropriate when used to describe the place where a railroad track crosses a boundary line. *Redfields v. Redfields* (N. J.) 13 Atl. 600, 602.

The point of intersection of two roads, as laid out and marked on the ground by the viewers, is the point where the middle or center lines of the two roads intersect. In re *Springfield Road*, 73 Pa. (24 P. F. Smith) 127, 129.

As used in Rev. St. U. S. §§ 2322, 2336, defining the rights of mine owners to mineral veins which intersect and cross each other, the words "intersect" and "cross" are not strictly synonymous, and in using both it must be presumed Congress intended to provide for different conditions. Veins might

intersect, either on their strike or dip, and not cross. In that event it was necessary to provide which location should have the ore at the space of intersection, and it was declared that the prior location should have the ore within that space. In case they crossed, then a further provision was necessary, and it was provided that the junior locator should have the right of way through the "space of intersection" for the convenient working of his mine. From a casual reading of this section it might be inferred that the space of intersection meant the intersection of the veins, but that does not necessarily follow. *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 59 Pac. 607, 613, 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17. But see, to the contrary, *Branagan v. Dulaney*, 8 Pac. 669, 671, 8 Colo. 408.

The parts of a sidewalk which are called "intersections," in an ordinance providing for the construction of a sidewalk, are those portions not directly in front of lots, but which fill out the spaces at the corners of blocks, from the lot lines to the curb lines at intersecting streets. There is a space left at such places not directly opposite any lot, and known as an "intersection." *Gage v. City of Chicago* (Ill.) 67 N. E. 477, 479, 203 Ill. 26 (citing *Hyman v. City of Chicago*, 188 Ill. 462, 59 N. E. 10).

#### INTERSECTING METHOD.

A method used in surveying for determining the center of a section of land, pursued by running straight lines from the quarter corner on the east to the quarter corner on the west, and from the quarter corner on the south to the quarter corner on the north, side of the section; the center being the points where these two lines cross. *Gerke v. Lucas*, 60 N. W. 538, 539, 92 Iowa, 79.

### INTERSTATE BUSINESS.

The term "corporations engaged in interstate business," in the title of an act to provide for the better protection of the earnings of laborers, servants, and other employes of corporations engaged in interstate business, means a corporation doing business and employing men in this state and having in another state such a situs as to permit of its being bound by process of garnishment there. *Bishop v. Middleton*, 61 N. W. 129, 43 Neb. 10, 26 L. R. A. 445.

### INTERSTATE COMMERCE.

See, also, "Commerce"; "Regulate Commerce."

Interstate commerce is commerce between two or more states of the Union.

*Louisville & N. R. Co. v. Railroad Com'rs of Tennessee* (U. S.) 19 Fed. 879, 701.

Interstate commerce means the interchange of commodities between citizens of the different states, without regard to state lines. *Commonwealth v. Gardner*, 19 Atl. 550, 551, 133 Pa. 284, 7 L. R. A. 666, 19 Am. St. Rep. 645.

A corporation domiciled in one state was engaged in interstate commerce when it shipped goods and merchandise to another state and there delivered them, or caused them to be delivered, to purchasers; the goods being commodities of barter and sale, the essence of commerce. *Bateman v. Western Star Milling Co.*, 20 S. W. 931, 932, 1 Tex. Civ. App. 90.

"Interstate commerce" is not business done within a state, but is business done between two or more states, or business commenced in one state and ended in another. Thus a package carried by a carrier from Omaha to St. Louis is not business done within the state of Nebraska, or in the state of Missouri, but it is business done between those two states. A contract for the carriage of goods from one state to another is an entire contract, and is an interstate contract, and the carriage of goods under such contracts is interstate commerce, and is not business done within any of the states from, through, and to which they are carried on such account. *Western Union Telegraph Co. v. City of Fremont*, 58 N. W. 415, 423, 89 Neb. 692, 26 L. R. A. 698.

Traffic is either state or interstate traffic according to its origin and destination. It is shipped by the consignor in the state where the consignee dwells, or it is not. If not, it is "interstate traffic." *Ft. Worth & D. C. Ry. Co. v. Whitehead*, 26 S. W. 172, 173, 6 Tex. Civ. App. 595.

"The word 'among' means intermingled with. A thing which is among others is intermingled with them." So that commerce among the several states cannot stop at the external boundary of a state, but may be introduced into the interior. It must concern more states than one. *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 194, 6 L. Ed. 23; *The Daniel Ball* (U. S.) 6 Fed. Cas. 1161, 1162.

"Commerce among the states does not stop at a state line. Coming from abroad, it penetrates wherever it can find navigable waters reaching from without into the interior, and may follow them up as far as navigation is practicable." *Frost v. Washington County R. Co.*, 51 Atl. 806, 808, 96 Me. 76, 59 L. R. A. 68.

A shipment may be interstate, though transported by virtue of numerous bills of lading. If the purpose and intention is,

when goods are shipped from St. Louis, that their final designation should be a point in Texas, it would be an interstate shipment, notwithstanding the transportation was not on a through bill of lading. *Gulf, C. & S. F. Ry. Co. v. Fort Grain Co. (Tex.)* 72 S. W. 419.

#### Agencies or instruments of.

The term "interstate commerce" includes traffic across a river between states, and therefore a bridge over such a river is an instrument of interstate commerce, and a state has no power of fixing charges for transportation thereover without the consent of Congress. *Covington & C. Bridge Co. v. Kentucky*, 14 Sup. Ct. 1087, 1088, 154 U. S. 204, 38 L. Ed. 962.

Anything which is designed to be transported for commercial purposes from one state to another, and is actually in transit, and any passenger who is actually engaged in any such interstate commercial transaction, and any car or carriage actually transporting or engaged in transporting such passenger or thing, are the agency and subject-matter of interstate commerce. *In re Grand Jury* (U. S.) 62 Fed. 828, 831.

A ferry company, incorporated in Kentucky under a franchise for the transportation of persons and property from the Kentucky side to the Indiana side of the Ohio river, is engaged in interstate commerce. *Louisville & J. Ferry Co. v. Commonwealth*, 57 S. W. 624, 625, 108 Ky. 717.

The transportation of merchandise and passengers from state to state is interstate commerce, whether carried on by individuals or corporations. *Indiana v. Pullman Palace Car Co.* (U. S.) 16 Fed. 193, 199.

"Commerce with foreign nations and among the states, strictly considered, consists in intercourse and traffic, including in those terms the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules applicable alike to the whole country, and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not therefore permissible." A state has no power to impose any restriction on the transmission of persons or property or telegraphic messages from one state to another, as such acts constitute "commerce," within the meaning of the federal Constitution, giving Congress the power to regulate commerce between the states. *Wabash, St. L. & P. Ry. v. Illinois*, 7 Sup. Ct. 4, 12, 118 U. S. 557, 30 L. Ed. 244.

"Interstate commerce" includes transportation upon a railroad passing through

more states than one, or from a point in one state to a point in another. *Mobile & O. R. Co. v. Sessions* (U. S.) 28 Fed. 592.

#### **Carrier with connecting lines.**

It has been generally held that, where a carrier in one state receives a commodity for shipment by a continuous trip over its own line and connecting lines, giving a through bill of lading to the point of destination, with the provision that its own liability shall cease upon delivery to its connecting line at a point within the state where it was received, such transportation is to be regarded as "interstate commerce," and the carrier is but one of the several agencies employed. *Houston Direct Nav. Co. v. Insurance Co. of North America*, 32 S. W. 889, 890, 89 Tex. 1, 30 L. R. A. 713, 59 Am. St. Rep. 17; *Texas & P. Ry. Co. v. Avery* (Tex.) 33 S. W. 704, 706; *State v. Gulf, C. & S. F. Ry. Co.* (Tex.) 44 S. W. 542; *Norfolk & W. R. Co. v. Commonwealth*, 6 Atl. 45, 46, 114 Pa. 256.

A railroad which is a link in a through line of road by which passengers and freight are carried into a state from other states, and from that state to other states, is engaged in the business of "interstate commerce." *In re Grand Jury* (U. S.) 62 Fed. 834.

A railroad is engaged in interstate commerce which is incorporated in Pennsylvania and operating a line of railroad for the transportation of freight and passengers extending through the state of New York and into other states of the Union, though no part of its road is within the state of New York. It operated in connection with its road a ferry from the New Jersey shore across the Hudson river to the state of New York, where it had terminal facilities, consisting of wharves, piers, docks, and buildings connected therewith, used in the transaction of the business of delivering freight and passengers carried over its line to that state, and receiving freight and passengers to be carried from the state into New Jersey and into other states reached by its system of roads; the only transportation from New York carried on by the company being from that part of the Hudson river within the terminal boundaries of the state by means of its ferry boats. It collected in the city of New York money due for transportation to that port, and for transportation from that city, making contracts for transportation of freight and passengers over its lines, and issuing and selling passenger tickets, and employing in said city a large number of agents, clerks, and laborers in the prosecution of its business, and engaged in no other business in that city, except such as related to the transportation of freight and passengers over its lines. *People v. Wemple*, 33 N. E. 720, 721, 138 N. Y. 1, 19 L. R. A. 694.

The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation it is subject to the regulation of Congress. *The Daniel Ball*, 77 U. S. (10 Wall.) 557, 564, 19 L. Ed. 999.

#### **Coasting trade.**

"Commerce among the states," as used in the United States Constitution, conferring power upon Congress to regulate commerce among the states, must of necessity be commerce within the states. The Supreme Court says: "Commerce among the states cannot stop at the boundary line of each state, but may be introduced into the interior." In the same opinion it is said: "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one." Again: "The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation and to those internal concerns which affect the states generally, but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself." The commerce among the states, which Congress has power to regulate, either directly or incidentally, is that commerce which may be carried on by vessels regularly licensed by the laws of Congress, or in other words, the coasting trade. *North River Steamboat Co. v. Livingston* (N. Y.) 3 Cow. 713, 747.

#### **Delivery to carrier as commencement.**

"In the application of this comprehensive definition it is settled by declarations of the Supreme Court that such commerce includes, not only the actual transportation of commodities and persons between the states, but also the processes of such transportation; that is, it includes all the negotiations and contracts which have as their object, or involve as an element thereof, such transmission or passage from one state to another, and such commerce begins, and the regulating power of Congress attaches, when the commodity or thing traded in commences its transportation from the state of its production to some other state, and terminates when the transportation is completed and the property has become a part of the general mass of the property in the state of its destination." Just when this commerce begins is not determined by the character of the commodity, nor by the intention of the owner to transfer it to another

state, nor by his preparation of it for transportation, but it is fixed by its actual delivery to a carrier for transportation, or the actual commencement of its carriage to the other state at such time; that is to say, when the carriage commences the regulating authority of the state ceases, and that of the federal power attaches, and continues until the mixing of the property with the general mass in the state of its destination. Neither the protection of the manufacturer of any article or commodity constituting a subject of commerce and intended for trade and traffic with citizens of other states, nor any preparation for their transportation prior to the commencement of their actual carriage, constitute interstate commerce, within the regulating power of Congress, nor after the termination of the carriage, and the mingling of such merchandise and the property in the state of destination, can any sale, distribution, or consummation in such state form interstate commerce, subject to federal control. In *re Greene* (U. S.) 52 Fed. 104, 113; *United States v. Boyer* (U. S.) 85 Fed. 425, 433; *The Daniel Ball*, 77 U. S. (10 Wall.) 557, 564, 19 L. Ed. 999; *Arkansas v. Kansas & T. Coal Co.* (U. S.) 96 Fed. 353, 359; *Bennett v. American Exp. Co.*, 22 Atl. 159, 160, 83 Me. 236, 13 L. R. A. 83, 23 Am. St. Rep. 774.

The "regulation of commerce," confided to the federal government by the Constitution, applies to subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the states, or put in the way of such transit, may be regulated, but only because and in so far as they form part of an interstate trade or commerce. The fact that an article is manufactured for export into another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce. *United States v. E. C. Knight Co.*, 15 Sup. Ct. 249, 254, 156 U. S. 1, 39 L. Ed. 325.

Packing houses, engaged in the slaughtering of cattle, sheep, and hogs intended for interstate and foreign markets, are not engaged in interstate commerce. *United States v. Boyer* (U. S.) 85 Fed. 425, 435.

#### **Delivery to dealer affecting.**

Beer manufactured in another state, and imported and delivered to a dealer in this state, ceases upon delivery to be an article of "interstate commerce," within the provision of the federal Constitution conferring upon Congress power to regulate commerce among the several states. *Fuqua v. Fabst*

*Brewing Co.*, 38 S. W. 29, 30, 90 Tex. 298, 35 L. R. A. 241.

#### **Drummer or soliciting agent.**

A state statute imposing a license upon drummers and other sellers by sample within a certain taxing district is a regulation of interstate commerce, and therefore unconstitutional as applied to citizens of other states. *Robbins v. Taxing Dist. of Shelby County*, 7 Sup. Ct. 592, 120 U. S. 489, 30 L. Ed. 694 (followed in *City of Fort Scott v. Pelton*, 18 Pac. 954, 955, 39 Kan. 764); *In re Mitchell* (U. S.) 62 Fed. 576.

Where a traveling salesman accepted an order for sale of liquors in Iowa, which order was sent to his principal in Illinois, subject to the latter's acceptance or rejection, and the liquor was shipped by express C. O. D. from the principal to the buyer, the transaction constituted "interstate commerce." *State v. Hanaphy*, 90 N. W. 601, 602, 117 Iowa, 15. See, also, *State of Louisiana v. Lagarde* (U. S.) 60 Fed. 186, 191.

Contracts which operate as a restraint upon the soliciting of orders for and sale of goods in one state to be delivered from another are contracts in restraint of "interstate commerce." *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 294, 29 C. C. A. 141, 46 L. R. A. 122.

A state law which places substantial restrictions upon the taking or soliciting of orders by a nonresident salesman for intoxicating liquors, to be purchased in and imported from another state, where such orders are subject to approval or rejection at the election of the nonresident merchant, is a burden upon interstate commerce; and so far as the act applies to such cases it is repugnant to the provisions of the federal Constitution giving Congress the power to regulate interstate commerce. *State v. Hickox*, 68 Pac. 35, 37, 64 Kan. 650.

"Interstate commerce" means commercial transactions between citizens of different states, so that Laws 1895 (2d Sess.) c. 4, § 3, requiring all persons other than photographers of the state, who shall solicit pictures to be enlarged outside of the state, to pay a privilege tax in each county where so engaged, is unconstitutional as applied to agents soliciting pictures to be enlarged in another state, as imposing a burden on interstate commerce. *State v. Scott*, 39 S. W. 1, 2, 98 Tenn. 254, 36 L. R. A. 461.

Commercial transactions between citizens of different states constituted "interstate commerce," which, though conducted by an agent, cannot be subjected to the burden of taxation under state laws. Where one, purporting to act as agent of a nonresident principal, sells goods by sample to residents of the state, and forwards his orders



to a branch house outside the state, though there is a branch house within the state, and the bill for the goods shows they were consigned and charged to the agent individually, without reference to the purchasers, and on receipt of the original package the agent breaks it and delivers the articles to the different purchasers, the transaction does not constitute interstate commerce. *Kimmell v. State*, 56 S. W. 854, 104 Tenn. 184.

Commerce between the states includes the soliciting of orders and sale of goods in one state by an agent acting for a firm in another state; and hence a state statute imposing a license on such agents and a fine for engaging in the business without payment of such license is in conflict with the commerce clause of the federal Constitution, and is therefore void. *Robbins v. Taxing Dist. of Shelby County*, 7 Sup. Ct. 592, 593, 120 U. S. 489, 30 L. Ed. 694.

"Interstate commerce," within the meaning of the clause in the United States Constitution which empowers Congress to regulate commerce, does not include Act Feb. 20, 1877, which imposes a license of \$25 per month on every travelling merchant, agent, drummer, or other person selling or offering to sell any goods, etc., to be delivered at some future time within the state, so as to make this statute unconstitutional, for the reason that the act taxes the citizens of Nevada and all other states equally, and that it is also a tax on the person, and not on the goods sold. *Ex parte Robinson*, 12 Nev. 263, 28 Am. Rep. 794.

Under Revenue Law Va. §§ 45, 46, the agent for the sale of articles manufactured in other states must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them; while the agent for the sale of articles manufactured in the state, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufacturers and against the manufacturers of other states. Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is therefore a tax upon them, and if this is made to depend upon the foreign character of the articles—that is, upon their having been manufactured without the state—it is to that extent a regulation of commerce in the articles between the states. It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the state can impose a tax upon them, or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article, and prevent competition with the

home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several states. *Webber v. Virginia*, 103 U. S. 344, 26 L. Ed. 565.

#### Exchange or sale of commodities.

The word "commerce," as used in the federal Constitution, declaring that Congress shall have power to regulate commerce among the several states, applies only to commodities which are the subject of purchase and sale. Thus, while it might include wine or molasses in barrels and casks, or bottles and boxes, the barrels, casks, bottles, and boxes in which the commodities were kept for safety, and by which they were transferred from one state to another and from the seller to the buyer, did not thereby become objects of commerce not subject to congressional regulation. But it was held in *Almy v. California*, 65 U. S. (24 How.) 169, 16 L. Ed. 644, that a stamp duty imposed by the Legislature of California on bills of lading for gold and silver transported from any place in that state to another out of the state was forbidden by the federal Constitution commerce clause, since, such instruments being necessary to the transaction of commerce, the duty was on exports. In *re Trade-Mark Cases*, 100 U. S. 82, 95, 25 L. Ed. 550.

The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question of the right of a state to tax such commerce. The nonaction of Congress on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled. As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by legislation on the part of the state discriminating against the manufacturers of other states. *Welton v. Missouri*, 91 U. S. 275, 282, 23 L. Ed. 347.

#### Incidental passage through second state.

Transportation from one point to another in the same state, with incidental passage through territory of an adjoining state, is not interstate commerce. *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672; *Campbell v. Chicago, M. & St. P. Ry. Co.*, 53 N. W. 351, 86 Iowa, 587, 17 L. R. A. 443; *Dillon v. Erie R. Co.*, 43 N. Y. Supp. 320, 328, 19 Misc. Rep. 116.

"Commerce between the states," as used in the clause of the federal Constitution authorizing Congress to regulate commerce between the states, does not include the continuous transportation of freight from a point

within the state to another point within the same state over a line of railway partially within the state and partially within another state. *Campbell v. Chicago, M. & St. P. Ry. Co.*, 53 N. W. 351, 352, 86 Iowa, 587, 17 L. R. A. 443.

#### Insurance.

The business of a foreign insurance company is not interstate commerce. *D'Arcy v. Connecticut Mut. Life Ins. Co.*, 69 S. W. 768, 769, 108 Tenn. 567 (citing *Paul v. Virginia*, 75 U. S. [8 Wall.] 163, 19 L. Ed. 357; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297).

#### Internal traffic.

"Commerce among the states," as used in Const. U. S. art. 1, § 8, providing that Congress shall have power to regulate commerce among the states, does not include internal commerce, but only that which proceeds from one state to another, and commerce among the states must of necessity be commerce with the states. *North River Steamboat Co. v. Livingston (N. Y.)* 3 Cow. 713, 729; *Geer v. Connecticut*, 16 Sup. Ct. 600, 605, 161 U. S. 519, 40 L. Ed. 793; *Gibbons v. Ogden*, 19 U. S. (9 Wheat.) 1, 194, 5 L. Ed. 302; *The Daniel Ball*, 77 U. S. (10 Wall.) 557, 558, 19 L. Ed. 999.

"Commerce among the states," as defined by the Supreme Court of the United States, is trade, traffic, intercourse, a dealing in articles of commerce between cities, by its citizens or others, and carried on in more than one state. Commerce within a state is purely a matter of internal regulation, when confined to those articles which have become so distributed as to form items in the common mass of property. *Groves v. Slaughter*, 40 U. S. (15 Pet.) 449, 511, 10 L. Ed. 800.

"Commerce among the states," as used in the United States Constitution, does not comprehend any commerce which is purely internal between man and man in a single state, or between different parts of the same state, and not extending to or affecting other states, and means commerce which concerns more states than one. *Sears v. Board of Com'rs of Warren County*, 36 Ind. 267, 279, 10 Am. Rep. 62.

"Among the several states," as used in the commerce clause of the federal Constitution, declaring that Congress shall have power to regulate commerce among the several states and with the Indian tribes, etc., means that Congress shall have the right to regulate commerce between individual citizens of different states, but does not authorize Congress to interfere in any manner with the traffic between citizens of the same state. In *re Trade-Mark Cases*, 100 U. S. 82, 95, 25 L. Ed. 550.

#### Live stock commission merchant.

"Interstate commerce," within the meaning of the anti-trust act of July 2, 1890, does not include the business of a live stock commission merchant, whose place of business is at a certain yard in a city, and who buys and sells stock for others, although the stock may have been shipped and consigned to him for sale from another state or territory, and may be sold for shipment to another state or to a foreign country. *Hopkins v. United States*, 19 Sup. Ct. 40, 43, 171 U. S. 578, 43 L. Ed. 290.

#### Protection of game.

A state law which makes it a penal offense to have prairie chickens in one's possession from February 1st to August 15th, no matter where the birds were caught, is not an attempt to regulate commerce between the states, and is not in conflict with that clause of the Constitution which gives to Congress the power to regulate commerce. *State v. Randolph*, 1 Mo. App. 15, 16.

#### Sale of goods in another state.

Within the meaning of Const. U. S. art. 1, § 8, cl. 2, which gives to Congress power to regulate commerce between the several states, "interstate commerce" means commerce which contemplates the transfer of goods from one state to another. It would not include a contract for the sale of goods between citizens of different states, where no transfer of property from one state to another was contemplated between the parties. *Reed v. Walker*, 21 S. W. 687, 688, 2 Tex. Civ. App. 92.

The sale of goods which are in another state at the time of the sale, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. *Hynes v. Briggs (U. S.)* 41 Fed. 468, 470.

The term "interstate commerce" includes the sale of brick in one state to be delivered in another, or the filling of an order sent from one state for brick in another. *Cook v. Rome Brick Co.*, 12 South. 918, 919, 98 Ala. 409.

Where parties in the state order goods from a foreign corporation in another state, and the goods are shipped into the state with a draft attached to the bill of lading, a suit brought in the state for the purchase price by the corporation is not affected by Rev. St. arts. 745, 746, prohibiting foreign corporations from doing business or bringing an action in the state, unless they file their articles of incorporation with the Secretary of State, since the transaction is interstate commerce. *Gale Mfg. Co. v. Finkelstein*, 54 S. W. 619, 22 Tex. Civ. App. 241.

Where a sale or exchange of commodities is between parties from different states, to

be effected, so far as the immediate act of exchange goes, by transportation from state to state, it is commerce between the states, within the meaning of the Constitution and the Sherman act. But it is not the transportation that constitutes the transaction interstate commerce. That is an adjunct only, essential to commerce, but not the sole test. The underlying test is that the transaction, as an entirety, including each part calculated to bring about the result, reaches into two or more states, and that the parties dealing with reference thereto deal from different states. *United States v. Swift & Co.* (U. S.) 122 Fed. 529, 531.

#### **Stockyards erected in two states.**

The business of a stockyards company does not come under the designation of "interstate commerce," and is not exempt from such regulation merely because the yards of the company are erected in two states, and it does business in both, though it is possible, as to stock billed from one state to another, its business is interstate commerce, and to that extent exempt from state regulation. *Cotting v. Kansas City Stockyards Co.*, 79 Fed. 679, 681; *Cotting v. Kansas City Stockyards Co.* (U. S.) 82 Fed. 850, 852.

#### **Transportation.**

The term "interstate commerce" may be applied to the transportation of merchandise from a place in one state to a place in another. *Kaelser v. Illinois Cent. R. Co.* (U. S.) 18 Fed. 151, 153; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Baird v. St. Louis, I. M. & S. R. Co.* (U. S.) 41 Fed. 592, 594; *Hardy v. Atchison, T. & S. F. R. Co.*, 5 Pac. 6, 9, 32 Kan. 698.

Within the meaning of the term as used in the Constitution, giving Congress the right to regulate commerce between the states, transportation of a commodity exchanged is a part of the "commerce," and if the transit be between two or more states it is *ex vi termini* interstate transportation and interstate commerce. *Louisville & N. R. Co. v. Railroad Commission* (U. S.) 19 Fed. 679, 709.

The transportation of passengers, where their passage is from one state to another, is "interstate commerce," and a regulation concerning such passengers is a regulation of interstate commerce. *Anderson v. Louisville & N. R. Co.* (U. S.) 62 Fed. 46, 49; *Bowman v. Chicago & N. W. R. Co.*, 8 Sup. Ct. 689, 698, 125 U. S. 465, 31 L. Ed. 700.

An act prohibiting a class of persons from being imported into the state is an act regulating interstate commerce. *Arkansas v. Kansas & T. Coal Co.* (U. S.) 96 Fed. 353, 359.

"Commerce" consists, among other things, of the transportation of commodities,

and, if such transportation be between states, it is "interstate commerce." A combination of competing railroads engaged in interstate traffic into a joint traffic association for the purpose of maintaining reasonable and just rates, fares, rules and regulations, to prevent unjust discrimination, etc., is held to be in restraint of interstate commerce, within the meaning of the anti-trust statute. *United States v. Joint Traffic Ass'n*, 19 Sup. Ct. 25, 31, 175 U. S. 505, 43 L. Ed. 259.

Commerce among the several states unquestionably consists in carrying of persons or commodities from one state to another, whether it be an adjoining one or not, for the purpose of business or pleasure, or for the sale or exchange of some commodities, or for the disposition of them in some other way. This is "commerce," and it is "commerce among the states." *State v. Delaware, L. & W. R. Co.*, 30 N. J. Law (1 Vroom) 473, 487.

The term "interstate commerce," within the meaning of the clause of the federal Constitution giving Congress the power to regulate such commerce, includes the transportation of passengers or merchandise through a state, or from one state to another; and hence a state tax upon such freight is repugnant to the Constitution. *State Freight Tax Case*, 82 U. S. (15 Wall.) 232, 271, 21 L. Ed. 164.

Interstate commerce is the shipping of goods by a corporation domiciled in one state to persons doing business in another state. *American Starch Co. v. Bateman* (Tex.) 22 S. W. 771, 772.

Const. U. S. art. 1, § 8, providing that Congress shall have the exclusive power to regulate "commerce among the several states," must be construed as giving an exclusive power to Congress, and that no state has the power to pass laws regulating interstate commerce, though Congress has not acted upon the subject; and a law passed by a state fixing the maximum rates which a railroad company might charge for the transportation of certain kinds of freight between various points or places in the state and other points or places in another state is unconstitutional and void, such transportation being "commerce among the several states," and penalties for its violation cannot be recovered. *Commonwealth v. Housatonic R. Co.*, 9 N. E. 547, 556, 143 Mass. 264.

#### **Transportation entirely through state.**

Commerce among the states includes freight carried entirely through the state from without, and freight brought into the state from without, or carried from within to points without, and generally all shipments which do not begin and end within the boundaries of the state. *Fargo v. Stevens*, 7 Sup. Ct. 857, 861, 121 U. S. 230, 30 L. Ed. 888.

Where a package of liquors, when seized, was in the possession of a common carrier and in transit from Massachusetts, through New Hampshire, to Maine, for delivery to the consignee, it was commerce among the several states. *State v. Intoxicating Liquors*, 21 Atl. 840, 841, 83 Me. 158.

#### Warehouse.

The fact that a lease exempting the lessor from liability for destruction of buildings on the leased land is of part of a railroad company's depot grounds, and that it is to be used for a cold-storage warehouse, does not make the lease one affecting interstate commerce. To a certain degree interstate commerce is dependent on the erection and maintenance of proper warehouses for the reception and storage of the products of the country, but the fact that such buildings are so used does not place them beyond the police power of the state. *Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co.* (U. S.) 62 Fed. 904, 907.

#### INTERVAL

Code, § 1298, subsec. 3, requiring that, when a train is leaving a city, a bell or whistle shall be sounded when the train starts and "at intervals" until it has left the corporate limits, means short intervals. *Byrne v. Kansas City, Ft. S. & M. R. Co.* (U. S.) 61 Fed. 605, 613 (citing *Louisville & N. R. Co. v. Gardner*, 69 Tenn. [1 Lea] 688; 690).

#### INTERVENE.

"To intervene" is to come between, and "to be heard" is added to the definition only by local legal signification and usage; and in a treaty giving consuls of foreign powers, on the death without will of a citizen of the country which he represents, the right "to intervene in the possession," the only intelligent construction would be that the consul had the right to come between the property and the possession by some one else than himself, with the result that possession must necessarily be landed in him. To intervene in the administration is secondary. He must first come into possession, and then he comes between the administration and the person who might have a right thereto under the state law. This is giving to the word "intervene" its ordinary definition, and avoiding its local legal significance. In *re Lobraciano's Estate*, 77 N. Y. Supp. 1040, 1042, 1047, 38 Misc. Rep. 415.

"To intervene" is to come between (Webst. Dict.), and the right to intervene in a judicial proceeding is a right to be heard with others who may assert demands or defenses. It is not a right to take possession of the entire corpus of a fund which is the subject of the proceeding; and therefore the

consul of a foreign nation, under a treaty entitling him to intervene in the possession, administration, and judicial liquidation of the estate of a deceased citizen of his nation, does not give him the right to a possession of the said property without giving proper bonds therefor. In *re Logiorato's Estate*, 69 N. Y. Supp. 507, 509, 34 Misc. Rep. 31.

#### INTERVENING AGENCY.

"Intervening agencies" sometimes interrupt the current of responsible connection between negligent acts and injuries; but as a rule these agencies, in order to accomplish such result, must entirely supersede the original culpable act and be in themselves responsible for the injury, and it must be of such a character that they could not have been foreseen or anticipated by the wrongdoer. If it required both agencies to produce the result, or if both contributed thereto as concurrent forces, the presence and assistance of one will not exculpate the other, because it would still be the efficient cause of the injury. The intermediate cause must supersede the original wrongful act or omission, and be sufficient of itself to stand as the cause of the plaintiff's injury, to relieve the original wrongdoer from liability. "One of the most valuable of the criteria furnished us by the authorities is to ascertain whether any new force has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient as the cause of the misfortune, the other must be considered too remote. \* \* \* The new force or power here would have been harmless but for the displaced wire and the fact that the wire took on a new force, for the creation of which the company was not responsible. Yet it contributed no less directly to the injury on that account." *Wehner v. Lagerfelt*, 66 S. W. 221, 224, 27 Tex. Civ. App. 520 (citing *Ahern v. Oregon Telegraph Co.*, 33 Pac. 403, 35 Pac. 549, 24 Or. 276, 22 L. R. A. 640).

#### INTERVENING DAMAGES.

"Intervening damages," as used in an appeal bond stipulating that the appellants should prosecute their appeal to effect, and answer and pay all intervening damages occasioned by delay if judgment be affirmed, are such as make the party as well off as if no appeal had been taken, and it can only be determined by looking on the appellant's property from the time of the appeal until the final judgment. *McGregor v. Balch*, 17 Vt. 562, 568.

The "intervening damages" which the statute requires to be inserted in the condition of the recognizance for a review are such damages resulting from the delay as are occasioned by a material alteration in the circumstances of the party appealing or re-

viewing, subsequent to the entering of the recognizance, such as the bankruptcy or removal of the party beyond process. They do not include the extra expense of procuring witnesses and employing counsel, or the time and money necessarily expended in the defense of a suit. *Peasley v. Buckminster*, 1 Tyler, 284, 287.

"Intervening damages" import such as accrue between the appeal or review and final judgment. Under a practice authorizing the court to add interest at 12 per cent. and double costs in case a writ of error does not prevail, or if it is brought for delay merely, it is held that the interest in such case does not constitute an item of intervening damages. *Roberts v. Warner*, 17 Vt. 46.

As used in a bond stipulated for the payment of costs and intervening damages on an appeal from a decree of the probate court, approving and allowing a will, the term "intervening damages" must apply to some expenditure in and about the management of the estate and some detriment to the same occasioned by the appeal. *Sargeant v. Sargeant*, 20 Vt. 297, 302.

#### INTERVENER.

Where junior attaching creditors file interpleas, claiming priority of lien in the action under which the first attachment was levied, they are usually called "interveners." *Standard Implement Co. v. Lansing Wagon Works*, 48 Pac. 638, 639, 58 Kan. 125.

#### INTERVENTION.

A petition in intervention is a petition to become a party to a suit as either plaintiff or defendant. *Logan v. Greenlaw* (U. S.) 12 Fed. 10, 16.

An intervention takes place when a third person is permitted to become a party to an action between other persons, either in joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adverse to both the plaintiff and defendant. Civ. Code, § 22. *Fischer v. Hanna*, 47 Pac. 303, 308, 8 Colo. App. 471.

An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, and has made complaint setting forth the grounds upon which the intervention is based, filed by leave of court. A complainant in intervention must have such an interest in a subject-matter in litigation, and of such a direct and immediate character, that he will gain or lose by the direct legal operation and effect of the judgment. *Gale v. Frazier*, 30 N. W. 188, 141, 4 Dak. 196.

"Intervention," under the statutes, merely results in the addition of a new party or new parties to an original action, for the purpose of hearing and determining at the same time all conflicting claims which may be made to the subject-matter in litigation. It was not intended to change the nature and character of the action itself, or to stop the machinery of a trial thereof. *Reay v. Butler* (Cal.) 7 Pac. 669, 671.

Any person may, before the trial, intervene in an action or proceeding who has an interest in the matter in litigation, in the success of either party, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff and claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, and is made by a complaint setting forth the grounds upon which the intervention rests, filed by leave of the court or judge on the ex parte motion of the party desiring to intervene. *Ballinger's Ann. Codes & St. Wash.* 1897, § 4846.

#### INTESTACY.

Intestacy is the condition of dying without having made any will. *Brown v. Mugway*, 15 N. J. Law (3 J. S. Green) 830, 331.

The word "intestacy," in section 2660 of the Code, providing that letters of administration may be issued in cases of intestacy, is to be construed as referring to a person, and not to a specific property; and hence letters of administration cannot be issued to dispose of the undistributed residue of the estate not disposed of by will, and the executor is entitled to administer such property. *In re Haughian*, 75 N. Y. Supp. 932, 933, 37 Misc. Rep. 457.

#### INTESTATE.

"The word 'intestate' signifies a person who died without leaving a valid will," and hence the validity of the will is a test as to intestacy. *In re Cameron's Estate*, 62 N. Y. Supp. 187, 188, 47 App. Div. 120.

The word "intestate," in its legal and popular sense, means a person who dies without making a will. Such is its meaning in 1 Rev. St. p. 754, providing that the sum of advancements made to the child of an intestate shall be deducted from his share of the estate, unless the advancements exceed such share, in which case the child shall inherit nothing. *Messmann v. Egenberger*, 61 N. Y. Supp. 556, 559, 46 App. Div. 46; *Thompson v. Carmichael* (N. Y.) 3 Sandf. Ch. 120, 129; *Kent v. Hopkins*, 33

N. Y. Supp. 767, 768, 86 Hun, 611. Within the meaning of this law and rule, a man who dies leaving a will is not an intestate, although by his will be bequeaths only his personal estate, leaving his real estate undisposed of. *Thompson v. Carmichael* (N. Y.) 3 Sandf. Ch. 120, 127, 129. Or one who dies devising all of his real estate, or a case of partial intestacy. *Kent v. Hopkins*, 33 N. Y. Supp. 767, 768, 86 Hun, 611.

The word "intestate" signifies a person who died without leaving a valid will; but, where it is used with respect to particular property, it signifies a person who died without effectually disposing of that property by will, whether he left a will or not. Code Civ. Proc. N. Y. 1899, § 2514, subd. 1.

The use of the word "intestate" in a will devising land to a certain person, to her and her heirs, forever, but, if said devisee should die without heirs and intestate, the estate devised to her should vest in another, implies the power in the devisee to devise and bequeath the estate given to her by the will, conferring an absolute power of disposition over the property devised, making the limitation over void. *Armstrong v. Kent*, 21 N. J. Law (1 Zab.) 509, 511.

"Intestate," as used in the statute of descent, providing that, when any of the children of the intestate die without issue in the lifetime of the mother, every brother and sister, etc., shall inherit equally with the mother, means a deceased father. *Mowry v. Staples*, 1 R. I. 10, 13.

## INTESTATE LAWS.

Testator's will was that after the death of his wife, and in case she should marry, and when the youngest child should arrive at twenty-one, then his estate should be distributed "agreeably to the intestate laws." Held, that the phrase "agreeably to the intestate laws" meant the intestate laws governing the descent of testator's estate, and not that of his children, and the estate vested in interest on his death. *Appeal of Letchworth*, 30 Pa. (6 Casey) 175, 179.

## INTESTATE SUCCESSION.

A succession is called intestate when the deceased has left no will, or when his will has been revoked or annulled as irregular. Civ. Code 1900, La. art. 1096.

## INTIMACY—INTIMATE.

The word "intimacy," as used in an offer on a trial of an action for breach of contract of marriage to show that plaintiff had had an intimacy with several different men, means nothing more than close and familiar acquaintance. *McCarty v. Coffin*,

32 N. E. 649, 157 Mass. 478; *Foster v. Hanchett*, 35 Atl. 316, 817, 68 Vt. 319, 54 Am. St. Rep. 386.

A publication respecting a person employed in the post office department stated that complaints had been made by persons outside of the department, asking his dismissal on account of intimacy with a well-known local young elocutionist. Held, that the word "intimacy" should not be construed in its ordinary signification as meaning a proper friendly relation of the parties. As here used, it conveys the idea of an improper relation, at least disreputable and degrading, and tending to such an extent to unfit the plaintiff for the position he held. In this connection the words are libelous per se. *Collins v. Dispatch Pub. Co.* 25 Atl. 546, 547, 152 Pa. 187, 34 Am. St. Rep. 636, 31 Wkly. Notes Cas. 316, 320.

The statement that a man was "intimate" with his brother's wife for a number of years does not impute or imply the commission of the crime of adultery, so as to be actionable per se. *Adams v. Stone*, 131 Mass. 433, 434.

"Intimate," as used in a declaration setting forth a libel by defendant that plaintiff's name and that of her husband's hostler had been coupled together and handled quite extensively through the village, and that it was claimed they were "intimate together," means criminally intimate, and that they had committed the crime of adultery with each other. *Wilcox v. Moon*, 22 Atl. 80, 82, 63 Vt. 481.

## INTIMATE ACQUAINTANCE.

A person, in order to be an intimate acquaintance of the one alleged to be insane, within the meaning of the statute rendering him competent to testify as to such insanity, should be familiar with the temperament and habits of mind of the person whose soundness is in question; but the determination as to such competency is in the discretion of the court below. *People v. Levy*, 71 Cal. 618, 12 Pac. 791.

The phrase "intimate acquaintance," in Code Civ. Proc. § 1870, subd. 10, allowing evidence as to sanity by an intimate acquaintance of the person on trial, is said to be more or less indefinite, and that the question of whether a sufficiently intimate acquaintance has been shown is largely within the discretion of the trial judge. *People v. McCarthy*, 115 Cal. 255, 258, 46 Pac. 1073.

## INTIMATION.

An "intimation" is "a conclusion from something said." *Miller v. Miller* (Pa.) 3 Serg. & R. 267, 270, 8 Am. Dec. 651.

On a trial for murder, a remark by the trial judge, when defendant, his family, and counsel were passing from the courtroom to another room to consult, that "this is spectacular," and certain remarks by him to the Solicitor General, as follows: "Small potatoes, Mr. Hill;" by Mr. Hill: "And few in the hill, your honor;" by the court: "And stringy at that"—are not such "rulings or intimations" as are subject to review on appeal. *Bone v. State*, 12 S. E. 205, 206, 86 Ga. 108.

## INTIMIDATION.

"Intimidation," as used in a declaration that a person by means of intimidation drove the customers of another from him and succeeded in breaking up his business, means the act of making one timid or fearful, by a declaration of an intention or determination to injure another by the commission of some unlawful act. If the act intended to be done is not unlawful, the effect thereof is not "intimidation" in a legal sense. *Payne v. Western & A. R. Co.*, 81 Tenn. (13 Lea) 507, 514, 49 Am. Rep. 668.

Act April 11, 1873, § 2, providing that if any two or more persons shall confederate, for the purpose of "intimidating, alarming, or disturbing" any person or persons, they shall, on conviction, be fined, implies the use of physical force and menace, and involves a breach of the peace; and hence an allegation of a threat to prosecute for selling whisky without a license was not an intimidation, alarming, or disturbing within the statute. *Embry v. Commonwealth*, 79 Ky. 439, 441.

## INTO.

Act N. J. March 18, 1867, incorporating a railway company authorizing it to extend such railway "into certain townships," means to any part of such township. *Pompton Tp. v. Cooper Union for Advancement of Science and Art*, 101 U. S. 196, 201, 25 L. Ed. 803.

## INTO COURT.

In a bail bond, which required the surety thereon to surrender the body of the principal into court, the words "into court" signified a delivery to the officers of the court, who were under the control of the court, and could take custody of the principal under the direction of the court. *Converse v. Washburn*, 43 Vt. 129, 132.

## INTOXICANTS.

A Vermont statute prohibited the sale of intoxicating liquors, etc. A mittimus

recited that respondent had been duly convicted of the crime of selling intoxicants under the statute. Held, that the term "intoxicants," as used in the mittimus, should not be construed as synonymous with "intoxicating liquors" in a criminal proceeding, and that the respondent was entitled to a discharge on habeas corpus. "It would seem like exercising a little arbitrary freedom to substitute 'intoxicants' in a criminal proceeding for 'intoxicating liquors.'" *In re McLaughlin*, 4 Atl. 862, 863, 58 Vt. 186.

## INTOXICATED—INTOXICATION.

See "Habitual Drunkenness or Intoxication."

As crime, see "Crime."

Under the law a man is intoxicated whenever he is so much under the influence of spirituous or intoxicating liquors that it so operates upon him, that it so affects his acts or conduct or movement, that the public or parties coming in contact with him could readily see and know that it was affecting him in that respect. A man to that extent under the influence of liquor that parties coming in contact with him or seeing him would readily know that he was under the influence of liquor by his conduct or his words or his movements would be sufficient to show that such party was intoxicated. The word "intoxicated" is synonymous with "drunk," and in the Standard Dictionary "drunk" is defined as under the influence of intoxicating liquor to such an extent as to have lost the normal control of one's bodily and mental faculties, and commonly to evince a disposition to violence, quarrelsomeness, and bestiality. In *State v. Pierce*, 65 Iowa, 85, 21 N. W. 195, it was held that one is drunk who is so far under the influence of intoxicating liquors that his passions are visibly excited or his judgment impaired. *Sapp v. State*, 42 S. E. 410, 411, 116 Ga. 182.

There are degrees of intoxication or drunkenness. A man is said to be dead drunk when he is perfectly unconscious, powerless. He is said to be stupidly drunk when a kind of stupor comes over him. He is said to be staggering drunk when he staggers in walking. He is said to be foolishly drunk when he acts the fool. All these are cases of drunkenness, of different degrees of drunkenness. So it is a very common thing to say a man is badly intoxicated, and again that he is slightly intoxicated. There are degrees of drunkenness, and therefore many persons may say that a man was not intoxicated because he could walk straight, or he could get in and out of a wagon. Whenever a man is under the influence of liquor, so as not to be entirely himself, he is intoxicated. Although he can walk straight, attend to his business, and may not give any

outward and visible signs to the casual observer that he is drunk, yet if he is under the influence of the liquor so as not to be himself, so as to be excited from it, and not to possess that clearness of intellect and control of himself that he otherwise would have, he is intoxicated. *Elkin v. Buschner* (Pa.) 16 Atl. 102, 104.

An instruction, in a personal injury case in which contributory negligence of defendant arising from his intoxication was urged as a defense, that the words "Intoxicated condition" meant such a condition that defendant was incapable of giving attention to what he was doing as a man of prudent and reasonable intelligence would give, was thought to be proper. *Kenney v. Rhineland*, 50 N. Y. Supp. 1088, 1090, 28 App. Div. 246.

"Intoxicated," as used in Code, c. 32, § 16, providing that if any person having a state license to sell spirituous liquors shall sell or give any such liquors "to any person who is intoxicated at the time, or who is in the habit of drinking to intoxication, when he knows or has reason to believe such person is intoxicated, or is in the habit of drinking to intoxication," shall be guilty of a misdemeanor, means such inebriation as attracts observation and becomes known to others, or gives them reason to believe the person is intoxicated; and of this a bystander would generally be a better judge than the party himself, whose opinion on the subject for obvious reasons is worth but little. *Halstead v. Horton*, 18 S. E. 953, 956, 38 W. Va. 727.

"Intoxication," as used in Rev. St. 1891, c. 43, giving a right of action for an injury to a person caused by the intoxication of another against the person furnishing the intoxicating liquors, does not mean excited to frenzy. *Smith v. People*, 31 N. E. 425, 426, 141 Ill. 447.

"The word 'intoxication' means an abnormal mental or physical condition, due to the influence of alcoholic liquors, a visible excitation of the passions and impairment of the judgment, or a derangement or impairment of physical functions or energies. This implies a condition which would not result from the reasonable, ordinary, and moderate use of the most intoxicating liquors. Intoxication, by means even of those liquors which the law itself recognizes as per se intoxicating in general acceptance, is produced by their unreasonable, inordinate, immoderate, or excessive use, and to say that no liquor is intoxicating, unless its moderate and reasonable use will produce inebriety, is to declare that no liquor whatever is intoxicating." *Wadsworth v. Dunnam*, 13 South. 597, 599, 98 Ala. 610.

When it is apparent that a person is under the influence of liquor, or when his man-

ner is unusual or abnormal, and his inebriated condition is reflected in his walk or conversation, when his ordinary judgment and common sense are disturbed, or his usual will power is temporarily suspended, when these or similar symptoms result from the use of liquors and are manifest, then the person is "intoxicated." It is not necessary that the person should be so-called "dead drunk," or hopelessly intoxicated. It is enough that his senses are obviously destroyed or distracted by the use of intoxicating liquors, within the meaning of the statute authorizing recovery of damages against a saloon keeper who sells liquor to an intoxicated person. *Lafler v. Fisher*, 79 N. W. 934, 935, 121 Mich. 60.

#### Drugs.

"Intoxication" is the act of inebriating, or the state of being inebriated; a state produced by drinking too much of an alcoholic liquid, or by the use of opium, hasheesh, or the like. The term is treated by lexicographers as synonymous with "drunkenness," and as used in Civ. Code, § 2427, providing that a total or partial divorce may be granted "in case of cruel treatment or habitual intoxication of either party," means drunkenness produced by the use of alcoholic liquors, and not the condition resulting from the excessive use of opiates. *Ring v. Ring*, 38 S. E. 330, 331, 112 Ga. 854.

"Intoxicated," as used in Gen. St. c. 94, § 10, providing that persons found intoxicated should be punished, etc., is used in its common and ordinary signification, and means intoxicated on spirituous liquor. It is sometimes said that a person is intoxicated or drunk with opium, ether, or laughing gas; but it is always felt and understood that such is an unusual and forced use of the word "intoxicated." Hence a complaint under such section, charging that the respondent became and was found intoxicated, is sufficient, without alleging upon what he became intoxicated. *State v. Kelley*, 47 Vt. 294, 296.

#### Drunkenness or inebriety.

"Intoxication" is a word nearly synonymous with "inebriety," or "inebriation," and is expressive of that state or condition which inevitably follows from taking into the body, by swallowing or drinking, excessive quantities of intoxicating liquors. *Commonwealth v. Whitney*, 65 Mass. (11 Cush.) 447, 449.

"Intoxication" is a synonym of "inebriety," or "drunkenness," implying or evidenced by undue and abnormal excitation of the passions or the feelings, or an impairment of the capacity to think and act correctly and effectually. *Standard Life & Acc. Ins. Co. v. Jones*, 10 South. 530, 532, 94 Ala. 434.



**Intemperance distinguished.**

Act 1872, making a person criminally liable for selling intoxicating liquor to a person in the "habit of getting intoxicated," does not mean habit of drinking intoxicating liquors intemperately. The word "intoxicated" means to become inebriated or drunk, but intemperance does not necessarily imply drunkenness; it being defined to be the use of any thing beyond moderation. *Mullinix v. People*, 76 Ill. 211, 218.

**INTOXICATED PERSON.**

Acts Reg. Sess. 1873, p. 151, providing that any person who should by the sale of intoxicating liquor cause the intoxication of another should be liable to pay a reasonable compensation to another person who may take charge of and "provide for such intoxicated person," means intoxicated person literally, and so authorizes a recovery only for the time during which such person may have remained intoxicated. *Krach v. Hellman*, 53 Ind. 517, 518.

**INTOXICATING BEVERAGES.**

"Intoxicating beverages," as used in Act Feb. 12, 1853, prohibiting the manufacture of intoxicating beverages and the traffic therein, should be construed to include strong beer and ale. *People v. Hawley*, 3 Mich. 330, 340.

**INTOXICATING BITTERS.**

"Intoxicating bitters," is a liquor, generally a spirituous liquor, in which bitter herbs or roots are steeped. *Roberson v. State*, 14 South. 869, 870, 100 Ala. 123.

What constitutes "intoxicating mixture, compound, or bitters," within the meaning of statutes prohibiting the sale thereof, has been said in *Carson v. State*, 69 Ala. 235, to be determinable by the following rule: If the liquors and other ingredients are used and mixed in such manner and proportion as to counteract the intoxicating force and character of the liquor, fairly constituting a medicine, and rendering its use as a beverage practically impossible, it does not come within the statute. On the other hand, if the liquor is the predominant element, or sufficiently retains its intoxicating qualities, so as to render the mixture reasonably susceptible of use as a beverage, or of substitution for the ordinary intoxicating drinks, it is within the statutory prohibition. The term includes a strengthening cordial and a ginger tonic which contains sufficient alcohol and does actually intoxicate persons using them. *Compton v. State*, 11 South. 69, 70, 95 Ala. 25.

**INTOXICATING DRINKS.**

The term "intoxicating drinks" is not necessarily synonymous with the expression "spirituous, vinous, or malt liquors," so that under the statute forbidding the sale of such liquors an indictment charging the sale of intoxicating drinks is not sufficient, since there are intoxicating drinks which are not and do not contain spirituous, vinous, or malt liquors. *Roberson v. State*, 14 South. 869, 100 Ala. 123.

**INTOXICATING LIQUOR.**

Any intoxicating liquor, see "Any."

"Intoxicating liquors" is a broad term, which embraces all liquors used as a beverage, which, when so used, will or may intoxicate. *People v. Hawley*, 3 Mich. 330, 339; *People v. Sweetser*, 46 N. W. 452, 455, 1 Dak. 308; *State v. Oliver*, 26 W. Va. 422, 431, 53 Am. Rep. 79.

"Intoxicating liquors," within the meaning of the local option law, are such as are intended for use as a beverage, or are capable of being so used, which contain alcohol, either obtained by fermentation or by the additional process of distillation, in such proportion that it would produce intoxication when taken in such quantities as may practically be drunk. *Sebastian v. State*, 72 S. W. 849, 850, 44 Tex. Cr. R. 508.

Any liquor intended for use as a beverage or capable of being so used, which contains alcohol, either obtained by fermentation or by the additional process of distillation, in such a proportion that it will produce intoxication when taken in such quantities as may be practically drunk, is an intoxicant. *Pike v. State*, 51 S. W. 395, 397, 40 Tex. Cr. R. 613 (citing *Decker v. State*, 44 S. W. 845, 39 Tex. Cr. R. 20); *Malone v. State (Tex.)* 51 S. W. 381.

The use of the term "intoxicating liquors," in an indictment charging the illegal sale of intoxicating liquors, includes liquors sold which are not in fact intoxicating, if they are within the liquors enumerated in a statute declaring certain liquors to be intoxicating. *Commonwealth v. Timothy*, 74 Mass. (8 Gray) 480, 482.

Where an officer went to defendant's house and stated that the latter was wanted for the selling of intoxicating liquor without having paid a United States revenue tax, and the defendant made statement in the nature of an admission that he had been selling intoxicating liquors at some time before, the term "intoxicating liquors" must have been used in its ordinary sense, and to have referred to liquors the sale of which without a license is unlawful. *Commonwealth v. Kyne*, 38 N. H. 362, 363, 162 Mass. 146.

Where an indictment charged defendant with selling spirituous, vinous, or malt liquors in violation of a local prohibitory law, it must be shown that he sold one or more of the kinds of liquor mentioned, and proof that the liquor sold was intoxicating is not sufficient without further proof that it was either spirituous, vinous, or malt. *Brantley v. State*, 8 South. 816, 817, 91 Ala. 47.

"Intoxicating liquors," as used in a complaint and warrant designating for seizure certain intoxicating liquors, to wit, "several casks of French brandy, several casks of gin, and several casks of intoxicating wines," means only the intoxicating liquors named, and does not include all intoxicating liquors. "Intoxicating liquors" is the name of a genus of which brandy, gin, etc., are species. *Mallett v. Stevenson*, 26 Conn. 428, 431.

"Intoxicating liquors," within the meaning of St. 1855, c. 405, in reference to a nuisance by the unlawful sale of intoxicating liquors, is to be understood as having the same meaning as in chapter 215, § 1, which provides that ale, porter, strong beer, lager beer, cider, and all wines shall be considered intoxicating liquors. *Commonwealth v. Shea*, 80 Mass. (14 Gray) 386, 387.

On the trial of defendant for the sale of intoxicating liquors, it appeared that the liquor sold was called "Phosphate Lemon Rye," that it contained about 23 per cent. of alcohol, that it was sold and used as a beverage, and that it produced intoxication similar to the known effects of whisky and other intoxicating liquors. This the court held was sufficient to establish its character as an intoxicating liquor, and to authorize the restraint of its sale. *State v. Coulter*, 19 Pac. 868, 870, 40 Kan. 87.

The use of the term "intoxicating liquor" is sufficient, in an indictment for the illegal sale of liquors, to describe the liquors sold, and it is unnecessary to specifically describe the particular kinds of liquors. *Buell v. State*, 72 Ind. 523; *Houser v. State*, 18 Ind. 106, 107; *Commonwealth v. Conant*, 72 Mass. (6 Gray) 482; *Batchelder v. Commonwealth*, 109 Mass. 361, 362; *State v. Witt*, 39 Ark. 210, 218; *State v. Reynolds*, 47 Vt. 297, 299.

The term "intoxicating liquors" is sufficient, in an indictment, to describe the offense of illegally selling intoxicating liquors, without the use of the words "fermented" or "distilled," which are used in the statute, as intoxicating liquors are either fermented or distilled. Similar indictments were held good in *State v. Williamson*, 21 Mo. 496, *State v. Dengolensky*, 82 Mo. 44, and *State v. Lisles*, 58 Mo. 359. *State v. Effinger*, 44 Mo. App. 81, 83.

Under a statute regulating the sale of intoxicating liquors, an indictment charging the sale of a certain malt liquor, but not al-

leging that such liquor was intoxicating, is insufficient, as the courts could not from their general knowledge say that all malt liquors are intoxicating. *Shaw v. State*, 56 Ind. 188, 189.

By the express provisions of Act Iowa Jan. 28, 1875, the words "intoxicating liquors" shall be construed to mean all spirituous, malt, and vinous liquors, provided that nothing in the act shall be so construed as to forbid the manufacture of cider from apples, or wine from grapes or other fruits, grown or gathered by the manufacturing company. *Worley v. Spurgeon*, 38 Iowa, 465, 466, 467; *State v. Stapp*, 29 Iowa, 551, 552; *State v. Brindle*, 28 Iowa, 512, 513.

The Iowa prohibition law (St. 1884, § 2416) provides that, whenever the words "intoxicating liquors" occur in the chapter, the same shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous, and malt liquors, and all intoxicating liquors whatever. *Tredway v. Riley*, 49 N. W. 268, 269, 32 Neb. 495, 29 Am. St. Rep. 447.

"Intoxicating liquors," as used in Acts 1882-83, p. 548, prohibiting the sale of "alcoholic, spirituous, or malt liquors, or intoxicating bitters," within a certain county, embraces all the liquors mentioned in the title of the act, which were "alcoholic, spirituous, or malt liquors, or intoxicating bitters," and the act is not unconstitutional from the fact that the phrase is capable of including more as well as those liquors mentioned. *Bell v. State*, 18 S. E. 288, 289, 91 Ga. 227.

The term "intoxicating liquors," as used in an indictment charging a place as one where intoxicating liquors were habitually sold and drunk, cannot be held to include spirituous, vinous, or malt liquors, within Rev. St. § 6948, making it an offense to keep open on election day any place where on other days spirituous, vinous, or malt liquors are habitually sold and drunk. All spirituous, vinous, or malt liquors are intoxicating, but all intoxicating liquors are not necessarily either spirituous, vinous, or malt liquors. *Weisbrodt v. State*, 33 N. E. 603, 50 Ohio St. 192.

Under the Kansas liquor laws all fermented liquor is presumed to be intoxicating. *State v. Vollmer*, 6 Kan. 371, 378.

The words "intoxicating liquors," as used in the chapter relating to licenses, shall be deemed and construed to mean spirituous, vinous, malt, and fermented liquors, and all mixtures and preparations thereof, including bitters that may be used as a beverage and producing intoxication. Pol. Code Idaho 1901, § 1513.

The words "intoxicating liquor" shall apply to any spirituous, vinous, or malt liquor, or to any intoxicating liquor whatever which

is used or may be used as a beverage. *Horner's Rev. St. Ind. 1901, § 5313.*

Ale, porter, strong beer, lager beer, cider, all wines, any beverage which contains more than 1 per cent. of alcohol by volume at 60° Fahrenheit, and distilled spirits, shall be deemed to be intoxicating liquor within the meaning of the chapter relating thereto. *Rev. Laws Mass. 1902, p. 835, c. 100, § 2.*

The words "intoxicating liquors," wherever used in the laws or statutes of this state now in force or hereafter to be in force, shall be construed to mean spirituous, vinous, fermented, and malt liquors, or either of them. *Gen. St. Minn. 1894, § 2032.*

The term "intoxicating liquors," as used in the article relating to dramshops, shall be construed to mean fermented, vinous, or spirituous liquors, or any composition of which fermented, vinous, or spirituous liquors is a part. *Rev. St. Mo. 1899, § 3016.*

By the words "spirit," "spirituous liquor," or "intoxicating liquor," in statutes, shall be intended all spirituous or intoxicating liquor, and all mixed liquor any part of which is spirituous or intoxicating, unless otherwise expressly declared. *Pub. St. N. H. 1901, p. 65, c. 2, § 33.*

All spirituous, malt, vinous, fermented, or other intoxicating liquors or mixtures thereof, by whatever name called, that will produce intoxication, or any liquors or liquids which are made, sold, or offered for sale as a beverage, and which shall contain *coccus indicus*, copperas, opium, cayenne pepper, picric acid, Indian hemp, strychnine, tobacco, darnal seed, extract of logwood, salts of zinc, copper, or lead, alum or any of its compounds, methyl alcohol or its derivations, amyl alcohol, or any extract or compound of any of the above ingredients, shall be considered and held to be intoxicating liquors within the meaning of the chapter of the Penal Code relating to prohibition and the unlawful dealing in intoxicating liquors. *Rev. Codes N. D. 1899, § 7598.*

As used in the chapter relating to intoxicating liquors, the phrase "intoxicating liquors" means any distilled, malt, vinous, or any other intoxicating liquors. *Bates' Ann. St. Ohio 1904, § 4364—20c.*

#### Alcohol.

Alcohol is an "intoxicating liquor" within the meaning of the statute prohibiting the sale of intoxicating liquors to minors. *Emerson v. State, 43 Ark. 372, 375; Rucker v. State (Tex.) 24 S. W. 902, 903; Shaw v. Carpenter, 54 Vt. 155, 162, 41 Am. Rep. 837; Greiner-Kelley Drug Co. v. Truett (Tex.) 75 S. W. 536, 537.*

Where an indictment charges the sale of alcohol, it does not charge the sale of "in-

toxicating liquor." *State v. Witt, 39 Ark. 216, 218.*

That alcohol is an intoxicant is as well known and established as any other physical fact. There is not one man in 10,000 or 100,000 who, if asked whether alcohol is intoxicating, would not reply immediately in the affirmative. It is not a purely scientific fact; it is a fact that every person of commonest understanding knows. Indeed, it is a matter of common knowledge that alcohol is the intoxicating element of the various forms of beverages known as spirituous or intoxicating liquors. In a prosecution for the sale of intoxicating liquors, where the proof was of the sale of pure alcohol, it was not necessary to prove that the alcohol was intoxicating. *Snider v. State, 81 Ga. 753, 7 S. E. 631, 17 Am. St. Rep. 850.*

#### As alcoholic beverage.

A liquor is intoxicating when it is intended for use as a beverage, or capable of being so used, which contains alcohol, either obtained by fermentation or by the additional process of distillation, in such a proportion that it will produce intoxication when taken in such quantities as may practically be drunk. *Decker v. State, 44 S. W. 845, 39 Tex. Cr. R. 20; Taylor v. State (Tex.) 49 S. W. 589, 590; Malone v. State (Tex.) 51 S. W. 381, 382; Pike v. State, 51 S. W. 895, 897, 40 Tex. Cr. R. 613.*

In a prosecution for selling intoxicating liquor, where the proof was of the sale of peach cider, the trial court instructed the jury that, if they found that the liquor sold by defendant contained 6 per cent. of alcohol, such liquor was intoxicating. The appellate court held this instruction to be error, and said: "The courts may not say as a matter of law that the presence of a certain per cent. of alcohol brings the compound within the prohibition, or that a particular ingredient does or does not destroy the intoxicating influence of the alcohol, or prevent it from becoming an intoxicating beverage. Of course, the larger per cent. of alcohol, and the more potent the other ingredients, the more probable does it fall within or without the prohibition of the statute, but in each case the question is a question of fact, and to be settled as other questions of fact." *City of Topeka v. Zufall, 19 Pac. 859, 361, 40 Kan. 47, 1 L. R. A. 387.*

All "intoxicating liquors" that are used as a beverage contain alcohol mingled with other things, particularly with water. It is a matter of common knowledge that alcohol is the intoxicating element in intoxicating liquor. Whisky is alcohol mingled with water and other elements, of which the alcohol alone is intoxicating. The words "mixed liquor, part of which is intoxicating," do not properly describe any well-known kind

of intoxicating liquor, but they are not inconsistent with the general words "intoxicating liquor." *Commonwealth v. Morgan*, 21 N. E. 369, 149 Mass. 314.

The presence of malt in any compound does not necessarily make it an intoxicating liquor. It is not the presence or absence or any one particular ingredient that brings liquor within the definition of "intoxicating liquors." The mere presence of alcohol does not necessarily make it such. The influence of alcohol may be counteracted by other elements, and the compound be, strictly and fairly, only a medicine. It cannot be said, as a matter of law, that the presence of a certain per cent. of alcohol brings a particular compound within the definition of "intoxicating liquors," or that any particular ingredient does or does not destroy the intoxicating influence of the alcohol, or prevent it from ever becoming an intoxicating beverage. The larger the per cent. of alcohol, and the more potent the other ingredients, the more probable it is that the liquor falls within the definition of "intoxicating liquors"; but whether or not a particular liquor is intoxicating is a question of fact. Beer is presumed to be intoxicating. *State v. May*, 34 Pac. 407, 408, 52 Kan. 53.

Under the Iowa statute prohibiting the manufacture and sale of intoxicating liquors, and defining "intoxicating liquors" to mean "alcohol, wine, beer, spirituous, vinous, and malt liquors, and all intoxicating liquors whatever," a beverage containing alcohol is an intoxicant, regardless of whether the quantity of alcohol contained in it is or is not of itself intoxicating. Alcohol is an intoxicating liquor, regardless of the fact that the quantity drunk at any one time will not have that effect. It is immaterial, in a statutory sense, what effect alcohol may have on the human system; it is intoxicating liquor. However much it may be diluted, it must remain an intoxicant when used as a beverage; that is to say, the statute provides that alcohol is an intoxicant whenever and however used as a beverage, and, no matter how it may be diluted or disguised, it so remains, because the statute so declares. *State v. Intoxicating Liquors*, 41 N. W. 6, 76 Iowa, 243, 2 L. R. A. 408.

Pub. St. c. 100, § 27, provides that ale, porter, strong beer, lager beer, cider, all wines, and any beverage containing more than 3 per cent. of alcohol by volume at 60° Fahrenheit, as well as distilled spirits, shall be deemed intoxicating liquors within the meaning of the chapter. *Commonwealth v. Snow*, 133 Mass. 575, 576.

Pub. Laws, c. 596, § 1, as amended by Pub. Laws, c. 634, § 1, provides that whenever the words "intoxicating liquors" shall be used in the act it shall be deemed to in-

clude ale, wine, rum, or other strong or malt liquors, or any mixed liquors a part of which is ale, wine, rum, or other strong or malt liquor, or any liquor or mixture of liquors which shall contain more than 2 per cent. by weight of alcohol. These words do not purport to change the nature of things and make liquors intoxicating which are not intoxicating, but simply enact that the words "intoxicating liquors," when used in the act, shall be deemed to include any liquor or mixture of liquors which shall contain more than 2 per cent. by weight of alcohol, whether intoxicating or not. *State v. Guinness*, 16 Atl. 910, 16 R. I. 401; *State v. McKenna*, 17 Atl. 51, 52, 16 R. I. 398.

#### Ale and porter.

There is a class of liquors or liquids that are universally conceded and known to be intoxicating. Some contain a greater portion of the intoxicating properties than others. Wine is less intoxicating than brandy, yet one is as universally acknowledged to be an intoxicating liquor as the other. So with ale; everybody understands that it is intoxicating, and that it comes within the provision of the statute that prohibits the sale of intoxicating liquors. When the government, in a prosecution for the violation of the statute, proves the resident guilty of selling or furnishing any of this class of liquors contrary to the statute—that is, sufficient to warrant the jury in finding him guilty of selling intoxicating liquors—there is no more occasion for requiring affirmative proof that ale is intoxicating than that brandy is intoxicating or that gunpowder is explosive. *State v. Barron*, 37 Vt. 57, 60.

The term "intoxicating liquors," by the express provision of St. 1875, c. 99, § 18, includes ale, as well as distilled spirits. *Commonwealth v. Curran*, 119 Mass. 206, 208. So, also, under previous statutes. *Commonwealth v. Chappel*, 116 Mass. 7; *Commonwealth v. Dean*, 80 Mass. (14 Gray) 99.

Under Act May 1, 1854, § 4, making it an offense to keep a place of public resort where "intoxicating liquors" are sold, ale is not included. *Johnston v. State*, 23 Ohio St. 556, 558.

Where, under an indictment for keeping for sale "intoxicating liquor," the proof showed that the liquors kept for sale were ale and cider, the trial court ruled that ale and cider, after fermentation is completed, are intoxicating liquors, without proof of the amount of alcohol which they may contain; but the Supreme Court reversed this judgment of the trial court, and held that whether they are intoxicating or not is a question for the jury. *State v. Biddle*, 54 N. H. 379.

Ale and porter are intoxicating liquors, notwithstanding the ale and porter are in a

damaged condition and impalatable, as long as their intoxicating properties remain. *Shaw v. Carpenter*, 54 Vt. 155, 162, 41 Am. Rep. 837.

Where a statute declares that the words "intoxicating liquors," as used in an act, should apply to any spirituous, vinous, or malt liquors, etc., the courts will judicially recognize the fact that ale is a malt liquor, and consequently an intoxicating liquor, within the meaning of the statute. *Wiles v. State*, 33 Ind. 206, 208. See, also, *State v. Gravelin*, 16 Atl. 914, 16 R. I. 407.

#### **Bay rum.**

Bay rum is not an intoxicating liquor, even though it contains sufficient alcohol to produce intoxication. In re *Intoxicating Liquor Cases*, 25 Kan. 751, 768, 87 Am. Rep. 284.

#### **Beer.**

A sale of intoxicating liquors is *prima facie* established by proof of a sale of beer, without evidence of its intoxicating qualities. *State v. Spiers*, 73 N. W. 343, 344, 103 Iowa, 711; *State v. Jenkins*, 4 Pac. 809, 32 Kan. 477; *Stout v. State*, 96 Ind. 407; *Myers v. State*, 93 Ind. 251, 252; *Douglas v. State*, 52 N. E. 238, 21 Ind. App. 302. Thus, also, an indictment is sufficient which charges the sale of beer, without alleging that it was a malt or intoxicating liquor. *Welsh v. State*, 25 N. E. 883, 126 Ind. 71, 9 L. R. A. 664.

Malt beer is an intoxicating liquor within the meaning of the statute prohibiting the sale of the same. *Mullen v. State*, 96 Ind. 304, 306.

Beer may be, but is not necessarily, a malt liquor, and may not be intoxicating; therefore it devolves on the state, on a trial for selling intoxicating liquors, to prove that the beer sold was either a malt liquor, or that it was in fact intoxicating. *Kurz v. State*, 79 Ind. 483, 490; *Plunkett v. State*, 69 Ind. 68, 69.

It being a matter of general knowledge that there are varieties of the beverage denominated "beer" that contain no malt and are not intoxicating, the term "beer," as to its quality and effect, does not import intoxicating liquor. *State v. Sioux Falls Brewing Co.*, 58 N. W. 1, 3, 5 S. D. 39, 26 L. R. A. 138.

The term "intoxicating liquor" will not be held, by the process of judicial notice, to include brewer's beer, unless there is evidence that such beer is in fact intoxicating. *Klare v. State*, 43 Ind. 483, 485.

Under Act May 1, 1854, § 4, making it an offense to keep a place of public resort where intoxicating liquors are sold, intoxicating liquors will not be held to include beer. *Johnston v. State*, 23 Ohio St. 556, 558.

Under a statute which classes beer as an intoxicating liquor, proof that a customer asked defendant for a bottle of beer, and that he sold the customer a bottle of liquor which had the appearance of beer, was sufficient to convict of the offense of selling intoxicating liquor. Although there are some kinds of beer which are not intoxicating, the burden would be upon defendant to show that this beer was not intoxicating. *State v. Cloughly*, 35 N. W. 652, 653, 73 Iowa, 626.

An indictment for the sale of "intoxicating liquors" under St. 1855, c. 215, § 17, is not supported by evidence of sales of beer, without evidence that it is strong beer or lager beer, or without proof of the intoxicating quality of such beer. *Commonwealth v. Hardiman*, 75 Mass. (9 Gray) 136.

"Intoxicating liquors," within the meaning of Act 1869, c. 415, prohibiting the sale of intoxicating liquors, and providing that ale, porter, strong beer, lager beer, and all wines shall be considered as intoxicating liquors, as well as distilled spirits, is not limited to the enumerated liquors, but includes other liquors which are in fact intoxicating; but the question whether they are intoxicating is for the jury. Thus the sale of a beer which is not strong beer or lager beer is illegal if intoxicating, and the latter fact is to be determined by the jury. *Commonwealth v. Blas*, 116 Mass. 56, 58.

The amendatory act of 1851 declares every fermented drink to be an intoxicating liquor within the act prohibiting the selling of intoxicating liquor without a license; therefore beer, being a fermented drink, is an intoxicating liquor or drink within the statute. *State v. Lemp*, 16 Mo. 389, 391.

The term "intoxicating liquor" in *Sess. Acts* 1887, p. 180, is made to include beer by the special provisions of section 1 of the act. *State v. Houts*, 36 Mo. App. 265, 267.

#### **Brandy and brandied fruit.**

Courts and juries will take knowledge of the fact that brandy is an intoxicating liquor. It needs no evidence to support a fact so well known. *State v. Lewis*, 90 N. W. 818, 86 Minn. 174. See, also, *Snider v. State*, 7 S. E. 631, 632, 81 Ga. 753, 12 Am. St. Rep. 350.

On the trial under an indictment charging defendant with having sold "a certain quantity of spirituous liquor, to wit, a quart of brandy," an instruction that the jury need not find that the brandy, gin, ale, etc., sold were actually intoxicating was right. Ale is by the statute declared to be an intoxicating liquor, and as such its sale is prohibited; and brandy, gin, etc., according to all law dictionaries, and according to the popular and universal acceptance of the words, are the names of particular kinds or species of intoxicating liquor, and there is no more reason

for requiring the jury to find the former actually intoxicating than the latter; no more reason for requiring the jury to find that brandy is intoxicating liquor, than to find that "intoxicating liquor" is intoxicating. *State v. Wadsworth*, 30 Conn. 55, 59.

The sale of a bottle of brandy peaches is not a sale of intoxicating liquors within the statute. *Holland v. Commonwealth*, 7 Ky. Law Rep. 223.

Under an indictment charging an unlawful sale of intoxicating liquor, a conviction may be had on proof of a sale of brandy peaches and brandy cherries put up in bottles and preserved in liquor which was spirituous and intoxicating. *Ryall v. State*, 78 Ala. 410.

A bottle containing six peaches and about a gallon of a fluid tasting like alcoholic liquor, but very weak, and not capable of producing intoxication unless consumed in very large quantities, is not "intoxicating liquor" within the meaning of a statute requiring a license for the selling of such liquor. *Rabe v. State*, 39 Ark. 204.

#### Cider.

The term "intoxicating liquors," within the meaning of the statute declaring that ale, cider, and all wines shall be construed intoxicating liquors, includes unfermented cider. *Commonwealth v. Dean*, 80 Mass. (14 Gray) 99.

Cider is not an "intoxicating liquor" within the meaning of sections 31 and 36 of the act which prohibits the sale of any intoxicating liquor, unless it is shown by evidence to be intoxicating. *Commonwealth v. Chappel*, 116 Mass. 7.

The term "intoxicating liquors," within the meaning of the liquor laws, includes all spirituous, vinous, or malt liquors, and will include cider when proved to be intoxicating. *Hewitt v. People*, 57 N. E. 1077, 186 Ill. 336.

Under Act May 1, 1854, § 4, making it an offense to keep a place of public resort where intoxicating liquors are sold, intoxicating liquors will not be held to include cider. *Johnston v. State*, 23 Ohio St. 556, 558.

Where, under an indictment for keeping for sale intoxicating liquor, the proof showed that the liquors were ale and cider, and the trial court ruled that ale and cider, after fermentation is completed, are "intoxicating liquors," without proof of the amount of alcohol they contain. The Supreme Court reversed the judgment, holding that whether they were intoxicating or not is a question for the jury. *State v. Biddle*, 54 N. H. 379.

Whether the term "intoxicating liquors" includes certain cider and wine made from fruit growing in the state, and charged to

have been illegally sold, is a question of fact for the jury. *State v. Page*, 66 Me. 418, 419.

#### Cologne.

Cologne is not an intoxicating liquor, though containing sufficient alcohol to produce intoxication. In re Intoxicating Liquor Cases, 25 Kan. 751, 766, 37 Am. Rep. 284.

#### Drugs.

Drugs are not within the meaning of an act of the Legislature prohibiting merchants from selling intoxicating liquors without a license. *Anderson v. Commonwealth*, 72 Ky. (9 Bush) 569, 571.

#### Essences.

In affirming a conviction for the sale of intoxicating drinks on evidence that defendant sold a bottle of essence of cinnamon, the court said that it was not necessary that it should have been proved as a fact that it was intoxicating, but it was sufficient if facts were proved from which the jury might have properly inferred that it was intoxicating or that it produced intoxication. *State v. Muncey*, 28 W. Va. 494, 495.

Extract of lemon, generally and properly known and used for culinary purposes, recognized as such in standard dispensatories prior to the enactment of the dramshop act, and not then known and classed among liquors used as a beverage, is not an intoxicating liquor, within the meaning of such act, because it contains alcohol and may, or in fact does, produce intoxication. *Holcomb v. People*, 49 Ill. App. 73, 74.

Intoxicating liquors, in Laws 1881, c. 123, prohibiting the sale of spirituous, malt, vinous, fermented, or other intoxicating liquors, extends the scope of the statute so as to include every liquor which comes within the general definition of intoxicating liquors. "Intoxicating liquors," or mixtures thereof, reasonably construed, means liquors which will intoxicate and as are commonly used as beverages, and also any mixtures of any liquors as retain their intoxicating qualities, which may fairly be presumed may be used as a beverage and become a substitute for the ordinary intoxicating drinks. The term does not include essence of lemon, cologne, or similar preparations, which, though they contain alcohol, which is the intoxicating factor of all drinks, are never used as beverages. Whatever is generally and popularly known as "intoxicating liquor," such as wine, beer, gin, etc., is within the prohibition of the statute, and may be so declared as a matter of law by the court; and whatever, on the other hand, is generally and popularly known as medicine, or an article for the toilet or culinary purposes, duly recognized or described in the United States Dispensatory or like standard authority, may be

declared as a matter of law not to be within the statute. In *re Intoxicating Liquor Cases*, 25 Kan. 751, 762, 87 Am. Rep. 284.

#### Gin.

No juror can be supposed to be so ignorant as not to know what gin is, and proof that a defendant sold gin is proof that he sold intoxicating liquor. *Commonwealth v. Peckham*, 68 Mass. (2 Gray) 514, 515. See, also, *Snider v. State*, 7 S. E. 631, 632, 81 Ga. 753, 12 Am. St. Rep. 850.

#### Hop ale.

While the court may know that whisky, brandy, wine, and lager beer are intoxicating, it cannot judicially know that hop ale is intoxicating, and a conviction of selling intoxicating liquors without a license is not sustained by proof of the selling of hop ale, without proof that such ale was intoxicating. *Barnes v. State* (Tex.) 44 S. W. 491-492.

#### Lager beer.

In an action in which defendant was convicted of selling intoxicating liquors upon evidence that he sold lager beer, the court said: "We have no more hesitation in holding that the liquor known as 'lager beer' is intoxicating, than we should have in holding that spruce beer is not; and we should put both rulings upon the same ground, to wit, that such is the common understanding resulting from common observation." *State v. Church*, 60 N. W. 143, 144, 6 S. D. 89.

"We agree with Wells, J., when he says, in *Commissioners of Excise v. Taylor*, 21 N. Y. 173, 178, 'that but one safe and sensible line of distinction can be drawn between the different kinds of liquor containing alcohol, in order to determine upon which of them the statute was intended to operate, and that is between those which are capable of causing intoxication, and those containing so small a percentage of alcohol that the human stomach cannot contain sufficient of the liquor to produce that effect.' Of course, we are not unmindful of the fact that different liquors and different quantities will produce different effects upon different persons, and that the effect upon persons may depend upon their habits, their health, their age, and constitutions." In *Rau v. People*, 63 N. Y. 277, 279, the Court of Appeals said: "Hitherto the courts have not been willing to take notice that lager beer is intoxicating, but have submitted the question, when controverted, to the jury, to be determined upon the evidence. Where the liquors are not such as are known to the courts to be intoxicating, their character as intoxicating or not must be determined upon competent evidence as a question of fact." *People v. Schewe* (N. Y.) 29 Hun, 122, 123.

Lager beer, being a malt liquor, is an "intoxicating liquor," under Act June 25, 1875

(Pub. Laws, c. 508), entitled "An act to regulate and restrain the sale of intoxicating liquors," section 1 of which forbids the sale of ale, wine, rum, or other strong or malt liquors. *State v. Rush*, 13 R. I. 198, 199.

Lager beer is, by the express provisions of St. 1869, c. 415, § 30, an intoxicating liquor. *Commonwealth v. Chappel*, 116 Mass. 7.

The term "intoxicating liquor," without more, may be used in a prosecution under St. 1855, c. 215, § 1, prohibiting all unauthorized sales of intoxicating liquors, and declaring that lager beer shall be deemed intoxicating, to describe lager beer alleged to have been illegally sold. *Commonwealth v. Anthes*, 78 Mass. (12 Gray) 29, 32.

The term "intoxicating liquors" does not include liquors containing alcohol in so slight a quantity as not to unduly excite the human system. Lager beer falls within the term "intoxicating liquors," if the use of it is ordinarily attended with entire or partial intoxication, and whether such is the fact is to be decided by the jury. *People v. Zeiger* (N. Y.) 6 Parker, Cr. R. 355, 359.

The term "intoxicating liquor," as used in Laws 1857, § 51, providing that no inn, tavern, or hotel keeper or other person shall sell or give away intoxicating liquors or wines on Sunday, is not confined to such well-known beverages as whisky, gin, ale, and strong beer, of which courts, acting on their own knowledge derived from observation, will take notice that they are intoxicating. It means all intoxicating liquors, and may therefore include lager beer. *Rau v. People*, 63 N. Y. 277, 279.

Ale and lager beer have been recognized, both in common speech and in our statute, as intoxicating liquors, so that where the testimony in a prosecution for the illegal selling of intoxicating liquors showed that the liquor consisted of ale and lager beer, and that upon analysis the beer was found to contain 2.89 per cent. and the ale 4.94 per cent. of alcohol, no evidence was necessary to show that it was intoxicating. *State v. Gravelin*, 16 Atl. 914, 16 R. I. 407.

#### Medicinal preparations.

As a medicine, see "Medicine."

One of the most common of the fraudulent devices to sell liquor "is to put a few drugs, barks, or extracts into very common liquor and put it on the market for sale as a pretended medicine under the name of 'Cordial Tonic' or 'Bitters.' 'Hostetter's Bitters,' 'Fitzpatrick's Bitters,' 'Home Bitters,' 'Home Sanative Cordial,' 'Reed's Gilt-Edge Tonic,' and other compounds were of this character, and have all rightly been adjudged to be mere shams as medicines, because they were sold and used as intoxicating beverages, and for the liquor, and not for the drugs and

barks, they contained, and dealers in them have been dealt with precisely as if they had sold plain whisky without any disguise." *United States v. Stafford* (U. S.) 20 Fed. 720, 722.

In the prosecution of a druggist for the sale of essence of ginger, an instruction that if the jury believed from the evidence that he sold essence of ginger, and that it, when diluted with water and drank to excess, would produce intoxication, they should convict, wholly ignoring his motive in the sale, and whether, when he sold it, it was a medicine, known and recognized as such, and incapable in its then state of being used as a beverage, was error. A standard medicine prepared according to a standard formula laid down in the United States Dispensatory, and used by physicians throughout the United States as a medicine in their practice, and which without dilution cannot be used as an intoxicant, is not an intoxicating liquor in itself, and its sale as a medicine is not a sale of intoxicating liquor, though it may be so diluted with water that it may be drank in quantities sufficient to become an intoxicant. *Bertrand v. State*, 18 South. 545, 546, 73 Miss. 51.

Medicated bitters producing intoxication are "intoxicating liquors" within Const. art. 16, § 20, authorizing the Legislature to enact laws whereby any county, town, or city may determine whether the "sale of intoxicating liquors shall be prohibited within the prescribed limits." *James v. State*, 17 S. W. 422, 423, 21 Tex. App. 353.

A tonic, containing  $3\frac{1}{2}$  to 4 per cent. alcohol, which it appeared could be drunk in sufficient quantities to make persons intoxicated, was an intoxicating liquor. *Johnson v. State* (Tex.) 66 S. W. 552, 553.

The evidence in a prosecution for selling intoxicating liquor being that the liquor sold was in a bottle marked "Hostetter's Bitters," a patent medicine, it was competent to prove that the contents were intoxicating, "tasted like whisky," and that it made those drunk who drank it. *Parrott v. Commonwealth*, 6 Ky. Law Rep. 221.

Lemon ginger and Empire Tonic Bitters are sold by the bottle as medicinal preparations, and are believed to possess curative properties. They consist of about one-third alcohol, and the residue of the distilled water and extracts from herbs, etc., and the quantity of alcohol is not greater than is necessary to extract and retain the virtues from the herbs, and is less than is contained in some ordinary tinctures. Held, that they are medicinal preparations, and not intoxicating liquors. *United States v. Stubblefield* (U. S.) 40 Fed. 454.

Under a statute prohibiting the selling without license of intoxicating liquors and

all compounds or preparations thereof, a combination of numerous drugs and chemicals preserved in a dilution of alcoholic spirits, containing about 33 per cent. of alcohol, is a compound or preparation of intoxicating liquor. *Gostorf v. State*, 39 Ark. 450.

As used in Acts 1882-83, pp. 613, 616, making it unlawful for any person to sell, give away, or otherwise dispose of any intoxicating liquors, bitters, or beverages, the expression "intoxicating liquors, bitters, or beverages" means liquors which will intoxicate, and which are commonly used as beverages for such purposes, and also any mixture of such liquors as retain their intoxicating qualities, which may fairly be presumed may be used as a beverage and become a substitute for the ordinary intoxicating drinks. Given that the particular compound will intoxicate, the question is not what quantity of it is necessary to produce intoxication, but whether the necessary quantity, however great or small, may reasonably be drunk. It is of no consequence that it may require from two to eight bottles of ginseng cordial to produce intoxication, if that quantity may be taken without other deleterious consequences than such as are incident to intoxication. If the quantity requisite to a state of intoxication may be safely used, it is a compound reasonably liable to be used as an intoxicating beverage. *Wadsworth v. Dunnam*, 18 South. 597, 598, 98 Ala. 610.

"Intoxicating liquors," as used in a Missouri dramshop act, making it a criminal offense for any person to sell intoxicating liquors without a license, etc., includes bitters compounded in part of intoxicating liquor, and sold for other than medicinal purposes. *State v. Lillard*, 78 Mo. 136, 138.

As "the intention of our statutes regulating the sale of intoxicating liquors is to prevent the use of such liquors as a beverage, and thus to check, and, if possible, extirpate, the evils of intemperance, these statutes are intended to apply to all intoxicating liquors which would be resorted to to gratify the appetite for intoxicating drinks, but there is a large class of medicines, bitters, and tinctures used, not as beverages, but as medicines, to which it is quite obvious that these statutes were not intended to apply, although such articles are composed in part of alcohol, and if used in sufficient quantities will produce intoxication. It would be, we think, a narrow construction of these statutes, a mere following of the letter without regard to the spirit and object of the law, to hold that the words 'intoxicating liquors' should include medicines or medicinal preparations when alcohol is used in them in quantities capable of producing intoxication, and the law makes no distinction in regard to the manufacture, use, and sale of medicines upon the ground that they are or are not the product of quack-



ery. But when intoxicating drinks intended to be sold and used as a beverage are, by some tincture or preparation, slightly disguised, so as to have to some extent the taste, flavor, or appearance of medicines or bitters, when in fact they are really meant to be sold and used as intoxicating drinks, such mixtures, however disguised, are within the prohibition of the law." The fact that Dr. Ham's Aromatic Invigorating Spirit contains 20 per cent. of alcohol does not necessarily prove that it is not a medicine, and the burden of showing that it is an intoxicating liquor is on the person asserting such fact. *Russell v. Sloan*, 33 Vt. 856, 858.

Under Gen. St. § 8048, relative to the sale of intoxicating liquors, providing that the term "spirituous and intoxicating liquors" shall include not only all mixed liquors, but also all mixed liquor of which a part is spirituous and intoxicating, liquors spirituous and intoxicating in their nature do not lose their identity when compounded with drugs or chemicals for use as medicine, or in commerce or the arts. *State v. Gray*, 22 Atl. 675, 676, 61 Conn. 89.

"Intoxicating liquors," within the meaning of the statute prohibiting their keeping for sale without a license, includes any liquor which is really intoxicating, though it is sold to be used as a medicine, or is disguised under the name of a medicine, or is a mixture of liquor and other ingredients. But if, when mixed with other ingredients, it cannot be used as an intoxicating drink, it is not within the prohibition of the statute, though it contains spirituous liquor as one of its ingredients. *Commonwealth v. Ramsdell*, 130 Mass. 68, 69.

The term "intoxicating liquors," within the meaning of the statute prohibiting the sale and vending thereof, includes all kinds of intoxicating liquors, and it is immaterial whether they are mixed or contain some other ingredient. We all know, from observation at least, that many of these vile compounds are more hurtful in their effect than would be pure liquor. *Howell v. State*, 71 Ga. 224, 228, 51 Am. Rep. 259.

"The mere fact that a compound sold as a medicine contains alcohol sufficient to render it intoxicating does not make the sale thereof a violation of the statutes prohibiting the sale of 'intoxicating liquors,' but such a law cannot be evaded by selling as a beverage intoxicating liquors containing drugs, barks, or seeds which have medicinal qualities. The uses to which the compound is ordinarily put, and the purposes for which it is usually bought, and its effect upon the system, are material facts from which may be inferred the intention of the seller. If the other ingredients are medicinal, and the alcohol is used either as a necessary preservative or vehicle for them, if from all the facts

and circumstances it appears that the sale is of the other ingredients as a medicine, and not of the liquor as a beverage, the seller is protected." *King v. State*, 58 Miss. 737, 740, 38 Am. Rep. 344.

"Intoxicating liquors" means liquors which are used as a beverage, and their character is not changed by putting into them roots and tinctures, unless they change the nature or character of the liquor, so that it is no longer whisky or brandy. If its distinctive character as an intoxicating liquor was so destroyed that it could not be used as a beverage, and becoming in fact a medicine to be used for diseases, and of such a character that it could not in reason be styled or used as an intoxicating drink, the sale of it is not a sale of intoxicating liquors. So long as the liquor retains its character as an intoxicating liquor capable of use as a beverage, notwithstanding that other ingredients may have been mixed therewith, it is an intoxicating liquor, the sale of which is prohibited. *State v. Laffer*, 38 Iowa, 422, 425; *Carl v. State*, 6 South. 118, 87 Ala. 17, 4 L. R. A. 380. If the other ingredients are medicinal, and the alcohol is a necessary preservative or vehicle for them, the sale is lawful. *Carl v. State*, 6 South. 118, 119, 87 Ala. 17, 4 L. R. A. 380.

#### **Paregoric.**

Paregoric is not an intoxicating liquor, though containing sufficient alcohol to produce intoxication. In re *Intoxicating Liquor Cases*, 25 Kan. 751, 766, 37 Am. Rep. 234.

#### **Pop.**

An article called "pop," which the testimony shows was a malt liquor and would intoxicate if taken in sufficient quantities, which tasted like poor beer, and was drawn from kegs like beer kegs, is an intoxicating liquor. *Godfreidson v. People*, 88 Ill. 234, 236.

#### **As property.**

See "Property."

#### **Rum.**

As long as the laws for licensing the sale of intoxicating liquors have existed, rum and other alcoholic liquids have been held to be intoxicating liquors per se. *Snider v. State*, 7 S. E. 631, 632, 81 Ga. 753, 12 Am. St. Rep. 350.

#### **Spirituous liquor synonyms.**

See, also, "Spirituous Liquors."

The term "intoxicating liquors" and "spirituous liquors," when used in a license law, are synonymous. *State v. Jefferson County Com'rs*, 20 Fla. 425, 429.

"Intoxicating liquors," as used in a complaint charging that the defendant did sell,

deal, or traffic in and give away, for the purpose of evading a certain act, spirituous, ardent, or intoxicating liquors, is not synonymous with "spirituous liquor," and is not used as a mere explanation of the word "spirituous," but is intended to signify something else. All spirituous liquor is intoxicating, yet all intoxicating liquor is not spirituous. In common parlance, "spirituous liquor" means distilled liquor. Fermented liquor, though intoxicating, is not spirituous; hence the complaint is bad for uncertainty. *Clifford v. State*, 29 Wis. 327, 329.

The words "intoxicating liquors" are not synonymous with the words "spirituous liquors," since there are certain intoxicating liquors which are not spirituous. *Commonwealth v. Livermore*, 70 Mass. (4 Gray) 18, 20.

"Intoxicating liquors" is not synonymous with "spirituous, vinous, or malt liquors," as used in Code, § 629, requiring a license for engaging in the business of selling vinous, spirituous, or malt liquors; for a given liquor may be in a high degree intoxicating, and yet be neither spirituous, vinous, nor malt. Fermented or hard cider is an illustration; cane beer is another. *Allred v. State*, 8 South. 56, 57, 89 Ala. 112.

The term "intoxicating liquor," as used in St. 1850, c. 234, when amending a statute by striking out the word "spirituous," and inserting the word "intoxicating," in the several clauses prohibiting the retail sale of liquor, included a larger class of cases than spirituous liquors. They bear the relation to each other of genus and species. All spirituous liquors are intoxicating, but all intoxicating liquors are not spirituous. The word "intoxicating," *ex vi termini*, includes spirituous. *Commonwealth v. Herrick*, 60 Mass. (6 Cush.) 465, 467. Thus, the mere fact that ale, porter, or cider is intoxicating does not show that it is spirituous liquor, and therefore an indictment charging the sale of "spirituous liquor" does not describe the sale of ale, porter, or cider. *State v. Adams*, 51 N. H. 568, 569.

Where the information charged defendant with furnishing liquor to one who was in the habit of getting intoxicated, contrary to Laws 1901, c. 141, § 11, and the evidence was that the liquor furnished was whisky, the fact that in an instruction the court referred to the liquor as "intoxicating," instead of "spirituous," gave the defendant no just cause for complaint; for in view of the fact that all spirituous liquor is intoxicating, and there is no claim or evidence to show that anything but whisky, which is both spirituous and intoxicating, was furnished, the words "intoxicating" and "spirituous," though not strictly synonymous, are convertible. *State v. Pritchard* (S. D.) 91 N. W. 583, 584.

#### Whisky.

Whisky is an intoxicating liquor. "That whisky will intoxicate is as well known as that fire will burn or water will drown." *Eagan v. State*, 53 Ind. 162, 163 (citing *Carmon v. State*, 18 Ind. 450, 451).

The phrase "intoxicating liquor" includes whisky, and hence, on a prosecution for selling intoxicating liquor, it was not error to instruct that whisky was an intoxicant. *Edgar v. State*, 37 Ark. 219, 223. See, also, *State v. Lewis*, 90 N. W. 318, 86 Minn. 174.

Judicial notice will be taken that the term "intoxicating liquor" includes whisky, and therefore an indictment for the unlawful sale of "spirituous liquor, commonly called 'whisky,'" is sufficient, without an averment that the whisky sold was an intoxicating liquor. *Schlicht v. State*, 56 Ind. 173, 176; *Snider v. State*, 7 S. E. 631, 632, 81 Ga. 753, 12 Am. St. Rep. 350.

#### Wine.

In a prosecution for selling intoxicating liquor on election day, an instruction that "wine is an intoxicating liquor within the meaning of the statute, and its sale or gift on election day is prohibited," was approved, the court saying: "The court takes judicial knowledge of the fact that wine is an intoxicating liquor, which is a matter of common knowledge." *Wolf v. State*, 27 S. W. 77, 78, 59 Ark. 297, 43 Am. St. Rep. 34.

Where the Legislature declared that "by the words 'spirit,' 'spirituous or intoxicating liquor,' shall be intended all spirituous or intoxicating liquor, and all mixed liquor, any part of which is spirituous or intoxicating, unless otherwise expressly declared," a statute which makes it a criminal offense for any person to sell or keep for sale spirituous liquor, or to solicit or to take an order therefor, covers and includes the selling or taking orders for intoxicating wines. No reason appears why the Legislature should prohibit the soliciting of orders for one kind of intoxicating liquors and permit it as to others. *Jones v. Surprise*, 9 Atl. 384, 385, 64 N. H. 243.

The court does not judicially know that wine is not an intoxicating liquor, and will not question the right of the Legislature to declare it to be intoxicating. *Jackson v. State*, 19 Ind. 312.

Under the express provisions of the Massachusetts statutes, the term "intoxicating liquors" includes wine. *Commonwealth v. Dean*, 80 Mass. (14 Gray) 99; *Commonwealth v. Chappel*, 116 Mass. 7.

"Intoxicating liquors," as used in Acts 1876-77, c. 38, prohibiting the sale of intoxicating liquors, etc., includes port wine. *State v. Packer*, 80 N. C. 439, 440.

Under Act May 1, 1854, § 4, which makes it an offense to keep a place of public resort where intoxicating liquors are sold, wine manufactured of the pure juice of the grape cultivated in the state is not included within the term "intoxicating liquor." *Johnston v. State*, 23 Ohio St. 556, 558.

The term "intoxicating liquors," in Sess. Acts 1887, p. 180, is made to include wine by the special provision of section 1 of the act. *State v. Houts*, 36 Mo. App. 265, 267.

## INTRA VIRES.

In all things that a corporation may lawfully do, the discretion and acts of the board of directors are conclusively deemed to be those of the corporation. Such are called "intra vires acts." The court neither can nor should undertake to control or interfere with their exercise. *Pittsburg, C. & St. L. R. Co. v. Dodd* (Ky.) 72 S. W. 822, 827.

## INTRASTATE COMMERCE.

Within the classification of commerce under interstate and "intrastate commerce," the latter term would undoubtedly include the duty of a common carrier to receive all proper goods offered to it for transportation, to make no undue indiscriminate between shippers of a like class, and to transport with reasonable expedition. There is nothing essentially national in these requirements. *Swift v. Philadelphia & R. R. Co.* (U. S.) 64 Fed. 59, 68.

## INTRICACY.

The word "intricacy," as used in a New York statute authorizing the court to grant a struck jury only in cases of intricacy and importance, cannot be construed to mean the testing the genuineness of a signature of a note. It is not a question of intricacy demanding more than ordinary intelligence, though it may be difficult to come to a satisfactory conclusion. *Poucher v. Livingston* (N. Y.) 2 Wend. 296.

## INTRINSIC VALUE.

"The 'intrinsic value' of a thing is its true, inherent, and essential value, not depending on accident, place, or person, but the same everywhere and to every one." *Bank of North Carolina v. Ford*, 27 N. C. 692, 698. The terms "market value" and "intrinsic value" are not synonymous. *Douglas v. Mercedes*, 25 N. J. Eq. (10 C. E. Green) 144, 146.

## INTRODUCED.

"Introduced," as used in a bill of exceptions reciting "that this was all the evi-

dence 'introduced' on the trial of said cause," is equivalent to the word given. *Jones v. Layman*, 24 N. E. 863, 364, 123 Ind. 569; *Kennedy v. Divine*, 77 Ind. 490, 492; *Stair v. Richardson*, 9 N. E. 300, 301, 108 Ind. 429 (citing *Beatty v. O'Connor*, 106 Ind. 81, 5 N. E. 880).

Liquor is not "introduced" into the Indian country, within the meaning of Rev. St. §§ 2139, 2140, and 29 Stat. p. 506, c. 109, prohibiting the introduction of liquors into the Indian country, by the mere act of transporting such liquors across an Indian reservation to a place where the owner may lawfully dispose of it. *United States v. Four Bottles Sour-Mash Whiskey* (U. S.) 90 Fed. 720, 723.

## INTROMISSION.

"Intromission" is a term signifying dealings in stock, goods, or cash of a principal coming into the hands of his agent, to be accounted for by the agent to his principal. It is a term partly legal and partly mercantile. *Stewart v. McKean*, 29 Eng. Law & Eq. 883, 891, 398.

## INTRUDER.

As the term is used when speaking of an intruder on lands, one who enters upon land without either right of possession or color of title is an intruder. *Miller v. McCullough*, 104 Pa. 624, 630.

When a defendant is in possession of land, claiming the same in good faith, under a legal right, as shown by his deed, he cannot be rejected therefrom as an intruder under section 4000 of the Code. *Russell v. Chambers*, 43 Ga. 478, 479.

## INTRUSION.

Trespass distinguished, see "Trespass."

"Intrusion" is, at common law, "one of the modes of ouster of the freehold, and is defined to be an entry by a stranger after a particular estate of freehold is determined before him in reversion or remainder, as when a tenant for life dieth seised of certain lands and tenements, and a stranger cometh thereon after such death of the tenant, and before any entry of him in reversion or remainder." *Hulick v. Scovill*, 9 Ill. (4 Gilm.) 159, 170 (citing 3 Ch. Bl. 169); *Birbright v. Hall* (Va.) 8 Munf. 536, 540; *Boylan v. Deinzer*, 18 Atl. 119, 121.

## INTRUST.

To "intrust" is "to deliver in trust," "to confide to the care of," "to commit to another with confidence in his fidelity." *Smith v. Marden*, 60 N. E. 509, 510 (citing Webster).

The word "intrusted," in the New York factors' act of 1830, providing that every

factor or other agent intrusted with the possession of any bill of lading, customhouse permit, or warehouse keeper's receipt for the delivery of any merchandise shall be deemed the owner thereof for the purposes of sale, imports that such document must have been delivered or transmitted by the owner of the merchandise personally or by his authorized agent, or it must have been obtained by the factor in the proper and ordinary mode of discharging the duties of his trust. *Bonito v. Mosquera*, 15 N. Y. Super. Ct. (2 Bosw.) 401, 450.

"Intrusted with the possession of goods," as used in 5 & 6 Vict. c. 39, providing that any agent who shall thereafter be intrusted with the possession of goods shall be deemed to be the owner so far as to give validity to any contract or agreement by way of pledge, lien, or security with the agent, the expression "any agent intrusted with the possession of goods" meant any agent intrusted with goods for the purpose of mercantile transactions, and could not apply to servants of the owner of goods, employed in the care or carriage of them. *Wood v. Rowcliffe*, 6 Hare, 183, 191.

"Intrusted," within Rev. St. c. 109, § 4, providing that every person having any goods, effects, or credits of the principal defendant intrusted or deposited in his hands or possession, means something more than mere possession. The mere possession of property by a party having no claim to hold it against the owner does not render him liable therefor as trustee. *Staniels v. Raymond*, 58 Mass. (4 Cush.) 314, 316.

The word "intrusted," in Comp. Laws, § 2380, making it embezzlement for any clerk, etc., to whom any money, goods, or chattels or other property shall be intrusted by his master or employer, to withdraw himself from his master or employer, and go away with the money, etc., with intent to steal the same, characterizes the act of a master who intrusts his employé with bills to collect, and therefore the money collected by the clerk is money intrusted to him by his employer, and he is guilty of embezzlement if he appropriates the same. *Ex parte Ricord*, 11 Nev. 287, 291.

A grantee accepting a conveyance of all nonexempt property of a debtor in trust for his creditors has property "intrusted in his hands," within the meaning of Pub. St. c. 183, § 21, providing for the attachment of property intrusted in the hands of a person summoned as a trustee, where such grantee has done nothing about taking possession of the property, and no creditors have become parties to the conveyance. *Avery v. Monroe*, 51 N. E. 452, 172 Mass. 132, 70 Am. St. Rep. 250.

One employed on a salary to sell goods which are put into his manual possession is

a person "intrusted with merchandise and having authority to sell or consign the same," within the meaning of Pub. St. c. 71, § 3, protecting one who receives goods from such person, and advances money thereon in good faith, believing him to be the actual owner. *Cairns v. Page*, 43 N. E. 503, 504, 165 Mass. 552.

St. 1887, c. 270, § 1, subd. 1, making an employer liable for injuries caused by defects in machinery, etc., arising from the negligence of one "intrusted with the duty of seeing" that the machinery was in proper condition, may be construed to include the person who understood the machinery and looked after it, though, in making repairs and looking after the machinery, he was subject to orders. *Copithorne v. Hardy*, 53 N. E. 915, 173 Mass. 400.

#### Animals for pasturage.

"Intrusted," as used in Gen. St. c. 125, § 2, which provides that any person to whom any horses, cattle, sheep, or other domestic animals shall be intrusted to be pastured or boarded shall have a lien thereon, etc., means "intrusted" by the owner or other persons having authority to pledge the animals for such purpose. It implies some privity between the owner or person having the right of disposing of the goods, and him in whose favor the lien is claimed. *Sargent v. Usher*, 55 N. H. 287, 290, 20 Am. Dec. 208.

A person pasturing another's cows or cow for the season, in the usual manner, under an agreement with the owner, is "intrusted" with the animal, within the statute giving a lien to persons to whom cattle are intrusted to be pastured or boarded. *Smith v. Marden*, 60 N. H. 509, 510.

#### Mail matter.

A local mail agent is "intrusted with mail matter" when he receives a single letter to be delivered to a mail agent to be conveyed to its destination through the mails, and he is just as guilty if he open and steal the contents of such letter as if he had stolen the contents of a letter taken unlawfully from a mail bag or pack with which he was intrusted. *United States v. Hamilton* (U. S.) 9 Fed. 442, 443.

The term "person intrusted with the mails," in the federal statute providing a punishment for robbing any carrier or agent or other person intrusted with the mails, includes a postmaster, and therefore one taking a mail package from him by force is guilty of robbing the mail, even though such package was not in the post office, but had been removed to some other place, and although the postmaster may have intended to appropriate the same for a private debt due to himself. *United States v. Bowman*, 5 Pac. 333, 334, 3 N. M. 201.

**INTOLERABLE.**

"Intolerable" means not to be borne. *Shaw v. Shaw*, 17 Conn. 189, 193.

**INTOLERABLE CRUELTY.**

The term "intolerable cruelty," as used in a statute relating to divorce, imports barbarous, savage, and inhuman acts. They must be of that character as to be, in fact, intolerable—not to be borne. "Intolerable cruelty" has the same meaning as previously given by courts of Great Britain to the term "extreme cruelty" in divorce statutes, and is therefore to be treated as synonymous with that term. *Shaw v. Shaw*, 17 Conn. 189, 193.

Mere faults of temper and of manner do not constitute "intolerable cruelty," so as to render the continuance of the marriage relation by the suffering victim impracticable and be a ground for divorce. *Morehouse v. Morehouse*, 39 Atl. 516, 519, 70 Conn. 420.

**INTOLERABLE SEVERITY.**

"Intolerable severity" and extreme cruelty, "as causes for divorce, are substantially identical." *Blain v. Blain*, 45 Vt. 538, 544.

**INURE.**

The word "inure," as used in a statute providing that grants to build and operate waterworks shall be made to inure for not more than a certain number of years, means "to take or have effect; to operate." *Cedar Rapids Water Co. v. City of Cedar Rapids*, 91 N. W. 1081, 1083, 118 Iowa, 234.

The word "inure," in Const. 1885, art. 10, § 2, providing that certain homestead exemptions shall inure to the widow and heirs of the party entitled to such exemption, is employed instead of "accrue," and is not equivalent to the word "descent" or any other word importing the descent of property. The rights of the widow in the property of her husband are dependent alone upon the statutes of descent and dower. *Hinson v. Booth*, 22 South. 687, 691, 39 Fla. 383. It does not, therefore, operate to take away her dower right in that portion of the real estate exempted as a homestead. *Godwin v. King*, 18 South. 108, 110, 81 Fla. 525.

As used in U. S. Pension Laws, § 47, providing that no sum of money due or to become due to any pensioner shall be liable to attachment if the same remains with the Pension Office, or is in force of transmission to the pensioner entitled thereto, but shall inure to his own benefit, the phrase "inure to his own benefit" means that the pensioner may use the money in any manner he may see proper for his own benefit and to secure the comfort of his family, free from

attacks of creditors. *Holmes v. Tallada*, 17 Atl. 238, 125 Pa. 183, 3 L. R. A. 219, 11 Am. St. Rep. 880.

**INVALID.**

Otherwise invalid, see "Otherwise."

The term "invalid," when used in a statute providing that, if any foreign corporation commence to do business in the state without first filing certain statements and certificates, all acts and contracts made by it during the time it neglects to make such filing shall be void and invalid, is used interchangeably with "void," and adds no force to it, but in this instance will be construed as voidable, merely, rather than absolutely void. *Mutual Ben. Life Ins. Co. v. Winne*, 49 Pac. 446, 448, 450, 20 Mont. 20.

The word "invalid" has precisely the same meaning as the two words "not valid." *Hood v. Perry*, 75 Ga. 310, 312.

Rev. St. § 6486, provides that, whenever the sale of any lands for taxes is invalid, the county auditor shall not convey such lands, but the purchase money and interest thereon shall be refunded out of the county treasury to the purchaser, etc. Section 6487 declares that no sale or conveyance of land for taxes shall be valid if such land shall not have been liable to taxation, etc., and in all such cases the money paid by the purchaser at such void sale shall be refunded out of the county treasury on the order of the county auditor. Held, that the word "invalid," as used in section 6486, will be construed in connection with the language "such void sale," used in section 6487, and to mean void, so that the statute, in giving a right to a purchaser to recover money paid by him on an invalid sale, intends a sale utterly ineffectual for any and all purposes, and hence, where a sale is effectual to convey a lien, the purchaser cannot recover the money paid by him. The right to have the purchase money refunded depends, not upon the efficacy of the sale to convey title, but upon its efficacy to carry to the purchaser the lien of the taxing power. *State v. Casteel*, 11 N. E. 219, 223, 110 Ind. 174.

**INVASION.**

"Invasion" necessarily supposes organization and military power or force. *Boon v. Aetna Ins. Co.*, 40 Conn. 575, 584.

Where an insurance policy was issued during the Rebellion on property in a state bordering on the states in insurrection, in an exception of risks from invasion, an invasion involved, of necessity, resistance by the constituted authorities of the government, and the employment of its military force. Destruction of property by fire was

quite as likely to be caused by resistance to the usurping military power as by the direct action of that power itself. *Aetna Ins. Co. v. Boon*, 95 U. S. 117, 129, 24 L. Ed. 395.

## INVEIGLE—INVEIGLEMENT.

"To inveigle is to persuade to something bad or hurtful by deceptive arts or flattery; to wheedle; to allure; to entice; to seduce. *Webst. Dict.* In a legal sense, it is to induce a party to come within the jurisdiction of the court by some scheme, subterfuge, fraud, trick, device, or misrepresentation, that he may be served with process." *Higgins v. Dewey*, 13 N. Y. Supp. 570.

The word "inveigle" is defined to be to persuade to something bad; to wheedle; to entice; to beguile. To inveigle involves no physical force, but such mental control over the person inveigled as to entice him to do what it is designed or intended to beguile him to do, and, if this be accomplished by falsehood, by deceit, misrepresentation, or device, whatever it may be, which captivates the mind, the crime is committed. *People v. De Leon* (N. Y.) 47 Hun, 308, 310.

To inveigle, when speaking of the inveiglement of a slave, is to seduce, entice, and decoy. This is merely persuasive, and, until consummated by the slave departing from the owner's service, there is no offense. When that occurs, the defendant has inveigled, stolen, and carried him away. *State v. McCoy* (S. C.) 2 Speers, 711, 716.

Within *Laws Or. 1887*, § 1746, punishing every person who, without lawful authority, "forcibly seizes and confines another, or inveigles or kidnaps another," with intent to cause such other person to be sent out of the state against his will, "inveigle" means to seduce them, to entice them, not by force, but by some art, some device, some representation which is essentially false, and calculated to secure action on the part of the person sought to be inveigled; to secure his acquiescence in the purpose of the mover, so that he may become within the control of some person or persons, with intent that he be sent out of the state. *In re Kelly* (U. S.) 46 Fed. 653, 655.

Inducing a person to go to a foreign country by the promise of work at a specified compensation, when the person making the promise knows that such compensation will not be obtained, is not an inveiglement. *Goodwin v. Burke*, 10 N. Y. Supp. 628, 629, 57 Hun, 592.

Inducing a woman to embark for a foreign country on the pretense that she was to be employed as a governess in a family, whereas the intention was that she should be confined in a house of prostitution, con-

stitutes an inveiglement, within the meaning of the statute. *People v. DeLeon*, 16 N. E. 46, 47, 109 N. Y. 226, 4 Am. St. Rep. 444.

## INVENTION.

See "Patentable Invention"; "Useful Invention."

As property, see "Property."

An invention is the finding out; the contriving; the creating of something which did not exist and was not known before, and which can be made useful and advantageous in the pursuance of life, or can add to the enjoyment of mankind. *Leidersdorf v. Flint* (U. S.) 15 Fed. Cas. 260, 261.

The term "invention," in the sense of the patent law, is the finding out, contriving, devising, or creating something new and useful which did not exist before, by an operation of the intellect. *Ransom v. New York* (U. S.) 20 Fed. Cas. 286, 291.

An invention resides in the conception of a thing and its embodiment. *Rose v. Hirah* (U. S.) 77 Fed. 469, 471, 23 C. C. A. 246.

An invention involves the conception of means which, when embodied in a concrete form, may become the subject of a patent. It is a mental result, and the machine, process, or product is but its material reflex and embodiment. *Smith v. Nichols*, 88 U. S. (21 Wall.) 112, 118, 22 L. Ed. 566; *Head v. Porter* (U. S.) 70 Fed. 498, 504.

Invention is that intuitive faculty of the mind put forth in search of new results or new methods, creating what had not before existed, or bringing to life what had been hidden from vision. This is in contradistinction to that suggestion of common experience which arose spontaneously and by a process of human reasoning in the minds of those who had become acquainted with the circumstances with which they had to deal. *Hollister v. Benedict & Burnham Mfg. Co.* 113 U. S. 59, 72, 73, 5 Sup. Ct. 717, 724, 28 L. Ed. 901; *J. J. Warren Co. v. Rosenblatt* (U. S.) 80 Fed. 540, 542, 25 C. C. A. 625.

The test of invention, within the meaning of the patent law in all cases, is whether the device or improvement is the product of an original conception of the patentee. It must involve something beyond what is obvious to persons skilled in the order to which it relates, and it must amount to something more than a mere carrying forward or more extended application of an original idea of another. It must be, under the statute, new as well as useful. *P. H. Murphy Mfg. Co. v. Excelsior Car Roof Co.* (U. S.) 70 Fed. 491, 495.

When a person has invented some mode of carrying into effect a law of natural science, or a rule of practice, it is the application of that law or rule which constitutes the peculiar feature of invention. *Electric Smelting & Aluminum Co. v. Pittsburgh Reduction Co.* (U. S.) 111 Fed. 742, 753 (citing *Sewall v. Jones*, 91 U. S. 184, 23 L. Ed. 275).

There is no hard and fast rule by which to judge invention. Each case must stand upon its own facts; but where it appears that the patented structure is at the head of the evolution in its particular order, that it is a marked improvement on what preceded it, that it does better work and accomplishes more satisfactory results, the court should surely be predisposed in its favor. *Bray v. United States Net & Twine Co.* (U. S.) 70 Fed. 1006, 1007.

A device which is novel in construction, which is useful, and which goes into immediate and general use is an invention. *Holmes v. Truman* (U. S.) 67 Fed. 542, 544, 14 O. C. A. 517.

Invention is the arrangement of machinery designed through the operation of the laws of nature to accomplish a certain result. *Hammerschlag v. Scamoni* (U. S.) 7 Fed. 584, 590.

#### **Adaptation to new use.**

It is no new invention to use an old machine for a new purpose. The inventor of a machine is entitled to the benefit of all the uses to which it can be put, no matter whether he had conceived the idea of the use or not. *Roberts v. Ryer*, 91 U. S. 150, 157, 23 L. Ed. 267.

#### **Aggregation or combination.**

An invention is the finding out by some effort and understanding. The mere putting of two things together, although it was never done before, is no invention to entitle one to a patent on some contrivance as an invention. It must have been found out by mental labor and intellectual creation, and, if the result of accident, it must be what would not occur to all persons skilled in the art who wished to produce the same result. There must be some addition to the common stock of knowledge, and not merely the first use of what was known before. *Earle v. Sawyer* (U. S.) 8 Fed. Cas. 254, 255.

In a suit for infringement of a patent it was claimed that there was not invention in the new mechanism, but only an aggregation of old elements. The court said: "A careful examination of the testimony and of the machine itself has satisfied me that, although the elements of combination claimed in the patent are old, the combination itself displays invention. A new and valuable result has been obtained. The safety and effi-

ciency of the machine have been greatly enhanced, and the profits resulting from its operation greatly increased." *United States Printing Co. v. American Playing-Card Co.* (U. S.) 70 Fed. 50, 52.

Unless a combination accomplishes some new result, the mere multiplicity of elements does not make it patentable. So long as each element performs some old and well-known function, the result is not a patentable combination, but an aggregation of elements. Indeed, the multiplicity of elements may go on indefinitely without creating a patentable combination unless by their collocation a new result is produced. *Fuller & Johnson Mfg. Co. v. Bender* (U. S.) 69 Fed. 999, 1000 (citing *Richards v. Chase Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, 40 L. Ed. 225).

Invention does not include the mere bringing of old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, but it includes any new combination which produces new and useful results, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. *Hailes v. Van Wormer*, 87 U. S. (20 Wall.) 853, 368, 22 L. Ed. 241.

The term "invention," within the meaning of patent laws, includes a novel organization of co-operative elements or devices into a useful mechanism, whether the elements be individually old or new; but the mere discovery that it would be a good thing to attach advertisements permanently to balloons, does not come within the meaning. In *re Gould*, 8 D. C. (1 McArthur) 410, 413.

There is no invention in merely selecting and putting together the most desirable parts of different machines in the same art, where each operates in the same way in the new machine as it did in the old, and effects the same results. When the assembled old elements effect a new mode of operation producing a more beneficial result, this rule does not hold. *Overweight Counterbalance Elevator Co. v. Henry Vogt Mach. Co.* (U. S.) 102 Fed. 957, 961, 43 C. O. A. 80; *Burnham v. Union Mfg. Co.* (U. S.) 110 Fed. 765, 770, 49 C. O. A. 163.

#### **Change of form or place.**

A mere change in the form of a spring or its place of attachment in a carpet sweeper, by which vertical motion of the wheels relative to the case is obtained, is not invention. *Goshen Sweeper Co. v. Bissell Carpet Sweeper Co.* (U. S.) 72 Fed. 67, 77, 19 C. O. A. 13.

A rearrangement is not sufficient to constitute invention where it would have sug-

gested itself to any one skilled in the art. It is not sufficient that the patentee may have produced a better and more merchantable article, but there must have been something novel in the means which were employed in its production. *Andrews v. Thum* (U. S.) 67 Fed. 911, 913, 15 C. C. A. 67.

In *Webster Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177, Justice Bradley says it may be laid down as a general rule, though perhaps not an invariable one, that, if a new combination and arrangement of known elements produces a new and beneficial result never attained before it, is evidence of invention. *De La Vergne Refrigerating Mach. Co. v. Featherstone* (U. S.) 67 Fed. 937, 939.

A change only in the form, proportions, or degree is not invention. *Smith v. Nichols*, 88 U. S. (21 Wall.) 112, 119, 22 L. Ed. 566; *Soehner v. Favorite Stove & Range Co.* (U. S.) 84 Fed. 182, 187, 28 C. C. A. 317.

It is not enough that a thing shall be new in the sense that in the shape or form in which it is produced it shall not have been known before, and that it shall be useful, but that it must, under the Constitution, be an invention or a discovery. *J. J. Warren Co. v. Rosenblatt* (U. S.) 80 Fed. 540, 542, 25 C. C. A. 625.

It rarely happens that old instrumentalities are so perfectly adapted to a use for which they were not originally intended as not to require any alteration or modification. If these changes involve only the exercise of ordinary mechanical skill, they do not sanction the patent; and, in most of the adjudged cases where it has been held that the application of old devices to a new use was not patentable, there were changes of form, proportion, or organization of this character which were necessary to accommodate them to the new occasion. *Aron v. Manhattan R. Co.*, 132 U. S. 90, 10 Sup. Ct. 24, 33 L. Ed. 272. The circumstance that the same congregation of devices has never been assembled in a new location is not controlling, and often of little value, in determining the question of a patentable novelty. The assemblage may be nothing but another instance of a double use, and, when they require special adaptation to the new arrangement and occasion, it still remains to inquire, whether this has required invention? *Dunbar v. Eastern Elevating Co.* (U. S.) 81 Fed. 201, 205, 26 C. C. A. 330.

#### Change of material.

A change in a well-known material alone does not constitute invention. *Fruit Cleaning Co. v. Fresno Home Packing Co.* (U. S.) 94 Fed. 845, 863.

The use of one material instead of another in constructing a known machine is in most cases so obvious a matter of mere

mechanical judgment, and not of invention, that it cannot be called an invention unless some new and useful result and increase of efficiency, or a decided saving in the operation, is clearly attained. *Hicks v. Kelsey*, 85 U. S. (18 Wall.) 670, 673, 21 L. Ed. 852; *George Frost Co. v. Cohn* (U. S.) 112 Fed. 1009, 1010.

The use of a rubber button in place of a metal button in hose supporters is sufficient to constitute invention where it appears that the former was not successful; and that an army of inventors and skilled mechanics had been at work to remedy the defect, and that, unless a metal button with a rubber check had been substituted, no success had been obtained. *George Frost Co. v. Cohn* (U. S.) 112 Fed. 1009, 1010.

Invention has never been permitted to rest on changes of material alone. It is true that patents have been upheld involving a change of material, but in every instance some new and useful result was accomplished, or the old result was accomplished in a much better way. Where the inventor has discovered new and unknown properties residing in a given material, or that a long sought for result, which has baffled an army of skilled artisans, can be achieved by the change in such cases, the substitution of one material by another may reach the plane of invention; but such substitution alone, unaccompanied by any actual effect in the art or for the benefit of the public, has been uniformly insufficient to support a patent. *Union Hardware Co. v. Seichow* (U. S.) 112 Fed. 1008, 1008.

#### As limited to claim.

The word "invention," as used in the statute providing that any person having an interest in an invention for which a patent was ordered to issue on payment of the final fee, but who fails to make the payment within a certain time, may make application for the patent for such invention the same as in the case of the original application, refers to the idea of the inventor, and not the limitations of that idea by the patent office, for the bounds of the latter are in the claims; but the claims of a patent are not coextensive with the invention. *Bowers v. San Francisco Bridge Co.* (U. S.) 69 Fed. 640, 644.

The word "invention," when used in an assignment of an invention pending an application for a patent, naturally refers to the subject-matter of the expected grant, and does not refer to any extension of the patent which may be obtained later by the assignor. *Johnson v. Wilcox & Gibbs Sewing Mach. Co.* (U. S.) 27 Fed. 689, 691.

#### Combination of old principles.

An invention in mechanics consists not in the discovery of new principles, but in a



new combination of old ones. The principles of mechanics are few, simple, and well understood. Their combinations are various and inexhaustible. Any new combination which is of substantial advantage in the arts comes within the policy and protection of the patent law. *Tyler v. Deval* (N. Y.) 1 Code R. 30, 31.

#### Development of idea.

Invention is the work of the brain, and not of the hand, and, if a conception be practically completed, the artisan or person who gives it embodiment in a machine is no more the inventor than the tools with which he wrought. *Blandy v. Griffith* (U. S.) 3 Fed. Cas. 675, 678.

The invention of a thing, in the patent law, is the conception of the idea, not its final development. The law does not mean, by invention, maturity. It is the idea struck out, the brilliant thought obtained, the great improvement in embryo. "The inventor must have that; but, if he has that, he may apply himself in improving it—maturing it. It may require half a life, but in that time he must have devoted himself to it as much as circumstances would allow, but the period when he strikes out the plan he afterwards patents is the time of the invention—is the time when the discovery occurs." *Adams v. Edwards* (U. S.) 1 Fed. Cas. 112, 115.

#### Duplication of parts.

Duplication of parts producing a new and useful result may constitute invention. *Parker v. Hulme* (U. S.) 18 Fed. Cas. 1138, 1140.

#### Extension of original idea.

"A 'patentable invention' is a mental result. It must be new, and shown to be of practical utility. A new idea may be ingrafted on an old invention—be distinct from the perception which preceded it, and be an improvement. In such case it is patentable. A prior patentee cannot use it without the consent of the improver, and the latter cannot use the original invention without the consent of the former. But a mere carrying forward, or a new or more extended application of the original thought, a change only in form, proportion, or degree, the substitution of equivalents doing substantially the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent." *Smith v. Nichols*, 88 U. S. (21 Wall.) 112, 118, 22 L. Ed. 566.

A mere carrying forward of a new or more extended application of the original thought is not invention. *Smith v. Nichols*, 88 U. S. (21 Wall.) 112, 119, 22 L. Ed. 566; *Soehner v. Favorite Stove & Range Co.* (U. S.) 84 Fed. 182, 187, 28 C. C. A. 317.

It is not invention to carry forward or make new or more extended application of a thought original with others, or well known in mechanics. *Double-Pointed Tack Co. v. Two Rivers Mfg. Co.* (U. S.) 3 Fed. 26, 33.

#### Improvement.

The invention of a new art, machine, or manufacture, and the invention of an improvement upon either, are substantially distinct and separate. *Thomson-Houston Electric Co. v. Elmira & H. R. Co.* (U. S.) 71 Fed. 396, 405, 18 C. C. A. 145.

"Improvement" and "invention" are not convertible terms. An improvement is not necessarily an invention, while an invention is *prima facie* an improvement. And where the most favorable construction that can be given to a patent is that the article constitutes an improvement over prior inventors, but it embodies no new principle or mode of operation not utilized before by other inventors, there is no invention. *William Schwarzwaelder & Co. v. City of Detroit* (U. S.) 77 Fed. 886, 891.

"Inventions" are often used as synonymous with and designated by the term "improvements." The term "improvement", is a technical one in the patent practice, and is almost always used to designate the invention itself in making out applications. *Appeal of Reese*, 15 Atl. 807, 811, 122 Pa. 392.

An improvement on a machine, to constitute it an invention, within the meaning of the law, must be new, not known or in use before; and it must also be useful. In other words, the person claiming the improvement must have found out himself and created and constructed an improvement which had not before been found out or produced by any person, and which is beneficial to the public. There can be novelty in the arrangement of the improved machinery—novelty created by the mind of the person claiming to be the inventor; and in connection with that species of novelty there must be utility. This novelty, worked out by the mind of the inventor, connected with utility, constitutes the essence of a patentable subject under the law. *McCormick v. Seymour* (U. S.) 15 Fed. Cas. 1329, 1331.

#### As invention patented.

Act 1839, § 7, providing that every person or corporation who has or shall have purchased or constructed any newly invented machine, manufacture, or composition of matter prior to the application of the inventor for a patent shall be held to possess the right to use the same and vend it to others to be used, and that no patent shall be held to be invalid by reason of such purchase, sale, or prior use, except on proof of abandonment of "such invention" to the public, means the invention patented. *Andrews v.*

Hoovey, 8 Sup. Ct. 676, 677, 124 U. S. 694, 31 L. Ed. 557.

#### **Mechanical skill.**

As the lowest order of invention is something more than mechanical skill, so the highest degree of mechanical skill is something less than invention. The line to be marked is that which separates mere constructive ability from inventive capacity. *Johnson Co. v. Pennsylvania Steel Co.* (U. S.) 67 Fed. 940, 942.

Where any intelligent artisan ought to be competent in the exercise of the ordinary skill of his craft, to suggest the matter covered by a claim for a patent there is no invention. *Griswold v. Wagner* (U. S.) 68 Fed. 494, 500, 15 C. C. A. 525.

Invention or discovery is the requirement which constitutes the foundation of the right to obtain a patent; and it is held that unless more ingenuity and skill are required in making or applying the improvement than are possessed by an ordinary machinist acquainted with the business, there is an absence of that degree of skill and ingenuity which constitute the essential element of every invention. *Dunbar v. Meyers*, 94 U. S. 187, 197, 24 L. Ed. 84.

#### **Mental conception.**

The word "inventions," as used in a contract for the sale of stock and property of a company owning all of a certain person's inventions and applications for any other cash or parcel carrying apparatus, and that the person would sign all papers that might be deemed necessary to complete the title to the patents, applications, or inventions, refers to inventions made at the time of the contract. A mental conception of an improvement on an existing machine, unexpressed to practice and unexpressed in any physical form or descriptive specification, does not constitute an "invention," within the meaning of the contract. *Lamson v. Martin*, 35 N. E. 78, 81, 159 Mass. 557.

#### **Omission of parts.**

Under ordinary circumstances the removal of surplus material or needless parts of a physical structure, without changing the relation, connection, or operation of the essential elements, cannot involve invention. *Ferguson v. Ed Roos Mfg. Co.* (U. S.) 71 Fed. 416, 418, 18 C. C. A. 162.

#### **Popularity.**

Invention cannot be predicated on the popularity of the article claimed to have been invented. *Ypsilanti Dress Stay Mfg. Co. v. Van Valkenburg* (U. S.) 72 Fed. 277, 281.

#### **Simplicity.**

In *Potts & Co. v. Creager*, 155 U. S. 607, 15 Sup. Ct. 194, 39 L. Ed. 275, Mr. Justice

Brown said: "Indeed, it often requires as acute a perception of the relations between cause and effect, and as much of the peculiar inventive genius which is characteristic of great inventors, to grasp the idea that a device used in one art may be made available in another, as would be necessary to create the device de novo. And this is not the less true if, after the thing had been done, it appears to the ordinary mind so simple as to excite wonder that it was not thought of before; but the decisive answer is that with dozens, and perhaps hundreds, of others laboring in the same field, it had never occurred to any one before. As the result of authorities upon the subject, it may be said that if the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use, but if the relations between them be remote, and especially if the use of the old device produced a new result, it must at least involve the exercise of inventive faculty." *Taylor v. Sawyer Spindle Co.* (U. S.) 75 Fed. 301, 307, 22 C. C. A. 203.

Though a thing is so simple as to seem to have been almost obvious without invention, to any one familiar with the subject, the want of such a thing so long, and the patents therefor, show that it had to be sought out with more than mere mechanical skill. *Johnson v. Brooklyn Heights R. Co.* (U. S.) 75 Fed. 663, 670.

The test of an invention should not be whether the mechanism is simple or complex, but whether the patentee has given to the world something new; whether the public is richer for his contribution to the art; whether he has produced novel and beneficial results. Invention should be determined more by an ascertainment of what the inventor has actually accomplished than by the technical analysis of the means by which the result is obtained. An invention does not cease to be meritorious because it is simple. *Gould Coupler Co. v. Platt* (U. S.) 70 Fed. 622, 624.

#### **Substitution of equivalents.**

The substitution of equivalents doing substantially the same thing in the same way by substantially the same means with better results is not such invention as will sustain a patent. *Smith v. Nichols*, 88 U. S. (21 Wall.) 112-119, 22 L. Ed. 566; *Soehner v. Favorite Stove & Range Co.* (U. S.) 84 Fed. 182, 187, 28 C. C. A. 817.

#### **Substitution of simple for complex.**

Under some circumstances it may happen that there is an invention in substituting for a complex and expensive form something simple and inexpensive. *Kenney v.*

Bent (U. S.) 97 Fed. 337, 339, 38 C. C. A. 205.

#### Trade-mark.

The term "invention," within the meaning of Const. art. 1, § 8, cl. 8, which confers on Congress the power to secure for a limited time, to authors and inventors, the exclusive right to their respective writings, inventions, and discoveries, does not include a trade-mark. *Trade-Mark Cases*, 100 U. S. 82-93, 25 L. Ed. 550.

#### Utility.

While utility is a circumstance to be considered in determining the question of novelty, it is not necessarily conclusive of the question, for, if so, every improvement in a machine, however slight, and although results from mechanical skill only, would be patentable. In *Rosenwasser v. Berry* (U. S.) 22 Fed. 841, the court says not every improvement is invention, but to entitle a thing to protection it must be the product of some exercise of inventive faculties, and it must involve something more than is obvious to persons skilled in the order to which it relates. In *Hollister v. Benedict & Burnham Mfg. Co.*, 113 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901, it is said that although the idea embodied in an invention and claimed in a patent is new and of increased utility beyond what has been attained, yet it may not be, in the sense of the patent laws, an invention. *Letteller v. Mann* (U. S.) 91 Fed. 909, 915.

#### INVENTIONS CLAIMED TO BE PATENTED.

In construing the act of May 4, 1869, regulating the execution and transfer of notes given for patent rights, the courts say: "To construe the phrases 'patent right,' 'patent inventions,' and 'inventions claimed to be patented,' as used in the act, to mean machines manufactured under letters patent by the patentee or his assigns, would give them an unusual, forced, and unnatural import." The statute does not apply to negotiable paper given for machines built under letters patent, nor to negotiable paper given to procure the agency to sell machines so built in certain specified territory. *State v. Peck*, 25 Ohio St. 26, 29.

#### INVENTIVE IDEA.

It is a commonly accepted rule of the law of patents that the inventive idea is not ordinarily present in the conception of a combination which merely brings together two or more functions to be availed of independently of each other. The mechanism which accomplishes such a result, and no more, is ordinarily spoken of as a mere aggregation. *Osgood Dredge Co. v. Metropolitan Dredging Co.* (U. S.) 75 Fed. 670, 672, 21 C. C. A. 491.

#### INVENTOR.

See "Original Inventor."

To constitute one an inventor it is not necessary that he should have the manual skill and dexterity to make the drafts of his invention. If the ideas are furnished by him for producing the result aimed at, he is entitled to avail himself of the mechanical skill of others to carry out practically his contrivance. *Sparkman v. Higgins* (U. S.) 22 Fed. Cas. 878, 879.

The term "inventor," as used in Rev. St. § 4952, relating to copyrights, carries an implication which excludes the results of only ordinary skill. There is a very broad distinction between what is implied in the word "author," as found therein, and the word "inventor," as the implication excluding the results of only ordinary skill is not necessarily involved in such word. *Henderson v. Tompkins* (U. S.) 60 Fed. 758, 764.

#### INVENTORY.

See "Full Inventory"; "Public Inventory"; "Testamentary Inventory."

"The word has a well-defined meaning in commercial circles, and is used to designate articles of merchandise or personal property, that the same may be distinguished without any attempt to describe in detail the properties of each article." *Peet v. Dakota Fire & Marine Ins. Co.*, 47 N. W. 532, 534, 1 S. D. 462.

An inventory is the account of an executor or administrator, to the correctness of which he is sworn—particularly as to all claims against him belonging to the estate. *Lloyd v. Lloyd* (N. Y.) 1 Redf. Sur. 399, 403.

"According to the best English writers, the word 'inventory' includes a description of a person, as well as those parts of his dress or other matters which are particularly specified. Thus Shakespeare speaks of a lady being inventoried: 'I will give out divers schedules of my beauty. It shall be inventoried, and every particle and utensil labeled to my will.'" *Per Pollock, C. B.*, in *Taylor v. Bullen*, 5 Exch. 779, 786.

"Inventory," as used in a statute requiring the sheriff, on attaching property to return a full inventory of the property attached, means a list or schedule or enumeration of property, setting out the names of the different articles either singly or in classes. *Silver Bow Min. & Mill. Co. v. Lowry*, 6 Pac. 62, 64, 5 Mont. 618 (citing *Bouv. Law Dict.*).

"Inventory," as used in a statute providing that, in case an inventory shall not be made and filed within 30 days by an as-

signee for the benefit of creditors, the assignment shall be void, is not satisfied "by the filing of any paper which the parties may produce and please to call an inventory, but requires a paper containing all the substantial requisites prescribed by the statute." *Pratt v. Stevens* (N. Y.) 26 Hun, 229, 230.

The word "inventory," in a statute requiring a just and true inventory to be made of goods levied on under a fieri facias, means a list of the individual articles. So it was decided in the case of *Watson v. Hoel*, 1 N. J. Law (Coxe) 136; the sheriff having specified one or two articles added, "and upon all the household property"; and the court amerced the sheriff in the debt and costs, declaring this to be no inventory, within the meaning of the act. *Lloyd v. Wyckoff*, 11 N. J. Law (6 Halst.) 218, 224.

In a proof of loss by fire of a church organ, the schedule described the property burned as an organ, and, in considering the objection that this was not a sufficiently definite description, the court said, "The schedule required we understand to be an inventory, and the inventory of a single article is made by naming the article," and held the description sufficient. *Smith v. Commonwealth Ins. Co.*, 49 Wis. 822, 327, 5 N. W. 804, 807.

The term "inventory," in a fire insurance policy requiring the insured to keep an inventory of all merchandise, stock, and produce, means a detailed and itemized enumeration of the articles composing the stock, with the value of each; and, the term being as comprehensive as the term "itemized inventory," evidence that other insurance policies required itemized inventories is not admissible to prove that the term "inventory," standing without qualification, means only a summary of the inventory. *Roberts, Willis & Taylor Co. v. Sun Mut. Life Ins. Co.*, 48 S. W. 559-562, 19 Tex. Civ. App. 338.

The ordinary and accepted meaning of the word "inventory" is an itemized list or enumeration of property, article by article. Where a fire policy provided that, unless a complete inventory of the stock covered had been taken within 12 months prior to its issue, one should be taken within 30 days, or the policy would be void, and the only inventory taken included such articles as, "Hardware, \$25; Marble City Drug Co., \$53.66," etc., the policy was not complied with; such an enumeration of articles not constituting an inventory. *Fire Ass'n of Philadelphia v. Calhoun*, 67 S. W. 153, 154, 28 Tex. Civ. App. 409.

An inventory is an itemized list of the various articles constituting a collection, estate, stock in trade, etc., with their estimated or actual values. *Black, Law Dict.* "To take an inventory," in common parlance, is to take stock; that is to say, an itemized list

of every article in the store at the time of the inventory, with the actual value of each. Where a fire policy contained what is commonly called the "iron-safe clause," providing that the insured should take a complete, itemized inventory of stock on hand at least once in each calendar year, and that, unless such inventory had been taken within 12 months prior to the date of the policy, one should be taken in detail within 30 days of the issuance of such policy—otherwise the same to be null and void from such date—an invoice of goods purchased was not an inventory of stock, under such clause of the policy. *Southern Fire Ins. Co. v. Knight*, 36 S. E. 821, 824, 111 Ga. 622, 52 L. R. A. 70, 78 Am. St. Rep. 216.

#### Invoice distinguished.

An invoice is an account or catalogue of goods, with the value, marks, or particular description thereof annexed. An inventory is a list or catalogue of property, merely. A statute authorizing a sheriff to make an inventory of attached property does not entitle him to compensation for making an invoice thereof. *Cramer v. Oppenstein*, 27 Pac. 713, 714, 16 Colo. 495.

#### Oath to as part of.

The inventory and list mentioned in Rev. St. § 1697, requiring an assignee for creditors to file in the office of the clerk a correct inventory of his assets and a list of his creditors, which inventory and list shall each be verified by his oath, and have affixed a certificate of the assignee, do not include the oath and certificate, which are extraneous and distinct from them, and are merely the verification and certificate of them. They do not in any sense affect the essential qualities or character of the inventory or list, or make them more correct and perfect than they are inherently. *Steinlein v. Halstead*, 8 N. W. 881, 52 Wis. 289.

## INVEST—INVESTMENT.

#### See "First-Class Investments."

The word "invest" has been judicially defined as follows: "To surround with or place in, as property in business; to place so that it will be safe and yield a profit. It is commonly understood as giving money for some other property." *Drake v. Crane*, 29 S. W. 990, 994, 127 Mo. 85, 27 L. R. A. 653 (citing *Neel v. Beach*, 92 Pa. 226).

"Investment" means, in common parlance, putting out money on interest, either by the way of loan, or by the purchase of income-producing property. To employ for some profitable use; convert into some other form of wealth, usually of a more or less permanent nature, as in the purchase of property or shares, or in loans secured by

mortgage. In all cases of investment, although the specific character of the property is changed, the title and control remain with the investor. *Stramann v. Scheeben*, 42 Pac. 191, 195, 7 Colo. App. 1.

When money is represented by anything but money, it is said to be invested. *People v. Commissioners of Taxes of City of New York*, 23 N. Y. 242, 243.

As the word is used when speaking of money, "invested" does not necessarily indicate the purchase of property or stocks, or a loan on negotiable securities. It implies the outlay of money in some permanent form, so as to yield an income. *Desobry v. Tete*, 31 La. Ann. 809, 816, 33 Am. Rep. 232.

The term "investments," in a will in which testator directed his trustees to hold his residuary estate, and to collect the rents, issues, and profits thereof, and to preserve such investments and securities standing in his name, was used in its broadest sense, embracing all kinds of property in which his wealth might be invested, either originally or by subsequent change. *Penfield v. Tower*, 46 N. W. 413, 417, 1 N. D. 216.

"Invest," in common parlance, means putting out money on interest, either by way of loan, or the purchase of income-producing property. Citing *Una v. Dodd*, 39 N. J. Eq. (13 Stew.) 186; *Duncan v. Maryland Sav. Inst. (Md.)* 10 Gill & J. 299; *Shoemaker v. Smith*, 37 Ind. 123; *Neel v. Beach*, 92 Pa. 221; *New England Mut. Life Ins. Co. v. Phillips*, 141 Mass. 535, 540, 6 N. E. 534. And as used in Civ. Code, § 571, authorizing corporations organized for the purpose of accumulating and loaning funds of their members, "to invest funds" includes all the transactions in which the funds of the corporation are placed or employed by it for the purpose of receiving an income therefrom. *Savings Bank of San Diego County v. Barrett*, 58 Pac. 914, 915, 126 Cal. 413.

The word "investments," as used in the chapter relating to the assessment of taxes, includes stocks, bonds, and securities of the United States or of this state, or any other state, nation, or government, or of any city, town, county, district, railroad, or other corporation, and any share, portion, interest, or stock in the capital, joint fund, assets, or profits of any company, whether incorporated or not, or in any steamboat or other vessel, or in any adventure, business, or undertaking. Code W. Va. 1899, p. 199, c. 29, § 47.

#### **Banking.**

"Investment" as used in the charter of an insurance company, authorizing the directors to make rules and regulations touching the management of the corporation and the investment of the funds of the corporation which shall not be repugnant to the Con-

stitution and laws of the state or of the United States, does not mean an investment or employment of such surplus funds in the banking business, for such surplus funds may be invested in many ways, besides in banking business, consistently with the provisions of the charter, and not prohibited by any other law, and it is rather a forced use of the term "invest" to apply it to active capital employed in banking. It is usually applied to a more inactive and permanent disposition of funds. *People v. Utica Ins. Co.*, 15 Johns. 358, 364, 8 Am. Dec. 243.

#### **Colorable transfer.**

The use of the term "investment" in a stipulation with one of the parties to a suit of the manner of the making of the investment is inconsistent with the idea of a merely colorable transfer, which is designed to conceal the misappropriation of the money, but implies an actual investment. *Butler v. Walsh*, 62 N. Y. Supp. 913, 915, 48 App. Div. 459.

#### **Debt.**

A promise to pay at a future date is not a sum invested, within the meaning of Laws 1885, c. 37, providing that nonresidents doing business in the state shall be assessed and taxed on all sums invested in any manner in said business. Thus, where wheat was purchased, and only partly paid for, the note given for the balance is not a sum invested. *People v. Parker*, 41 N. E. 435, 437, 147 N. Y. 31.

#### **Deposits in bank.**

There is a distinction between a general deposit of money in a bank, payable at any time on demand, and an investment of such money by a State Treasurer in United States or state bonds, or in loans on time to counties, cities, etc. By an investment the Treasurer loses control thereof, and the same cannot be replaced in the treasury until such bonds are paid or sold, or such loans become due and are collected by due course of law, while by a general deposit of money in a bank, payable at any time on demand, the treasurer does not lose control of the money, but may reclaim it at any time. He loses control of the specific coin or currency deposited, but not of an equal amount of coin or currency, having the same qualities and value. The retention by the treasurer of substantial control over the funds in the one case, and his loss of such control in the other, mark the leading distinction between a mere deposit of the funds and an investment thereof. *State v. McFetridge*, 54 N. W. 1, 11, 84 Wis. 473, 20 L. R. A. 223.

Const. art. 8, § 9, declares that all funds belonging to the state for educational purposes, the interest whereof only is to be used, shall be deemed trust funds held by the

state, and the state shall supply all losses thereof, that may at any time accrue, so that the same shall remain forever inviolate and undiminished, and shall not be invested or loaned except on United States or state securities or registered county bonds of the state. Held, that the word "invested," in such section, was used in the sense of the state's parting with the control of the money of the educational fund temporarily, with the understanding that other money might be returned in lieu thereof by the party receiving it, and hence the money was invested, within the prohibition of the Constitution, when it was deposited in banks for safe-keeping, the bank being under bonds to hold and repay the same subject to the checks of the state treasurer. "Money loaned is invested in a debt against the borrower. If a promissory note is taken for it in the lender's name, the note becomes the evidence of the investment, and secures it to the lender. If no note is taken, the money is nevertheless invested in the debt against the borrower and in the lender's name." *State v. Bartley*, 58 N. W. 172, 177, 89 Neb. 353, 23 L. R. A. 67.

A certificate of the receiver of an insolvent bank, to the effect that an administrator had deposited certain funds belonging to an estate in a bank prior to its insolvency, was not an investment. *Germania Safety Vault & Trust Co. v. Driskell* (Ky.) 66 S. W. 610, 611.

The term "investment," in Act June 12, 1836, § 36, directing that investments by committees of lunatics shall be made under the direction of the court of common pleas, and only exempting the committee from liability for loss when it pursues this course in good faith, includes a deposit in a savings bank under an agreement by which the committee is entitled to draw the money with interest at three months from date, or give thirty days' notice of its intention so to do. *Appeal of Frankenfield* (Pa.) 11 Wkly. Notes Cas. 373, 374.

#### Issuance of bonds to railroad.

Within the meaning of a statute authorizing a town to guaranty the bonds of a railroad company, but not to exceed the amount previously invested by such town in such railroad, where a town had issued \$40,000 in bonds to aid in the construction of a railroad, and had received stock of such railroad to the amount of \$35,000, the amount of the investment of such town in such railroad was properly regarded as \$40,000, and it could guaranty the bonds of such railroad company to such amount. *Douglas v. Town of Chatham*, 41 Conn. 211, 236.

#### Loans and discounts.

In common parlance the word "investment" means putting out money on interest,

either by way of loan or purchase of income-producing property. In its most comprehensive sense it is generally understood to signify the laying out of money in such a manner that it may produce a revenue, whether the particular method be a loan or the purchase of stocks, securities, or other property. *Drake v. Crane*, 29 S. W. 990, 994, 127 Mo. 85, 27 L. R. A. 653; *Una v. Dodd*, 39 N. J. Eq. (12 Stew.) 173, 186; and it may include discounting notes, which is nothing else than lending money on personal security. *Drake v. Crane*, 29 S. W. 990, 994, 127 Mo. 85, 27 L. R. A. 653.

"Invest" has a significance which includes loans made by the discount of paper, or loans made on commercial paper, and is so used in the statute authorizing the board of directors or trustees of a bank to invest one-half of the deposits on personal security, etc. *Colorado Sav. Bank v. Evans*, 56 Pac. 981, 983, 12 Colo. App. 334.

In common parlance "invest" is sometimes used to include the loan of money. Thus, we sometimes hear it said that a man's money is invested in bonds and mortgage or note and mortgage, meaning that it is lent on those securities. The word is used in the latter sense in Const. art. 8, § 4, authorizing the General Assembly to invest portions of the common school fund, and hence the General Assembly may authorize the loaning of such money. *Shoemaker v. Smith*, 37 Ind. 122, 129.

"Investment," as applied to money, means the putting out of money on interest, and discounting notes by a corporation is investing the funds of a corporation. *People v. Utica Ins. Co.* (N. Y.) 15 Johns. 858, 891, 8 Am. Dec. 243.

Money paid for a note, and especially a note bearing interest, may with entire propriety be said to be invested in that note. *Jennings v. Davis*, 31 Conn. 134, 140.

The word "invest," as used in Act Jan. 22, 1897, directing the state treasurer to invest all moneys now in his hands, which belong to a certain fund, in general fund warrants, merely authorizes him to purchase general fund warrants, and not to pay general fund warrants with the money from the special funds. *State v. Young*, 50 Pac. 786, 788, 18 Wash. 21.

The term "investment," in common speech, means the loaning or putting out of money at interest so as to produce an income. It implies the contractual relation of purchaser and seller, or borrower and lender, and in that sense it is employed in Const. art. 1, § 25, requiring school funds to be invested in United States or state securities. *State v. Bartley* (Neb.) 59 N. W. 907, 909.

**Payment of debt.**

A man cannot be said to invest capital when he purchases material for carrying on his business or expends money in the payment of debts. *Hubbard v. Brainard*, 35 Conn. 563, 572.

**Limited to personalty.**

The word "invest," in a will directing that the share of certain beneficiaries should be invested, was construed as capable of being limited and applicable to personalty. *In re Tatum*, 70 N. Y. Supp. 634, 635, 61 App. Div. 513.

**Purchase of business.**

N.'s deposition stated that the consideration of the two notes and the two mortgages executed to W. was for borrowed money from W. to invest in the firm of R. & N. and in another firm of N. & R. The obligations were made in the name of N. alone. Held, that the words "invest in" should be construed to mean that the money was borrowed by N. to obtain or purchase an interest in the two firms—in other words, to furnish his share of the capital stock—and should not be construed to mean that the loan was negotiated as a partnership loan to supply or replenish the stocks of the two firms. *Evan v. Winston*, 74 Ala. 349, 352.

**Purchase of seat in stock exchange.**

When we speak of capital invested in the business, we mean the money which is put into that business with the intention that it shall be used in the transaction of the business. Money cannot be said to be invested in the business when it is used only to buy the right to engage in business, which does not require the use of money or the privilege to transact business which calls simply for the exercise of skill, experience, or learning. Money invested by a nonresident in a seat in the stock exchange is not "capital invested," within the meaning of Gen. Laws, c. 24, § 7, providing that nonresidents in the state doing business therein shall be taxed on the capital invested in such business as personal property. *People v. Feltner*, 67 N. Y. Supp. 893, 896, 56 App. Div. 280; *People v. Feltner*, 60 N. E. 265, 268, 167 N. Y. 1, 82 Am. St. Rep. 698.

**As investment in real estate.**

Gen. St. § 3823, providing that any church or ecclesiastical society may have and hold, exempt from taxation, personal property, consisting of bonds, mortgages, or funds invested, to an amount not exceeding in value the sum of \$10,000, means invested in a form like bonds or mortgages, and not in real property. *First Unitarian Soc. v. Town of Hartford*, 34 Atl. 89, 90, 66 Conn. 363.

**Sale of property authorized.**

A conveyance by a wife of her separate estate to her husband, reciting that she ap-

pointed him trustee thereof for her children, and that the money was to be held, used, and invested by him in such manner as he might see proper, and that he agreed to use, invest, and handle the money according to his best ability, should not be construed as intending to limit the word "invest" in the context, but rather to enlarge the meaning so as to authorize the husband to invest in property. As so used the word will not limit the expenditure of the fund to a single investment, but a sale of the property in which the money was originally invested, and a reinvestment in other property, is not prohibited by this term. *Scottish-American Mortg. Co. v. Masie*, 60 S. W. 544, 545, 94 Tex. 339.

An authority given by a principal to an agent to invest the former's money will not authorize the agent to sell his principal's property, even such as may be required as the result of the investment. *Smith v. Stephenson*, 45 Iowa, 645.

A testator, in devising to C. the use of \$1,000 and certain lots, with the further provision that C. may "invest or use all this property as he may in his discretion think best," authorized a sale of the property by the devisee. *Crawford v. Wearn*, 20 S. E. 724, 725, 115 N. C. 540.

**INVESTED.**

"Invested," as used in Const. art. 16, § 8, which provides that municipal and other corporations, invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed, etc., has a present signification, and cannot be made to embrace the future but by the addition of some verbal auxiliary. It cannot be so construed as to exclude from the operation of the section corporations existing at the time this Constitution was adopted. *Pennsylvania Ry. Co. v. Duncan*, 5 Atl. 742, 743, 111 Pa. 352.

**INVESTMENT BROKER.**

Every person who is or may be hereafter engaged in the business of selling or negotiating choses in action made, issued, or guaranteed by any person or investment company chartered by or recognized under the laws of this or any other state or territory, and payment of which is secured by mortgages on real estate situated in any other state or territory, or by pledges of such mortgages, shall be an investment broker. Gen. St. Conn. 1902, § 2459.

**INVESTMENT COMPANY.**

The term "investment company," as used in the chapter relating to the taxation of corporations, shall include all building associations, companies, or corporations, and all other companies or corporations organized un-

der the laws of this or any other state or territory, for the purpose of negotiating or placing loans secured upon property without this state, or that may be engaged in selling choses in action, or bonds secured by mortgages on property, or by pledges of such mortgages, and which are secured by individuals or issued by municipal or other corporations without this state. V. S. 1894, 585.

### INVESTMENT IN BONDS.

The term "investment in bonds," whenever used in the revenue act, shall be held to mean and include all moneys invested in bonds of whatever kind, or certificates of indebtedness, commonly called "scrip," whether issued by incorporated or unincorporated companies, towns, cities, townships, counties, states, or other corporations held by persons residing in the state, either by themselves or by others for them, whether for themselves or as guardians, trustees, or agents. Ind. T. Ann. St. 1899, § 4900.

As used in the title relating to taxation the term "investment in bonds" shall be held to mean and include all moneys in bonds, or certificates of indebtedness, or other evidences of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, states, or other corporations or by the United States held by persons residing in this state, whether for themselves or others. Bates' Ann. St. Ohio 1904, § 2730.

The phrase "investment in bonds" shall be held to mean all investments in bonds of whatsoever kind, whether issued by the government of the United States, or of this or any other state or territory of the United States, or any foreign government, or any county, city, town, or other municipality, or by any corporation or company in this or any other state or country. Civ. Code S. C. 1902, § 265.

### INVESTMENT IN STOCKS.

The term "investment in stocks," whenever used in the revenue act, shall be held to mean and include all moneys invested in public stocks of this or any other state, or in any association, corporation, joint-stock company, or otherwise, or stock the capital of which is or may be divided into shares which are transferable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by the act, held by persons residing in the state, either for themselves or as guardians, trustees, or agents, or by others for them. Ind. T. Ann. St. 1899, § 4900.

As used in the title relating to taxation, the term "investment in stocks" shall be held to mean and include all moneys invested in the capital or stock of any bank, whether in-

corporated under the laws of this state or of the United States, or any association, corporation, joint-stock company, or other company, the capital or stock of which is or may be divided into shares, which are transferable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by law, held by persons residing within this state, either for themselves or others. Bates' Ann. St. Ohio 1904, § 2730.

The phrase "investment in stocks" shall be held to mean and include all investments of money or means in the evidences of indebtedness, other than bonds or bills designed to circulate as money, issued by any government or municipality, and shares of the capital of any corporation, company, or association, and every interest in any such shares or portion thereof; also, all interests or shares in ships, boats, or other vessels used, or designed to be used, exclusively or partially, in navigating the waters within or bordering on this state, whether such ship, boat, or vessel be within the jurisdiction of this state or not, and whether such vessel be registered or licensed at any collector's office in this state or not. Civ. Code S. C. 1902, § 265.

The term "investment in stocks," within the meaning of a statute providing for the taxation of investments in stocks, includes national bank stock. Niles v. Shaw, 34 N. E. 162, 163, 50 Ohio St. 370.

### INVESTIGATE—INVESTIGATION.

Amended Chicago Charter, c. 2, § 14, requiring the commissioners of public works to "investigate" the special benefits to be derived from proposed public improvements, etc., does not mean that they shall go upon the ground or street sought to be improved and there investigate. It is sufficient that they investigate the matter in their office, as they are presumed to know all the peculiarities of the locality and to be familiar with the subject. The word "investigation" denotes inquiry either by observation, experiment, or discussion. Wright v. City of Chicago, 48 Ill. 285, 290.

An "investigation," as used in Pen. Code, § 79, providing that persons concerned in bribery shall attend and testify on any trial or "investigation," includes all investigations in the conduct of which persons may be called by authority as witnesses to testify under oath concerning any matter, and is not limited to an investigation in the course of a criminal prosecution. People v. Shark, 14 N. E. 319, 335, 107 N. Y. 427, 1 Am. St. Rep. 851.

### INVIOLEATE.

See, also, "Remain Inviolable."

The provision of the Constitution which says that "the right of trial by jury shall for-



ever remain inviolate" means that the right shall, in all cases in which it was enjoyed when the Constitution became binding and obligatory, continue unchanged. The term "shall remain inviolate" does not merely imply that the right of jury trial shall not be abolished or wholly denied, but that it shall not be impaired. The word "inviolable" is defined by approved lexicographers to mean "unhurt; uninjured; unpolluted; unbroken." "Inviolable," says Webster, "is derived from the Latin word 'inviolatus,' which is defined by Ainsworth to mean 'not corrupted; immaculate; unhurt; untouched.'" This provision of the Constitution was held to be violated by the act of the General Assembly approved January 4, 1847, which gave judgment to any person employed on, or who furnished materials for, any water craft navigating the Apalachicola river, upon merely filing an affidavit of his claim, and which deprived the defendant of any trial to determine the validity of such claim before judgment could be entered against him. *Flint River Steamboat Co. v. Roberts*, 2 Fla. 102, 114, 48 Am. Dec. 178.

## INVITATION.

### See "Implied Invitation."

The term "invitation," within the rule that the owner of property who has held out any invitation, allurement, or inducement for others to come upon the property, must keep his premises in a safe condition, imports "that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability. But if he directly or by implication induces persons to enter on and pass over his premises he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby." According to this rule a railroad company, maintaining a private crossing and allowing the public to use it as a highway, is liable to a person injured by a collision occurring through the flagman's carelessness in signaling the person injured to cross the track. *Sweeny v. Old Colony & N. R. Co.*, 92 Mass. (10 Allen) 368, 373, 87 Am. Dec. 644.

"Invitation" is a term whose legal import is known, and may be used to express the relation between an owner or occupier of land and one who comes thereon under certain circumstances. The invitation which creates such a relation may be express, as when the owner or occupier of the land by words invites another to come on it, or make use of it or something thereon; or it may be implied; as when such owner or occupier by acts or conduct leads another to believe that the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared or allowed to be used. *Turess v. New York, S. & W. R. Co.*, 40 Atl. 614, 615, 61 N. J. Law, 814.

The declaration in an action for injuries against a railroad company at a crossing, alleging that the leaving of the gates open at such crossing by the railroad company was an "invitation" to the traveler to cross, means that the leaving open of the gates amounted to an implied assurance that the track might be safely crossed. *Wilson v. New York, N. H. & H. R. Co.*, 29 Atl. 258, 259, 18 R. I. 491.

Safety gates at a railroad crossing, which should be closed in case of danger, if standing open, are an invitation to the traveler on the highway to cross. *Roberts v. Delaware & H. Canal Co.*, 35 Atl. 723, 724, 177 Pa. 183.

Among the definitions of the verb "to invite" given by Webster is "to allure," "to attract." An invitation, then, may be said to consist in the act, not only of requesting or bidding, but in that of alluring or attracting, or in a situation which in itself is attractive or alluring; in other words, it may be express or implied. *Texas & P. Ry. Co. v. Brown*, 38 S. W. 146, 147, 11 Tex. Civ. App. 503.

### License distinguished.

There is a clear distinction between a "license" and an "invitation" to enter premises, and an equally clear distinction as to the duty of an owner in the two cases. An owner owes to a licensee no duty as to the condition of premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril, or willfully cause him harm; while to one invited he is under obligation for reasonable security for the purposes of the invitation. It is held that a fireman, entering a building in the course of his duty at a fire, enters under a license, and not under invitation. *Beehler v. Daniels*, 29 Atl. 6, 7, 18 R. I. 563, 27 L. R. A. 512, 49 Am. St. Rep. 790.

A mere promise or license by a railroad company to cross its road is not an "invita-

tion" to do so. Such an invitation must be some unequivocal act done by the company indicating its purpose to induce or invite people to use such crossing. *Weldon v. Philadelphia, W. & B. R. Co.* (Del.) 43 Atl. 156, 159, 2 Pen. 1 (citing *Wright v. Boston & A. R. Co.*, 142 Mass. 300, 7 N. E. 866).

### INVITED ERROR.

The principle of "invited error" is that if, during the progress of a case, any party thereto request or move the court to make an erroneous ruling, and the court rule in accordance with such request or motion, he cannot take advantage of the error on appeal; for example, if a special instruction be requested, and the court give the instruction, either in the form requested or in substance, the giving of the charge cannot be successfully urged as error. *Gresham v. Harcourt*, 53 S. W. 1019, 1021, 93 Tex. 149.

### INVOICE.

An "invoice," in commercial transactions, is defined to be "a written account of the particulars of merchandise shipped or sent to a purchaser, consignee, factor, etc., with the value or prices and charges annexed." *Merchants' Exch. Co. v. Weisman* (Mich.) 93 N. W. 869, 870.

"An invoice of goods is merely another term for bill rendered." *Pipes v. Norton*, 47 Miss. 61, 76.

An invoice is a list of goods sold and the prices charged for them, or the goods consigned and the value at which the consignee is to receive them. *Southern Exp. Co. v. Hess*, 53 Ala. 19, 22.

"The word 'invoice' is sometimes used to designate things of which it is the frequent accompaniment or evidence. An invoice accompanies goods and states price and cost. Consequently an invoice of goods sometimes means the goods themselves." *Sturm v. Williams*, 38 N. Y. Super. Ct. (6 Jones & S.) 325, 342.

The term "invoice," in Act May 28, 1830, for the more effectual collection of impost duties, which provides that the collectors of customs shall cause at least one package out of every invoice, and one package at least out of every twenty packages of each invoice, and a greater number if deemed necessary, of goods imported into the respective districts, which package or packages he shall have first designated on the invoice to be opened and examined, and if the contents be found not to correspond with the invoice, or to be falsely charged in the invoice, to have all the goods appraised and forfeited, if not described in the invoice, means the invoice produced at the custom house for the pur-

poses of an entry, and does not apply to a false invoice at the place of exportation, made with intent to defraud the revenue. *United States v. Twenty-Eight Packages of Pins* (U. S.) 23 Fed. Cas. 244, 245.

#### As evidence of receipt of goods.

An invoice of goods received by a consignee, retained and not objected to, and the truth of it in no manner disproved, is evidence that all the articles enumerated in it were received by the consignee, and if the consignee has rendered no accounts of sale, particularly after a number of years, and offers no evidence to prove what part was sold and at what prices, every presumption is against him that he sold them at the invoice prices. *Field v. Moulson* (U. S.) 9 Fed. Cas. 23.

#### As evidence of title.

In *Dows v. Bank*, 91 U. S. 618, 23 L. Ed. 214, the Supreme Court of the United States said: "An invoice is neither a bill of sale, nor evidence of a sale, and, standing alone, furnishes no proof of title." *Kentucky Refining Co. v. Globe Refining Co.*, 47 S. W. 602, 605, 104 Ky. 559, 42 L. R. A. 353, 84 Am. St. Rep. 468.

An invoice is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, or cost of the goods or price of the things invoiced, and is as appropriate to a bailment as a sale. Hence, standing alone, it is never regarded as evidence of title. *Sturm v. Boker*, 14 Sup. Ct. 99, 104, 150 U. S. 312, 37 L. Ed. 1093.

The term "invoice," as used in an insurance policy on outward shipments and homeward, for account of certain persons, to be consigned to them by "invoice" and bill of lading, carries no implication of ownership. It is well understood that an invoice usually accompanies goods that are consigned to a factor for sale, as well as in the case of a purchase. *Rolker v. Great Western Ins. Co.* (N. Y.) 4 Abb. Dec. 76, 79.

#### As evidence of value.

An invoice, like a bill of lading, is regularly made out when the cargo is completed, and is prima facie evidence of value, and no more, and is uniformly admissible in evidence. *Graham v. Pennsylvania Ins. Co.* (U. S.) 10 Fed. Cas. 935, 939.

#### Inventory distinguished.

An "invoice" is an account or catalogue of goods, with the value, marks, or particular description thereof annexed. An "inventory" is a list or catalogue of property merely. A statute authorizing a sheriff to make an inventory of attached property does not entitle him to compensation for making an in-

voice thereof. *Cramer v. Oppenstein*, 27 Pac. 713, 714, 16 Colo. 495.

#### **Proceeds distinguished.**

"Invoices" are not included in the term "proceeds," as used in a trust receipt stating, in effect, that a person took bills of lading in trust for the purpose of receiving and making sales of flour as agent of the other party and turning over the proceeds within a given time. An invoice is a written account of particular merchandise shipped or consigned to a purchaser, consignee, or factor, with the value, price, or charges annexed; while the word "proceeds" in its legal definition means money or other articles of value obtained from the sale of property. *Tradesmen's Nat. Bank of City of New York v. National Surety Co.*, 62 N. E. 670-672, 169 N. Y. 563.

#### **INVOICE COST.**

The term "invoice cost" sometimes means the prime price or cost of goods, although there is no invoice in fact. *Sturm v. Williams*, 38 N. Y. Super. Ct. (6 Jones & S.) 325, 342.

#### **INVOICE PRICE.**

The invoice price is the cost or value of the property at the shipping point, and such is its meaning in relation to fruit trees, whether they were grown by the person to whom they were shipped or some one else. *Pierce v. Southern Pac. Co. (Cal.)* 47 Pac. 874, 877, 40 L. R. A. 350.

The "invoice price" of goods, as used in an open policy of insurance, means the prime cost; the value which, upon a total loss, the insured is entitled to recover. *Le Roy v. United Ins. Co. (N. Y.)* 7 Johns. 843, 853.

The term "invoice price" sometimes means the prime price or cost of goods, although there is no invoice in fact. *Sturm v. Williams*, 38 N. Y. Super. Ct. (6 Jones & S.) 325, 342.

#### **INVOLUNTARY.**

See "Suicide, Voluntary or Involuntary."

Where an accident policy provides that it shall not cover a death resulting from voluntary or involuntary taking of poison, the word "involuntary" has a broader and more comprehensive meaning than an act forced upon one which he cannot help. The term is defined in the *Century Dictionary* as "not voluntary or willing; contrary or opposed to will or desire; independent of volition or consenting action of mind; unwilling; unintentional." "Involuntary" is an antonym of "voluntary," and therefore, in this sense, includes "accidental." *Kennedy v. Aetna Life*

*Ins. Co.*, 72 S. W. 602, 603, 81 Tex. Civ. App. 509.

"Involuntary" is not the equivalent of the word "undesigned" or "unintentional," though there are cases which seem to authorize such use of the word. *Smouse v. Iowa State Traveling Men's Ass'n*, 92 N. W. 53, 54, 118 Iowa, 436 (citing *McCarthy v. Travelers' Ins. Co.* [U. S.] 15 Fed. Cas. 1254).

The act of holding and using an instrument or weapon, the movement of which is the immediate cause of hurt to another, cannot be called an "involuntary" act, though its particular effect in hitting and hurting another is not within the purpose or intent of the party doing the act; and where a person raised his stick for the purpose of parting his dog and another's, and in so doing accidentally struck and injured such other, the act was unintentional, but not involuntary. *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 294.

#### **INVOLUNTARY BANKRUPT.**

Where a man is forced into bankruptcy against his will by his partner, it is not voluntary bankruptcy, any more than it would be if he were forced into it by any one else. It is compulsory and involuntary. *In re Murray* (U. S.) 96 Fed. 600, 602.

#### **INVOLUNTARY DEPOSIT.**

An involuntary deposit is made (1) by the accidental leaving or placing of personal property in the possession of any person, without negligence on the part of its owner, or (2) in case of fire, shipwreck, inundation, insurrection, riot, or the like extraordinary emergencies, by the owner of personal property committing it out of necessity to the care of any person. *Rev. St. Okl.* 1903, § 2826; *Rev. Codes N. D.* 1899, § 4002; *Civ. Code S. D.* 1903, § 1354.

#### **INVOLUNTARY DISCONTINUANCE.**

"A discontinuance is involuntary where, in consequence of some technical omission, misleading, or the like, the suit is regarded as out of court, as where the parties undertake to refer a suit not referable, or omit to enter proper continuances." *Hunt v. Griffin*, 49 Miss. 742, 748.

#### **INVOLUNTARY MANSLAUGHTER.**

"Involuntary," as applied to manslaughter, means that the killing was committed by accident, or without any intention to take life. *United States v. Outerbridge* (U. S.) 27 Fed. Cas. 390, 391.

"Involuntary manslaughter" is defined by *Wharton* as where a death results unin-

tentionally so far as the defendant is concerned, from an unlawful act on his part not amounting to a felony, as from a lawful act negligently performed; and by Anderson as "a killing in the doing of an unlawful act in itself or a lawful act in an unlawful or careless way." *Bias v. United States*, 53 S. W. 471, 474, 3 Ind. T. 27.

Involuntary manslaughter is the killing of another person in doing some unlawful act not amounting to a felony nor likely to endanger life, but without an intention to kill. *Ross v. Commonwealth* (Ky.) 55 S. W. 4, 5; *Conner v. Commonwealth*, 76 Ky. (13 Bush) 714, 718. This may be either where the act is directed against the person killed, or where it is directed against another person, or thing, and kills one not intended to be hurt. *Conner v. Commonwealth*, 76 Ky. (13 Bush) 714, 718; *Trimble v. Commonwealth*, 78 Ky. 176, 177.

"Involuntary manslaughter" consists in the killing of a human being without any intention to do so, or in the commission of an unlawful act or a lawful act which might probably produce such a consequence in an unlawful manner. Code Ga. § 4348; *Daly v. Stoddard*, 68 Ga. 145, 147. Section 21 of the Idaho act relating to crimes and punishments provides that when such involuntary killing shall happen in a commission of an unlawful act, which in its consequences naturally tends to destroy life, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged a murder. *People v. Mooney*, 2 Pac. 876, 877, 2 Idaho (Hasb.) 17.

"Involuntary manslaughter" occurs where one doing an unlawful act, not felonious nor tending to great bodily harm, or doing a lawful act without proper caution or requisite skill, undesignedly kills another. *State v. Trusty* (Del.) 40 Atl. 766, 768, 1 Pennewill, 319; *State v. Jones* (Del.) 47 Atl. 1006, 1007, 2 Pennewill, 573; *State v. Miller* (Del.) 32 Atl. 137, 138, 9 Houst. 564.

"Involuntary manslaughter" occurs where it plainly appears that neither death nor any great bodily harm was intended, but death was accidentally caused by some unlawful act, or an act strictly lawful in itself done in an unlawful manner. *Commonwealth v. Gable* (Pa.) 7 Serg. & R. 423, 427.

"Involuntary manslaughter" is the unlawful killing of a human being without malice, "in the commission of an unlawful act, not amounting to a felony, or in the commission of a lawful act, which might produce death, in an unlawful manner or without due caution or circumspection." Pen. Code Cal. § 192; *People v. Biggins* (Cal.) 3 Pac. 853, 858. See, also, *Territory v. Mantton*, 19 Pac. 387, 388, 8 Mont. 95.

"Involuntary manslaughter," according to the old writers, occurs when death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part not amounting to felony, or from a lawful act negligently performed. Hence it is manslaughter when the death of another occurs through the defendant's negligent use of dangerous agencies, and so when death incidentally, but unintentionally, results from the execution of a trespass. Involuntary manslaughter is the accidental killing of a human being in the prosecution of some unlawful act, not felonious, or in the improper performance of some lawful act, as where an act not strictly lawful is done in an unlawful manner and without due caution, or killing accidentally in the unlawful or negligent use of firearms without mischievous intent. *State v. Lockwood*, 24 S. W. 1015, 1016, 119 Mo. 463.

"Involuntary manslaughter" has been defined to be the unlawful killing of a human being without malice, either expressed or implied, and without intent to kill, or inflict the injury causing death, committed accidentally in the commission of some unlawful act, not felonious, or in the improper or negligent performance of an act lawful in itself. If an act be unlawful in itself, but without mischievous intention, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death, because the act which ensued was unlawful. *Johnson v. State*, 10 South. 667, 669, 94 Ala. 35.

There can be no "involuntary manslaughter" where there is an intention to kill. *Jackson v. State*, 76 Ga. 473, 477.

The distinction between voluntary and involuntary manslaughter is now obsolete at the common law. *United States v. Meagher* (U. S.) 37 Fed. 875, 881.

#### **Homicide excusable by misadventure distinguished.**

Involuntary manslaughter differs from homicide excusable by misadventure in this: that misadventure always happens in the prosecution of a lawful act, but this species of manslaughter, in the prosecution of an unlawful act. *Trimble v. Commonwealth*, 48 Ky. (9 B. Mon.) 176, 177; *Bias v. United States*, 53 S. W. 471, 474, 3 Ind. T. 27.

#### **INVOLUNTARY NONSUIT.**

An involuntary nonsuit takes place when the plaintiff, on being called when his case is before the court for trial, neglects to appear, or when he has given no evidence on which a jury may find a verdict. *Herring v. Poritz*, 6 Ill. App. (6 Bradw.) 208, 211; *Boyce v. Snow*, 58 N. E. 403, 404, 187 Ill. 181; *Id.*, 88 Ill. App. 402, 405; *Deeley v. Heintz*, 62 N. E. 158, 159, 169 N. Y. 129; *Sar-*

doval v. Rosser, 26 S. W. 933, 934, 86 Tex. 682; Hammergen v. Schurmeier (U. S.) 3 Fed. 77, 78.

An "involuntary nonsuit" is also entered by the court when the plaintiff, being called, refuses to appear at the time when the jury is to deliver the verdict. Sandoval v. Rosser, 26 S. W. 933, 934, 86 Tex. 682.

An "involuntary nonsuit" is for neglect either to appear, or, having appeared, for failure to present evidence to sustain a verdict in his favor, and is ordered against plaintiff's objection. Under our code practice a court has no power to order an involuntary nonsuit. Wabash R. Co. v. McCormick, 55 N. E. 251, 252, 28 Ind. App. 258 (citing Williams v. Port, 9 Ind. 551; Stults v. Forst, 135 Ind. 297, 34 N. E. 1125).

An involuntary nonsuit occurs when the plaintiff by some adverse ruling of the court, which precludes his recovery, is compelled to take a nonsuit. Williams v. Finks, 57 S. W. 732, 735, 156 Mo. 597.

#### INVOLUNTARY PAYMENT.

"Involuntary payment" includes any payment which is made under a claim involving the use of force as an alternative, as the party of whom it is demanded cannot be compelled or expected to await actual force, and cannot be held to expect that a person will desist after once making demand. Parcher v. Marathon County, 9 N. W. 23, 25, 52 Wis. 388, 38 Am. Rep. 745.

The term "involuntary payment" cannot be applied to the payment of an illegal and unjust demand by a party advised of all the facts, unless it is made to procure the release of the person or property from detention, or where the party procuring the payment is permitted, with apparent authority, to seize upon either, and the payment is made to prevent it. Wolfe v. Marshall, 52 Mo. 187, 168.

The term "involuntary payment" characterizes a payment which has been obtained by fraud, oppression, or extortion, or when it has been made to secure a right which the party paying was entitled to without such payment, and which right was withheld by the party receiving the payment until such payment was made, and therefore it may be recovered back; but a payment made by a person whose private warehouse has been designated for the storage of dutiable merchandise, in pursuance of an illegal requirement by the government that he pay the salary of an inspector, is not an involuntary payment which he can recover. Corkle v. Maxwell (U. S.) 6 Fed. Cas. 555.

#### INVOLUNTARY SERVICE.

Act Cong. June 23, 1874, 18 Stat. 251 [U. S. Comp. St. 1901, p. 3361], which provides

that whoever shall knowingly and willfully bring into the United States, or the territories thereof, any person inveigled or forcibly kidnapped in any other country, with intent to hold such person so inveigled or kidnapped in confinement, or to any "involuntary service," etc., shall be deemed guilty of a felony, and on conviction thereof be imprisoned, would include service by children as street musicians; their parents, who gave their consent to the service, having cast them off, and there not being any actual consent on the part of the children. United States v. Ancarola (U. S.) 1 Fed. 676, 683.

#### INVOLUNTARY SERVITUDE.

Const. art. 1, § 2, forbidding "involuntary servitude," otherwise than as a punishment of crime, whereof the party shall have been duly convicted, etc., includes enforced labor. State v. West, 43 N. W. 845, 847, 42 Minn. 147.

Const. U. S. Amend. 13, providing that neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction, means compulsory imprisonment at hard labor without pay. Ex parte Wilson, 5 Sup. Ct. 935, 941, 114 U. S. 417, 29 L. Ed. 89.

Const. Mo. 1865, art. 1, § 1, providing that there cannot be in the state either slavery or "involuntary servitude," except in punishment of crime, whereof the party shall have been duly convicted, includes the hiring of a vagrant to the highest bidder for a certain time, where he is not accused of crime. "Involuntary servitude" is but the condition of a person compelled to do services for another. Thompson v. Benton, 22 S. W. 863, 864, 117 Mo. 83, 20 L. R. A. 462, 38 Am. St. Rep. 639.

In holding that an injunction cannot be granted to prevent one person from quitting the service of another, it was held that such act would be an invasion of such person's natural liberty, and that one who is placed under such restraint is in a condition of "involuntary servitude," a condition which the supreme law of the land declares shall not exist within the United States or any possession subject to their jurisdiction. Arthur v. Oakes (U. S.) 63 Fed. 310, 318, 11 C. C. A. 209, 25 L. R. A. 414.

The denial of equal accommodations in inns, public conveyances, and places of public amusement does not impose involuntary servitude, within the meaning of the thirteenth amendment. In re Civil Rights Cases, 3 Sup. Ct. 18, 23, 109 U. S. 3, 27 L. Ed. 835.

An indenture purporting to bind a child of negro descent to an apprenticeship, which does not contain provisions for the security

and benefit of the apprentice which are required by the general laws of the state in indentures, is an indenture involving involuntary servitude. In re Turner (U. S.) 24 Fed. Cas. 837, 839.

The term "servitude," in the thirteenth amendment to the federal Constitution, prohibiting slavery and involuntary servitude, except as punishment for crime, is of larger meaning than "slavery," as the latter word is usually understood in this country, and includes all shades and conditions of involuntary slavery, of whatever class or name. In re Slaughterhouse Cases, 16 Wall. 36, 69, 21 L. Ed. 394.

**Service voluntarily entered.**

The term "involuntary servitude," as used in the thirteenth amendment to the Constitution, forbidding slavery and involuntary servitude, will be construed according to the purpose for which the amendment was made, and hence relates to such involuntary servitude as slavery, and not to servitude which was voluntarily entered into, such as service in the army or navy, or such service as according to the rules of common law had been recognized as justified by the circumstances of the case, as the power to imprison seamen and secure their return to the vessel. Hence Rev. St. U. S. §§ 4598, 4599, authorizing the apprehension, imprisonment, and return on board of deserting seamen in the merchant service, are not invalidated by the prohibition of involuntary servitude. Robertson v. Baldwin, 17 Sup. Ct. 323, 328, 165 U. S. 275, 41 L. Ed. 715.

"Involuntary servitude," in its constitutional meaning, applies to a relation attempted to be created by an indenture by which a free woman of color above 21 years of age binds herself to serve the obligee as a menial servant for 20 years. In re Clark (Ind.) 1 Blackf. 122, 12 Am. Dec. 213.

**Work on roads in lieu of poll tax.**

"Involuntary servitude," as used in Const. U. S. art. 13, § 1, providing that neither slavery nor involuntary servitude, except as a punishment for crime after conviction, shall exist within the United States, or any place subject to their jurisdiction, cannot be construed to include work on the streets, alleys, or avenues of a city, required of every male resident of such city between the ages of 21 and 45 years for two days of ten hours each, or in lieu thereof to pay a certain sum per day, though such work is in a sense involuntary servitude. It is like service or involuntary service on juries, or in the militia, or in the army, or in removing snow or ice from sidewalks, gutters, etc., and is not that kind of involuntary servitude which is akin to slavery, which is the interdicted involuntary servitude mentioned in the

Constitution. State v. City of Topeka, 12 Pac. 810, 815, 36 Kan. 78, 59 Am. Rep. 529.

**INVOLUNTARY TRESPASS.**

The term "involuntary," in a statute in reference to trespasses on realty which are involuntary or by negligence or mistake, is held to refer to trespasses committed when a person believes that he is doing an act upon his own land, or upon the land of another by permission, when in fact he is not, but is doing it upon land upon which he has no right to enter. Brown v. Neal, 36 Me. 407, 408.

**INVOLUNTARY TRUST.**

An "involuntary trust" is one which is created by operation of law. Civ. Code Mont. 1895, § 2952; Civ. Code Cal. 1903, § 2217; Rev. Codes N. D. 1899, § 4256; Civ. Code S. D. 1903, § 1609.

"Involuntary or constructive trusts" embrace all those instances in which a trust is raised by the doctrines of equity, for the purpose of working out justice in the most efficient manner, when there is no intention of the parties to create a trust relation, and contrary to the intention of the one holding the legal title. This class of trusts may be usually referred to fraud, either actual or constructive, as an essential element. Farmers' & Traders' Bank v. Kimball Milling Co., 47 N. W. 402, 403, 1 S. D. 388, 36 Am. St. Rep. 739.

**INVOLVE.**

See "Amount Involved"; "Heavily Involved"; "Subject-Matter Involved."

The primary signification of the word "involve" is "to roll up or envelop; and it also means to comprise, to contain, to include by rational or logical construction; and its exact synonym may not be found in a single word." Thus, in construing Const. art. 6, § 6, giving the district courts jurisdiction in all cases at law which involve the title or possession of real property, the meaning of the phrase, "cases at law which involve the title or possession of real property," may be expressed by the paraphrase, "cases at law in which the title or possession of real property is a material fact in the case upon which the plaintiff relies for a recovery or the defendant for a defense." Holman v. Taylor, 31 Cal. 338, 340. See, also, construing Code Civ. Proc. Cal. § 838; Copertini v. Oppermann, 18 Pac. 256, 258, 76 Cal. 181.

Const. art. 6, § 12, providing that the Supreme Court shall have exclusive appellate jurisdiction of a "case involving title to real estate," should be construed to include an action to annul a judgment by which plaintiff lost possession of property,

and to cancel the deed by means of which he lost, and to recover, that possession. *Dunn v. Miller*, 9 S. W. 640, 643, 96 Mo. 324.

"The word 'involving,' as used by the Constitution in fixing the appellate jurisdiction of the Supreme Court, implies that a constitutional question was raised in and submitted to the trial court, and that such court had the opportunity to pass upon it. It cannot be laid down by rule how every question must be raised in the trial court; but it should, at least, be fairly and directly presented by some of the methods recognized by the practice and procedure of the court." *Ash v. City of Independence*, 46 S. W. 749, 751, 145 Mo. 120 (quoting *Bennett v. Missouri Pac. Ry. Co.*, 18 S. W. 947, 948, 105 Mo. 642).

Within the provisions of the Constitution of Missouri that, when a federal question was involved, the cause, on application of the losing party in the Supreme Court, should be transferred to the full court for decision, a federal question must be involved, in the sense of arising for decision. *Duncan v. Missouri*, 14 Sup. Ct. 570, 571, 38 L. Ed. 485, 152 U. S. 377.

The phrase, "cases involving the validity of a statute," in its more extended sense, would include every case where controverted statutory rights are the subject of litigation; for in every such case the existence of the rights themselves depends on the validity of the statute from which they are supposed to arise. As used in the Illinois statute which provides for writs of error and appeals to the Supreme Court in "cases where the validity of a statute is involved," it is not used in its extended sense, but applies only to cases where the validity of the statutes as originally passed is the primary inquiry, and it does not include cases where the question of validity is incidental or collateral to the main inquiry. *City of Cairo v. Bross*, 99 Ill. 521, 524.

An ordinance establishing a police force, increasing the number of police officers, and fixing the amount of their salaries, involves an expenditure of money, within a charter provision requiring ordinances involving the expenditure of money to be certified by the clerk to the mayor for approval before taking effect. *State v. Barr (Ohio)* 8 O. L. D. 541, 5 N. P. 435.

#### **Involving freehold.**

See, also, "Freehold."

A freehold is "involved," within the statute permitting an appeal to the Supreme Court in cases in which a freehold is involved, in cases wherein the necessary result of the judgment or the decree is that one party gains and the other loses a freehold estate, or where the title to the freehold is so put in issue by the pleadings that the decision of

the case necessarily involves the decision of that issue. *Nevitt v. Woodburn*, 51 N. E. 593, 595, 175 Ill. 376. *Goodkind v. Bartlett*, 26 N. E. 387, 136 Ill. 18; *Taylor v. Pierce*, 50 N. E. 1109, 1110, 174 Ill. 9 (citing *Sandford v. Kane*, 127 Ill. 591, 20 N. E. 810). An inchoate right of dower being a mere contingent expectancy, an action involving it does not involve a freehold. *Goodkind v. Bartlett*, 26 N. E. 387, 136 Ill. 18. A bill in chancery to foreclose a mortgage on real estate does not involve a freehold, so as to authorize an appeal from the circuit court to the Supreme Court. *Pinneo v. Knox*, 100 Ill. 471.

A freehold is never involved in an action, except where the primary object of the suit is the recovery of a freehold estate or title which is directly put in issue, and where the suit, if prosecuted to final determination, will by virtue of the judgment or decree rendered therein, as between the parties, result in one gaining and the other losing the estate. It is not involved, though the title may, by operation of the decree, be completely divested and rendered null, if the effect of the decree can be altogether avoided by payment of the amount of the plaintiff's claims. Therefore a creditors' bill to set aside a conveyance of land as fraudulent and to subject the amount conveyed to the payment of the creditor's judgment did not involve a freehold, within the meaning of the statute; for the whole controversy could have been settled by the payment of the judgment. *Chicago, B. & Q. R. Co. v. Watson*, 105 Ill. 217.

The question of the right to redeem under a conveyance claimed to be a mortgage does not involve a freehold. *Kirchoff v. Union Mut. Life Ins. Co.*, 20 N. E. 808, 810, 128 Ill. 199.

Laws 1891, p. 118, § 1, provides that the limitation of the right of appeal to the Supreme Court in cases wherein the judgment exceeds \$2,500 shall not apply where the matter in controversy "relates" to a franchise or freehold. Section 4, subd. 3, provides that the Court of Appeals shall have jurisdiction, not final, in cases where the controversy "involves" a franchise or freehold. Section 15 provides that appeals will lie to review every final judgment of the Court of Appeals in cases which might have been taken for review to the Supreme Court in the first instance. Code 1887, p. 286, § 388, provides that appeals to the Supreme Court from the district court shall be allowed in cases which "relate" to a franchise or freehold. Held, that the word "involve," as used in section 4, subd. 3, is synonymous with the word "relate," and that the Supreme Court has jurisdiction of appeals in actions which relate to a freehold. *Wyatt v. Larimer & Weld Irr. Co.*, 83 Pac. 144, 147, 18 Colo. 298, 36 Am. St. Rep. 280.

**INVOLVED IN DEBT.**

See "Heavily Involved."

**INVOLVING THE MERITS.**

See "Merits."

**IPSO FACTO.**

The term "ipso facto" is defined as "by the very act itself; by the mere act." Probably a closer translation of the Latin term would be "by the fact itself." But under any construction of the term as used in the statute providing that the neglect of an officer to have his official bond executed and approved as provided by law, and filed for record within the time limited, his office shall thereupon "ipso facto" become vacant, it means that the failure to file the bond within the time limited shall of itself operate as a vacancy in the office, and not that a judgment of the court based upon such failure shall be required to operate such vacation, and the officer thereby loses all right to the office. *State v. Lansing*, 64 N. W. 1104, 1109, 46 Neb. 514, 35 L. R. A. 124.

**IRISH MOSS.**

See "Sea Moss."

**IRON.**

The manufactures, articles, or wares not specifically enumerated, composed wholly or in part of iron and steel, etc., in Tariff Act 1883, fixing a duty thereon, includes iron and steel wire hair pins, which are not dutiable as pins, solid head and others, as the latter class of pins have been distinguished in former tariff acts from hair pins. *Robertson v. Rosenthal*, 10 Sup. Ct. 120, 121, 132 U. S. 460, 33 L. Ed. 392.

**IRON ORE.**

Crude hematite ore, which cannot be used as a color, is assessable under Tariff Act July 24, 1897, par. 121 [U. S. Comp. St. 1901, p. 1636], as "iron ore." *Francklyn v. United States* (U. S.) 119 Fed. 470.

There is no trade custom establishing that a ton of iron ore is a ton with water mechanically present expelled by drying at a temperature of 212° Fahrenheit, and the duty imposed per ton by Tariff Act 1883, § 6, schedule 3, was payable on the water reported, without any deduction for water, except sea water taken during the voyage. *Earnshaw v. Cadwalader*, 145 U. S. 247, 259, 12 Sup. Ct. 851, 852, 36 L. Ed. 693.

**IRON WORKS.**

The term "iron works," as used in all laws relative to the employment of labor,

shall mean a mill, forge, or other premises in or upon which any process is carried on for converting iron into malleable iron, steel, or tin plate, or for otherwise making or converting steel. *Rev. Laws Mass. 1902, p. 916, c. 106, § 8.*

**IRRATIONAL.**

Webster gives "irrational" as a synonym for "insane." Though "insanity" is a term more frequently found in the books than "irrational," it is more the result of habit and convenience than because of any inherent or substantial difference in their meaning. *State v. Leehman*, 49 N. W. 3, 5, 2 S. D. 171.

**IRREDEEMABLE GROUND RENTS.**

Under the laws of Pennsylvania, an irredeemable ground rent is defined to be a rent preserved to himself and his heirs by the grantor of land out of the land itself. It is not granted like an annuity or a rent charge, but is reserved out of the conveyance of the land in fee. It is a separate estate from the ownership of the amount, and is held to be real estate, with the usual characteristics of an estate in fee simple—descendible, devisable, and alienable. *Wilson v. Iseminger*, 22 Sup. Ct. 573, 574, 185 U. S. 55, 46 L. Ed. 804.

**IRREGULAR.**

Not according to rule; improper or insufficient, by reason of departure from the prescribed course. *Black, Law Dict.*

**IRREGULAR CONDUCT.**

The term "irregular or improper conduct," in a statute authorizing all persons affected by the laying out or altering of a highway to appear before the court and remonstrate against the acceptance of the report of the committee for any irregular or improper conduct, includes the action of the committee appointed by the superior court to consider the matter of laying out a highway in failing to give notice of the proceedings to the persons whose lands are to be taken in the construction of the highway. *Shelton v. Town of Derby*, 27 Conn. 414, 422.

**IRREGULAR INDORSEMENT.**

When, at the inception of a note, a person other than the payee writes his name upon its back, such an indorsement is an irregular indorsement. *Carter v. Long*, 28 South. 74, 77, 125 Ala. 280.

An irregular indorsement is an indorsement in blank by third persons above the name of the payee, or when the payee does not indorse at all. By such indorsements it



is generally held, nothing else appearing, that the party intended to assume an absolute undertaking, usually that of maker; but this presumption may be rebutted by showing a contract for a different undertaking, for in this state no distinction has ever been made between regular and irregular indorsements, but they have been alike held prima facie to impose the obligation of maker. *Bank of Bellows Falls v. Dorset Marble Co.*, 17 Atl. 42, 43, 61 Vt. 106.

#### IRREGULAR INDORSER.

Where one puts his name on the back of commercial paper while it is in the hands of the maker, and the latter hands it to the creditor, the holder acquiring the paper with knowledge of the facts, the person so putting his name on the back of the paper is an irregular indorser. *Metropolitan Bank v. Muller*, 24 South. 295, 296, 50 La. Ann. 1278, 69 Am. St. Rep. 475.

#### IRREGULAR JUDGMENT.

Erroneous distinguished, see "Erroneous."

An irregular judgment is one rendered contrary to the course and practice of the court. *McKee v. Angel*, 90 N. C. 60, 62 (citing *Mabry v. Erwin*, 78 N. C. 45); *Stafford v. Gallops*, 31 S. E. 265, 266, 123 N. C. 19, 68 Am. St. Rep. 815; *Simmons v. Dowd*, 77 N. C. 155, 157; *Wolfe v. Davis*, 74 N. C. 597, 599; *McKenna's Estate v. McCormick*, 83 N. W. 844, 845, 60 Neb. 995.

An "irregular judgment" is one given contrary to the method of procedure and the practice under it allowed by law, as if a judgment should be given against an infant, no guardian having been appointed or appearing to represent him and take care of his interest in that behalf. So, where a complaint was filed against defendant, and in the progress of the action another party defendant was brought in, the complaint must be amended, or another complaint filed as to him, unless he waives his right to the same by answering the original complaint; and therefore a judgment by default against the party brought in for want of an answer, where no complaint was filed against him, was irregular. *Vass v. People's Building & Loan Ass'n*, 91 N. C. 55, 58.

#### IRREGULAR PROCEEDINGS.

Void proceedings would destroy jurisdiction in a court of inferior powers, but merely irregular proceedings would not. The difference is not readily perceivable. Generally speaking, it is the difference between substance and form, between void and voidable, or between void action and imperfect action. Error or nullity goes to the foun-

dation, and discovers that the proceedings have nothing to stand on, while irregularity denotes that the court was acting within its jurisdiction, but failed to consummate its work in all respects according to the required forms. The one applies to matters which are contrary to law; the other, to matters which are contrary to the practice authorized by law. One relates more to the act, and the other more to the manner of it. *Cobbesee Nat. Bank v. Rich*, 16 Atl. 506, 508, 81 Me. 164.

#### IRREGULAR PROCESS.

Sometimes the term "irregular process" has been defined to mean process absolutely void, and not merely erroneous and voidable; but usually this term has been applied to all process not issued in strict conformity with the law, whether the defects appear upon the face of the process or by reference to extrinsic facts, and whether such defects render the process absolutely void or only voidable. *Cooper v. Harter*, 2 Ind. (2 Cart.) 252, 253.

Irregular process is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case by reason of the existence or nonexistence of facts or circumstances rendering it improper in such a case. An order made or judgment rendered by a court, which is simply reversed as erroneous, will afford protection to a person acting under it. Error thus applied consists in nonconformity to the rules of procedure in an action which the court is authorized to hear, but not affecting any jurisdictional fact, which can be taken advantage of only by appeal or motion in the original action. *Bryan v. Congdon* (U. S.) 86 Fed. 221, 223, 29 C. C. A. 670.

There is a great difference between erroneous process and irregular (that is, void) process. The first stands valid and good until it be reversed. The latter is an absolute nullity from the beginning. The party may justify under the first until it be reversed; but he cannot justify under the last, because it was his own fault that it was irregular and void at the first. *Paine v. Ely* (Vt.) N. Chip. 14, 24.

#### IRREGULAR SUCCESSION.

"Irregular succession" is that which is established by law in favor of certain persons, or of the state, in default of heirs, either legal or instituted by testament. Civ. Code La. 1900, art. 878.

#### IRREGULARITY.

See "Legal Irregularity."  
Any irregularity, see "Any."

An "irregularity" is a violation or nonobservance of established rules and prac-

tices. The term is oftener applied to forms or rules of procedure in practice than to a nonobservance of the law in other ways; but it has application to both. *McCain v. City of Des Moines*, 19 Sup. Ct. 644, 646, 174 U. S. 168, 43 L. Ed. 936; *State v. City of Des Moines*, 65 N. W. 818, 823, 96 Iowa, 521, 81 L. R. A. 186, 59 Am. St. Rep. 381.

As defined by Chitty an irregularity is the technical term for every defect in practical proceedings or the mode of conducting an action or defense, as distinguished from defects in pleadings which can only be objected to by demurrer, or motion in arrest of judgment, or by writ of error. *Emeric v. Alvarado*, 2 Pac. 418, 464, 64 Cal. 529 (citing 8 Chit. Gen. Pr. 509); *Barton v. Sanders*, 16 Pac. 921, 923, 16 Or. 51, 8 Am. St. Rep. 261; *Ex parte Gibson*, 31 Cal. 620, 624, 91 Am. Dec. 546. It is a comprehensive term, including all formal objections to practical proceedings, and is of three descriptions, viz.: First, such deviations as constitute a total nullity; secondly, such as are mere irregularities, and can only be objected to in a reasonable time and subject to certain qualifications; and, thirdly, the nonobservance of certain rules or enactments that have been deemed merely directory. *Emeric v. Alvarado*, 2 Pac. 418, 464, 15 Or. 574.

An irregularity is defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner. *Hall v. Munger* (N. Y.) 5 Lans. 100, 113; *In re Wiltse*, 25 N. Y. Supp. 783, 789, 5 Misc. Rep. 105; *Bowman v. Tallman*, 26 N. Y. Super. Ct. (3 Rob.) 633, 635 (citing 1 Tidd, Pr. 512); *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 15 N. Y. Supp. 249, 253, 60 Hun, 583; *Farrington v. Root*, 31 N. Y. Supp. 126, 127, 10 Misc. Rep. 347; *Corn Exch. Bank v. Blye*, 23 N. E. 805, 806, 119 N. Y. 414; *Bronk v. State*, 81 South. 248, 250, 43 Fla. 461; *Jones v. Hart*, 60 Mo. 351, 356; *State v. Weare*, 46 S. W. 1099, 1108, 145 Mo. 162; *Jenness v. St. Clair Circuit Judge*, 4 N. W. 220, 222, 42 Mich. 469; *Salter v. Hilgen*, 40 Wis. 363, 365 (citing *McNamara*, Nullities and Irregularities, p. 4); *Ex parte Gibson*, 31 Cal. 619, 624, 91 Am. Dec. 546; *Barton v. Saunders*, 16 Pac. 921, 923, 16 Or. 51, 8 Am. St. Rep. 261; *Ex parte Schwartz*, 2 Tex. App. 74, 80; *Turrill v. Walker*, 4 Mich. 177, 183.

An irregularity is often waived by the subsequent action of a party, as by an appearance after defect of process, so that the judgment would be valid, notwithstanding such defect. *Downing v. Still*, 43 Mo. 309, 317.

An irregularity, in general, is either in the meane process, or the proceedings there-

on before judgment, or in the judgment or execution. Instances of such irregularities are found in the entering of a judgment by default against a defendant before the time has expired in which the law allows him to answer, etc. *Hirsh v. Weisberger*, 44 Mo. App. 506, 510 (citing *Branstetter v. Rives*, 34 Mo. 818).

"A judgment by default is irregular when the defendant in an action not appealable has not been served with a copy of process, or there has been no declaration regularly delivered or filed, and notice thereof given to defendant, or where it is signed before defendant's appearance, or without entering a rule to plead, or demanding a plea when necessary, before the time for pleading has expired, or after a plea has been regularly delivered or filed." *Jones v. Hart*, 60 Mo. 351, 356 (quoting *Tidd*, Prac. 512, 513); *Murray v. Purdy*, 66 Mo. 606, 611.

Where a court orders judgment directing a sale in a partition action, in a case in which a sale is prohibited by statute, because a life or other estate is outstanding, the judgment is not an irregularity, within the meaning of the section. *Prior v. Hall*, 18 N. Y. Civ. Proc. R. 83, 87.

"Irregularities," which are generally invoked for the purpose of vacating a judgment, and which will justify a vacation of the judgment after term time, occur where a judgment was entered in favor of plaintiff before the time for answering had expired, or where the judgment was entered while there was an answer or demurrer on file and not yet disposed of, and other irregularities of this character. *State v. Huston* (Wash.) 72 Pac. 1015, 1017 (citing *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182).

The entry of a judgment stated that "the court, having heard the counsel of the parties on this appeal, order that the judgment of the justice be reversed for irregularity, with costs," etc. The action being on an account, the plaintiff before the justice offered his book in evidence to support his cause, without having proved it to be his book. Held, that the words "for irregularity," in the entry, should be construed to refer to the proceeding of the justice in giving judgment without evidence, and not to mean that the court merely reviewed his judgment as a court of error and declined trying the merits. *Clark v. Fulse*, 2 N. J. Law (1 Penning.) 263, 264.

Code Civ. Proc. §§ 1577, 1578, authorizing administrators to mortgage an intestate's real estate, and providing that no irregularity in the proceedings shall invalidate the mortgage given in pursuance thereof, includes the non-appointment of a guardian ad litem for minors, where the court had jurisdiction to make the order for the execution of a mort-

gage by an administrator. *Thomas v. Parker*, 32 Pac. 562, 563, 97 Cal. 458.

#### Errors of law.

"Irregularity," as used in Gen. St. Minn. 1878, c. 66, § 253, subd. 1, authorizing a new trial for irregularity in the proceedings of the court, etc., does not mean an error of law, which is expressly made a ground for a new trial by subdivision 7 of the section. Errors of law occur only when there are rulings made on questions of law, and hence irregularities embrace only other prejudicial occurrences not amounting to rulings on matters of law. *Valerius v. Richard*, 59 N. W. 534, 535, 57 Minn. 443.

The term "Irregularity" cannot be applied to a ruling or decision made upon a question of law regularly presented for such decision during the trial. Hence the court's refusal to allow a peremptory challenge to a juror is not an irregularity in the proceedings of the court reviewable upon affidavits, but is an error in law appearing at the trial. *Silcox v. Lang*, 20 Pac. 297, 301, 78 Cal. 118.

#### False allegations of fact.

"Irregularity" in the obtaining of process does not include false allegations of fact, made as a foundation for a suit, in which the allegations are to be proved or disproved. *Everett v. Henderson*, 146 Mass. 89, 14 N. E. 932, 4 Am. St. Rep. 284.

#### Fraud.

Willard, Eq. Jur. 163, states that there is no case in which equity has undertaken to question the judgment of any other court for mere irregularity. The power in such cases is always exercised by the court in which the judgment was given, and the relief is frequently granted upon terms. Held, that the term "irregularity," as here used, evidently includes fraud, as well as such other acts or omissions as render the judgment void or reversible at the election of the unsuccessful party. *Smithson v. Smithson*, 56 N. W. 300, 302, 37 Neb. 535, 40 Am. St. Rep. 504.

#### As illegality.

Illegality distinguished, see "Illegality."

"Irregularities" in proceedings in an action is said to be but another word for "illegality." *Brown v. Brown*, 50 N. H. 538, 554.

#### As irregularity in matter of form.

"Irregularity," as used in Act Feb. 9, 1818, providing that the court of common pleas shall not set aside the proceedings of surveyors for irregularity or illegality, means irregularity in matter of form only, and not in matter of substance. *State v. Conover*, 7 N. J. Law (2 Holst.) 203, 216.

#### Jurisdictional defects contradistinguished.

The word "Irregularity," as used in Code Civ. Proc. § 1282, providing that a motion to set aside a final judgment for irregularity shall not be heard after the expiration of one year from the filing of the judgment roll, is used in contradistinction to jurisdictional defects, which courts have no power to authorize or approve. The irregularities referred to in the statute are necessarily those arising in practice, and consist of some step or proceeding taken in the prosecution or defense of an action which is without authority of law or contrary to some rule of practice. Where a verdict in replevin includes damages occasioned by the detention of the property, without finding any definite amount therefor, the awarding of a specific sum in the judgment constitutes an irregularity within the meaning of the section. *Corn Exch. Bank v. Blye*, 23 N. E. 805, 806, 119 N. Y. 414.

#### Mistake in form of action.

"Irregularity" is a neglect of method or order, and the mistake of a form of action cannot amount to a mere irregularity. *McHugh v. Pundt* (S. C.) 1 Bailey, 441, 444.

#### Nullity distinguished.

In *Holmes v. Russel*, 9 Dowl. 487, Mr. Justice Coleridge said: "It is difficult sometimes to distinguish between an irregularity and a nullity; but I think the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection. If he can waive it, it amounts to an irregularity; if he cannot, it is a nullity." *Jenness v. Lapeer County Circuit Judge*, 4 N. W. 220, 222, 42 Mich. 469; *Johnson v. Hines*, 61 Md. 122, 130.

In the exercise of the power of eminent domain municipal corporations should be held to an observance of all substantial provisions respecting the mode of procedure which were prescribed and intended for the protection of the citizen and to prevent a sacrifice of his property. If there be an omission of any of the essential jurisdictional requisites, the proceedings will be void. If, however, the defect is not so radical as to deprive the council of jurisdiction, but is only a deviation from certain minor provisions, designed to secure method and convenience in the procedure, it may properly be termed an "irregularity" only. *Dill. Mun. Corp.* §§ 604, 605; *Black, Interp. Laws*, §40, and cases cited. The distinction is expressly stated by Chief Justice Peters in *Cobbossee Nat. Bank v. Rich*, 81 Me. 164, 16 Atl. 506: "Generally speaking, it is the difference between substance and form, between void and voidable, or between void action and imperfect action. Error or nullity goes to the foundations, and discovers that the proceedings have nothing

to stand upon; while irregularity denotes that the court was acting within its jurisdiction, but failed to consummate its work in all respects according to the required forms. The one applies to matters which are contrary to law; the other, to matters which are contrary to the practice authorized by the law. One relates more to the act; the other, to the manner of it. It may be stated, as a general rule, that in doubtful cases the courts incline to treat defects in legal proceedings as irregularities, rather than as nullities." *Wilson v. Simmons*, 36 Atl. 380, 385, 89 Me. 242.

There is a marked, and in many respects important and substantial, distinction between defects in proceedings which constitute mere irregularities, or such as render the proceeding a total nullity and altogether void. Where the proceeding adopted is that prescribed by the practice of the court, and the error is merely in the manner of conducting it, such an error is an irregularity, and may be waived by the laches or subsequent acts of the opposite party; but where the proceeding is altogether unwarranted, totally dissimilar to that which the law authorizes, then the proceeding is a nullity, and cannot be made regular by any act of either party. *Iowa Min. Co. v. Bonanza Min. Co.*, 16 Nev. 64, 73.

#### As void.

"Where an execution is set aside for 'irregularity,' without further explanation, the term implies void, not voidable, process. Where the same term is made use of in a statute, and that statute is remediable, it must be understood in the same sense." It is so used in 1 Rev. Laws, p. 504, § 11, giving a remedy to a purchaser of lands or tenements under execution who shall be evicted on account of any irregularity in the proceedings. *Woodcock v. Bennett* (N. Y.) 1 Cow. 711, 742, 13 Am. Dec. 568.

An irregularity does not render the proceeding it affects void, but only voidable, and unless it be avoided by motion diligently made the objection will be waived. *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 15 N. Y. Supp. 249, 253, 60 Hun, 583.

### IRRELEVANCY—IRRELEVANT.

An irrelevant pleading is one which has no substantial relation to the controversy between the parties to the suit. *Goodman v. Robb* (N. Y.) 41 Hun, 605, 606; *Struver v. Ocean Ins. Co.* (N. Y.) 2 Hilt. 475, 476. Consequently, it is held that an irrelevant answer may be both good in form and true in fact, but have no relation to the case; for example, a bankrupt's discharge to an action for slander. *Morton v. Jackson*, 2 Minn. 219, 222 (Gil. 180, 182). See, also, *Howell v. Ferguson*, 87 N. C. 113, 114.

The word "irrelevant" is comparatively a modern introduction in England, and as used in parliamentary debate signifies "unassisting," or "unrelieving." In relation to pleading, it is used in the sense of "irrelative," which is a more appropriate word. *Seward v. Miller* (N. Y.) 6 How. Prac. 312, 314.

An answer is said to be "irrelevant" when the matter which it sets forth has no bearing on the question in dispute, does not affect the subject-matter of the controversy, and can in no way affect or assist the decision of the court. *Jeffras v. McKillop & Sprague Co.* (N. Y.) 2 Hun, 351, 353.

An irrelevant answer is an answer entirely foreign and not applicable to the action; for example, an attempt to set off a debt arising on a contract in an action for assault and battery, or vice versa. *Walker v. Hewitt* (N. Y.) 11 How. Prac. 395, 398.

An answer which is so framed that it does not set up a valid defense, but which states facts that might, by being properly averred, constitute a defense, cannot be regarded as "sham," "irrelevant," or "frivolous." *Struver v. Ocean Ins. Co.* (N. Y.) 9 Abb. Prac. 23, 27.

A defense is irrelevant which has no substantial relation to the controversy between the parties to an action. In an action to recover moneys alleged to be due to plaintiff from defendant, a defense alleging a mere notice from a third person to defendant that he was owner of the goods, in a cause of action therefor demanding payment to himself by virtue of an assignment from plaintiff, is irrelevant. *Carpenter v. Bell*, 24 N. Y. Super. Ct. (1 Rob.) 711, 715.

"Matter is irrelevant in a pleading which has no bearing on the subject-matter of the controversy and cannot affect the decision of the court." *Fabricotti v. Launitz*, 5 N. Y. Super. Ct. (3 Sandf.) 743; *Scofield v. State Nat. Bank*, 2 N. W. 888, 889, 9 Neb. 316, 31 Am. Rep. 412.

The phrase "irrelevant or redundant matter," in Code, § 160, authorizing the court to strike out such matter, refers rather to superfluous matter, incorporated with a plea otherwise good, than to a whole answer or defense. Where an entire defense to the whole or to some part of the demand is complained of, the objection cannot properly be taken by motion to strike out as irrelevant or redundant; but resort must be had to a motion to strike as frivolous or sham, or to a demurrer. *Nichols v. Jones* (N. Y.) 6 How. Prac. 355, 358.

An allegation is irrelevant when the issue formed by its denial can have no connection with or effect upon the cause of action, and the proper method of objecting to an irrelevant allegation is by motion to strike

out. This is the rule in South Carolina. *Smith v. Smith*, 50 S. O. 54, 67, 27 S. E. 545. An allegation or pleading is irrelevant when it has no connection with the issues involved. *Bank of Timmonsville v. Fidelity & Casualty Co.*, 121 Fed. 984, 935 (citing Pom. Rem. §§ 551, 552). See, also, *Dent v. South Bound R. Co.*, 39 S. E. 527, 529, 61 S. O. 329.

Wag. St. p. 528, § 80, relative to depositions, and providing that matter in depositions may be objected to at the trial for "irrelevancy or incompetency," refers to the substance of the testimony, and not to the mere form of a question. *Fox v. Webster*, 46 Mo. 181, 185.

#### Frivolous equivalent.

"Irrelevant" is equivalent to "frivolous," as used in Code Civ. Proc. § 537, providing that, if a demurrer, answer, or reply is frivolous, the party prejudiced thereby may apply for judgment thereupon, and judgment may be given accordingly. *Colt v. Davis*, 8 N. Y. Supp. 354, 355, 50 Hun, 366.

#### As impertinence.

The word "irrelevant" signifies not pertinent or inapplicable. *Scofield v. State Nat. Bank*, 2 N. W. 888, 889, 9 Neb. 316, 31 Am. Rep. 412.

"Irrelevancy," in an answer, in analogy to impertinence in an answer in Chancery under the former judicial system, may consist in statements which are not material to the decision of the case, or such as do not form or tender any material issue. Matter in defense, to be pertinent and relevant, must relate to allegations of fact in the complaint essential to the cause of action. *People v. McCumber*, 18 N. Y. 315, 321, 72 Am. Dec. 515.

"Irrelevant," as used in Code, § 160, providing that, if irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion, means what is usually understood as "impertinent." According to Webster, "irrelevant" means not applicable or pertinent; not serving to support. It may, therefore, come under the head of "impertinent." *Carpenter v. West* (N. Y.) 5 How. Prac. 53, 55.

The phrase "irrelevant or redundant matter," found in Code, § 160, which authorizes the striking of such matter from a pleading, means matter impertinently or unnecessarily stated in stating the cause of action in the complaint or the defense in an answer. *Fasnacht v. Stehn* (N. Y.) 53 Barb. 650, 651.

### IRREMOVABLE FIXTURES.

Fixtures are sometimes divided into two classes, removable and irremovable, and it

has been suggested that the use of such qualifying words is a solecism, for if a thing is fixed it must be irremovable; but the better reasoning seems to be that fixtures may designate articles of property which by their use are attached to the soil, but are capable of being removed. Fixtures that are not removable exist only between grantor and grantee, or heir and executor, and the like. *Menger v. Ward* (Tex.) 28 S. W. 821, 823.

### IRREPARABLE.

"Irreparable," means that which cannot be repaired, retrieved, put back again, or atoned for. *Gause v. Perkins*, 56 N. C. 177, 179, 69 Am. Dec. 728.

### IRREPARABLE INJURY.

By the term "irreparable injury" it is not meant that there must not be any physical possibility of repairing the injury. All that is meant is that the injury would be a grievous one, and at least a material one, and not adequately reparable in damages. *Sanderlin v. Baxter*, 76 Va. 299, 306, 44 Am. Rep. 165; *Ives v. Edison*, 83 N. W. 120, 121, 124 Mich. 402, 50 L. R. A. 134, 83 Am. St. Rep. 329; *Masonic Temple Ass'n v. Banks*, 27 S. E. 490, 491, 94 Va. 695; *Callaway v. Webster*, 98 Va. 790, 792, 37 S. E. 276, 277; *Haskell v. Sutton*, 44 S. E. 533, 538, 53 W. Va. 206 (citing *Western Union Tel. Co. v. Roger*, 42 N. J. Eq. [14 Stew.] 313, 11 Atl. 13); *Insurance Co. of North America v. Bonner*, 42 Pac. 681, 682, 7 Colo. App. 97.

"Irreparable injury," as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great; and the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in a case where the nuisance is a continuous one. *Newell v. Sass*, 81 N. E. 176, 180, 142 Ill. 104; *First Nat. Bank v. Tyson*, 32 South. 144, 148, 133 Ala. 459, 59 L. R. A. 399, 91 Am. St. Rep. 46; *Townsend v. Epstein*, 49 Atl. 629, 633, 93 Md. 537, 52 L. R. A. 409, 86 Am. St. Rep. 441; *Field v. Burling*, 37 N. E. 850, 854, 149 Ill. 556, 24 L. R. A. 406, 41 Am. St. Rep. 311.

Where an injury is of such a nature that it cannot be adequately compensated in damages, or cannot be measured by any pecuniary standard, it is irreparable. *Wilson v. City of Mineral Point*, 39 Wis. 160, 164; *Hodge v. Gleese*, 11 Atl. 484, 487, 43 N. J. Eq. (16 Stew.) 342; *Missouri, K. & T. Ry. Co. v. Texas & St. L. Ry. Co.* (U. S.) 10 Fed. 497, 508; *Dudley v. Hurst*, 8 Atl. 901, 904, 67 Md. 44, 1 Am. St. Rep. 368.

By irreparable injury is not meant such injury as is beyond the possibility of repair, or beyond possible compensation or damages, or necessarily great injury or great damages, but that species of injury, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other, and which, because it is so large on the one hand or so small on the other, is of such constant or frequent recurrence that no fair or reasonable redress can be had therefor in a court of law. *Farley v. Gate City Gaslight Co.*, 31 S. E. 193, 199, 105 Ga. 323; *First Nat. Bank v. Tyson*, 32 South. 144, 148, 133 Ala. 459, 59 L. R. A. 399, 91 Am. St. Rep. 46; *Radican v. Buckley*, 38 N. E. 53, 54, 138 Ind. 582 (citing *Wood, Nuis.*, § 778); *Wahle v. Reinbach*, 76 Ill. 322, 326; *Nashville, C. & St. L. Ry. Co. v. McConnell* (U. S.) 82 Fed. 65, 69.

An irreparable injury is one which cannot be repaired or retrieved. The injury must be of a peculiar nature, so that compensation in money cannot atone for it. Where from its nature it may be thus atoned for, if in the particular case the party be insolvent, and on that account unable to atone for it, it will be considered irreparable. *Indian River Steamboat Co. v. East Coast Transp. Co.*, 10 South. 480, 487, 28 Fla. 387, 29 Am. St. Rep. 258; *Gause v. Perkins*, 56 N. C. 177, 179, 69 Am. Dec. 728; *Deegan v. Neville*, 29 South. 173, 175, 127 Ala. 471, 85 Am. St. Rep. 137.

Irreparable injury, justifying the issue of an injunction, may be such either from the nature of the injury itself or from the want of responsibility in the person committing it. *Kerlin v. West* 4 N. J. Eq. (3 H. W. Green) 449.

In a note to the case of *Jerome v. Ross* (N. Y.) 7 Johns. Ch. 315, found in 11 Am. Dec. 500, it is said an injury resulting from trespass may be incapable of compensation for damage for a variety of reasons: (1) It may be destructive of the very substance of the estate. (2) It may not be capable of estimation in terms of money. (3) It may be so continuous and permanent that there is no instant of time when it can be said to be complete, so that its extent may be computed. (4) It may be vexatiously persisted in, in spite of repeated verdicts at law. (5) It may be committed by one who is wholly irresponsible, so that a verdict against him for damages would be entirely valueless. (6) It may be committed against one who is legally incapacitated from a beneficial use of the remedy at law. *Deegan v. Neville*, 29 South. 173, 175, 127 Ala. 471, 85 Am. St. Rep. 137.

The "irreparable injury" which authorizes equity to restrain a trespass has been variously defined. In 10 Am. & Eng. Enc. Law (2d Ed.) 361, it is said: "An injury is

irreparable either from its nature, as when the party injured cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard." In *Gause v. Perkins*, 56 N. C. 177, 179, 69 Am. Dec. 728, it was said that an irreparable injury is one "of a peculiar nature, so that compensation in money cannot atone for it." This definition is fairly deducible from the earlier cases, but it is entirely too narrow to meet the decisions of more modern times. The tendency of the courts at the beginning was to grant injunctions very sparingly in cases of trespasses, but the lapse of a few years has done much to break down the barriers of this conservatism and pave the way for the exercise of greater liberality in this direction, in the light of modern decisions. An irreparable injury may be said to be one which, either from its nature, or from the circumstances surrounding the person injured, or the financial condition of the person committing the injury, cannot be readily, adequately, and completely compensated for with money. In 1 Beach, Inj. § 35, it is said: "Where the injury complained of is such as to destroy plaintiff's property, or to render it entirely worthless for his purposes, it may properly be regarded as irreparable." In *Kerr*, Inj. 16, 17, it is said: "By the term 'irreparable injury' it is not meant that there must be no physical possibility of repairing the injury. All that is meant is that the injury would be a grievous one, or at least a material one, and not adequately reparable by damages; and by the term 'inadequacy of the remedy by damages' was meant that the damages obtainable at law are not such a compensation as will in effect, though not in specie, place the parties in the position in which they formerly stood." *Camp v. Dixon*, 38 S. E. 71, 73, 112 Ga. 872, 52 L. R. A. 755.

In order to constitute "irreparable injury," within the meaning of the law, the threatening of which would justify a court of equity in exercising its extraordinary power of injunction, it must clearly appear, not only that the wronged party could not be compensated in damages therefor, but also that the injury would follow if the court did not so interpose. *Wason v. Major*, 50 Pac. 741, 743, 10 Colo. App. 181; *City of Denver v. Beede*, 54 Pac. 624, 625, 25 Colo. 172.

"Irreparable" means that which cannot be repaired, restored, or adequately compensated for in money, or where the compensation cannot be safely measured. The courts have generally regarded as irreparable injuries the digging into mines of coal, iron, lead, and precious metals; and as such injuries subtract from the very substance of the estate, and tend to its ultimate destruction, eq-

uity is said to be prompt to restrain them. *Bettman v. Harness*, 26 S. E. 271, 272, 42 W. Va. 433, 36 L. R. A. 566.

It is for the chancellor, upon and from a proper exhibit of facts, to discover whether or not they make out and constitute irreparable injury as thus defined, and it is not sufficient for a complainant, without more, to assert its existence and swear to it. By so doing he is only swearing to a legal conclusion, and is himself assuming the functions and prerogatives of the chancellor. *Johnson v. Kier* (Pa.) 3 Pittsb. R. 204, 210.

Irreparable injury, in the sense in which it is used in conferring jurisdiction on the courts of equity, does not mean that the injury complained of is incapable of being measured by a pecuniary standard. Thus an appropriation of the land of another, constituting a permanent injury to and depreciation of the property, is an irreparable injury, owing to the uncertainty of the measure of damages. *Wilmarth v. Woodcock*, 25 N. W. 475, 476, 58 Mich. 482.

#### Extent of injury uncertain.

Where the extent of a prospective injury is uncertain, so that it is impossible to ascertain the measure of just reparation, the injury is "irreparable" in a legal sense, so that an injunction will be granted to prevent such an injury. *Lyon v. McLaughlin*, 32 Vt. 423, 425.

An "irreparable injury" is one the extent of which is doubtful, making it impossible to ascertain the measure of just reparation. *Lyon v. McLaughlin*, 32 Vt. 423, 425.

"Irreparable injury" is defined to be wrongs of a repeated and continuing character which occasion damages which are estimated only by conjecture and not by any accurate standard. *Commonwealth v. Pittsburg & C. R. Co.*, 24 Pa. (12 Harris) 159 160, 62 Am. Dec. 372; *Johnson v. Kier* (Pa.) 3 Pittsb. R. 204, 210; *Philadelphia Ball Club v. Lajoie*, 51 Atl. 973, 202 Pa. 210, 58 L. R. A. 227, 90 Am. St. Rep. 627.

#### Nuisance.

An "irreparable injury," to restrain which equity will interfere by injunction, means one the consequences of which could not adequately be compensated for, if it were suffered to go on. A nuisance which destroys the comfortable, peaceful, and quiet occupation of a homestead creates an irreparable injury, as does also one which may break up a business, destroy its good will, and inflict damages which are incapable of measurement, because the elements of reasonable certainty are not to be obtained for their computation. Where the injury is such that damages will furnish an adequate compensation, it is not irreparable. Ed-

wards v. Allouez Min. Co., 33 Mich. 46, 50, 31 Am. Rep. 301.

## IRRESISTIBLE.

By "irresistible" force is meant such an interposition of human agency as is, from its nature, a power absolutely uncontrollable. *The Onrust* (U. S.) 18 Fed. Cas. 723, 733; *Brousseau v. The Hudson*, 11 La. Ann. 427, 428.

## IRRESISTIBLE IMPULSE.

A person acts under an "irresistible impulse" when, by reason of duress of mental disease, he has lost the power to choose between right and wrong, to avoid doing the act in question; his free agency being at the time destroyed. *McCarty v. Commonwealth* (Ky.) 71 S. W. 656, 658 (citing *Parsons v. State*, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193; *Moore v. Com.*, 92 Ky. 630, 637, 18 S. W. 833).

"Irresistible impulse," in criminal law, is that uncontrollable impulse produced by disease of the mind, when that disease is sufficient to override the reason and judgment, and obliterate the sense of right as to the act done, and deprive the accused of the power to choose between them. This impulse is born of the disease, and when it exists capacity to know the nature of the act is gone. *State v. Knight*, 50 Atl. 276, 279, 95 Me. 467, 55 L. R. A. 373.

"Irresistible impulse" is not merely insanity, supposing moral insanity to consist of insanity of the moral system, co-existing with mental sanity. Moral insanity, as thus defined, has no support either in psychology or law; nor is "irresistible impulse" convertible with "passionate propensity," no matter how strong, in persons not insane. In other words, the irresistible impulse of the lunatic, which confers irresponsibility, is essentially distinct from the passion, however violent, of the sane, which does not confer irresponsibility. If the impulse was irresistible, the person accused is entitled to be acquitted, because the act was not voluntary, and was not properly his act. If the impulse was resistible, the fact that it proceeded from disease is no excuse at all. There can be no coexistence of an impulse absolutely irresistible with capacity to distinguish between right and wrong with reference to the act. *Leache v. State*, 3 S. W. 539, 542, 22 Tex. App. 279, 58 Am. Rep. 638 (citing 1 Whart. Cr. Law [8th Ed.] §§ 145, 574; *Steph. Cr. Law*, 91).

Irresistible impulse implies knowledge of right and wrong in some degree, but coupled with it the absence of power, resulting from a disordered mind, to success-

fully resist the impulse to do the criminal act. *State v. Peel*, 59 Pac. 169, 174, 23 Mont. 358, 75 Am. St. Rep. 529.

**IRRESISTIBLE SUPERHUMAN CAUSE.**

"Irresistible superhuman cause," as used in Civ. Code Cal. § 1511, providing that performance of an obligation will be excused when it is prevented or delayed by an irresistible and superhuman cause, means an act of God, and refers to those natural causes, the effects of which cannot be prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ. *Ryan v. Rogers*, 81 Pac. 244, 245, 96 Cal. 349; *Fay v. Pacific Imp. Co.* 26 Pac. 1099, 1101, 93 Cal. 258.

"Irresistible superhuman cause," as used in Civ. Code, § 855, providing that the want of performance of an obligation or an offer to perform, or any delay therein, is excused when it is prevented or delayed by an irresistible superhuman cause, should be construed as equivalent to and used in the same sense as "act of God," which Lord Mansfield says "is natural necessity, as wind and storms, which arise from natural causes, and is distinct from inevitable accident." 2 Pars. Cont. 159, defines the phrase "act of God" to mean "a cause which operates without any aid or interference from man; for if the cause of loss was wholly human, or became destructive by human agency and co-operation, then the loss is to be ascribed to man, and not to God, and to the person's negligence." 2 Greenl. Ev. § 219, after giving Lord Mansfield's definition of the phrase "act of God," says: "Therefore, if the loss happened by the wrongful act of a third person, or by an accidental fire not caused by lightning, the carrier is liable." Hence an accidental fire, not caused by lightning which destroyed the building in which his office was, and in it all the money, books, records, and documents pertaining to his office, is not "an irresistible superhuman cause," and will not excuse a county treasurer from the performance of the obligations of his bond, conditioned to well and faithfully and impartially perform the duties and execute the office, when not specially so stipulated, or when he is bound only to the exercise of reasonable care and diligence. *Clay County v. Simonsen*, 46 N. W. 592, 596, 1 Dak. 403. And as used in Civ. Code Cal. § 1859, declaring an innkeeper liable for the loss of personal property placed by his guests under his care, unless occasioned by an "irresistible superhuman cause," would not include a fire which originated in the hotel. *Fay v. Pacific Imp. Co.*, 26 Pac. 1099, 1100, 28 Pac. 943, 93 Cal. 253, 16 L. R. A. 188, 27 Am. St. Rep. 198.

**IRRESISTIBLE VIOLENCE.**

"Irresistible violence," within the meaning of the doctrine that a bailee of goods is discharged if the subject-matter bailed be lost by "irresistible violence," is synonymous with "vis major." *Walker v. Guarantee Ass'n*, 18 Q. B. 278, 288.

**IRRESPECTIVE OF BENEFITS.**

Benefits accruing from the construction of a railroad to an owner of lands through which it passes may properly and conveniently be divided into two classes, to wit: (1) General benefits, or such as accrue to the community, or the vicinage at large, such as increased facilities for transportation and travel, and the building up of towns, and consequent enhancement of the value of lands and town lots. (2) Special benefits, or such as accrue directly and solely to the owner of the lands from which the right of way is taken, as when the excavation of the railroad track has the effect to drain a morass, and thus to transform what was a worthless swamp into valuable arable land, or to open up and improve a water course. As to the first of these classes, we know from the debates of the convention which formed the Constitution, and from the discussion which preceded and followed the calling of that convention, as well as from the language of the Constitution itself, that it was the express design of the framers of the Constitution to exclude that class of benefits from the consideration of jurors in their assessment of compensation for rights of way appropriated by corporations. In adopting the language that "no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or first secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation," whether the second class, or special, benefits are included within such provision has not been decided, and does not arise in this case. *Little Miami R. Co. v. Collett*, 6 Ohio St. 182, 184, 185.

Const. Ohio art. 12, § 4, providing that "no right of way shall be appropriated to the use of any corporation until full compensation therefor be made in money, \* \* \* irrespective of any benefit from any improvement," means that full compensation shall be assessed by the jury, without looking at or regarding any benefits contemplated by the construction of the improvement. *Leroy & W. R. Co. v. Ross*, 20 Pac. 197, 200, 40 Kan. 598, 2 L. R. A. 217 (citing *Giesy v. Cincinnati W. & Z. R. Co.*, 4 Ohio St. 308).

A constitutional provision that damages to property caused by the construction of a



railroad must be ascertained, irrespective of any benefits, is construed to mean that a person whose land has been taken for the use of a railway company is entitled to be paid in money, and cannot be compelled to accept as compensation an estimated enhancement in the value of his remaining property. *St. Louis, A. & T. R. Co. v. Anderson*, 39 Ark. 167, 171.

## IRRESPONSIBLE.

See "Legally Irresponsible."

## IRREVOCABLE.

Generally, when it is said that a power is "irrevocable," we understand that the grantor cannot withdraw or call back the power. But the word "irrevocable" is "frequently used in a somewhat different sense. It may mean a thing, or denote a right or power, which cannot be annulled or vacated, except for a sufficient cause. It may mean 'unalterable' or 'irreversible.'" *City of Houston v. Houston City St. Ry. Co.*, 19 S. W. 127, 130, 83 Tex. 548.

Under a statute requiring a foreign insurance company, as a condition precedent to transacting business in the state, to file its written consent, "irrevocable," that actions may be commenced against it by service on the superintendent, a power of attorney used and filed in compliance with such statute will not be held to mean never to be revoked, abrogated, annulled, or withdrawn, but is limited to the time during which the insurance company does business within the state. *Mutual Reserve Fund Life Ass'n v. Boyer*, 61 Pac. 387, 390, 62 Kan. 31, 50 L. R. A. 538.

The word "irrevocable" signifies not to be recalled or revoked. Thus the use of the word in a power of attorney by a landowner appointing another as his true and lawful attorney, "irrevocable" by the landowner, shows an intention of the principal that the authority thereby conferred should not be revoked. It cannot, however, be inferred from its use that the agent was thereby vested with any greater power of disposition or authority, in respect to the property to be sold, than if this word had been omitted. It is not the policy of the law to deny to a person making such power irrevocable the right to revoke such authority, notwithstanding the fact that it was the fixed design of the parties so to do when they were made; but if the power is coupled with an interest, or the agent is interested in its execution, it shall not be revoked. The use of the word "irrevocable" alone is not evidence that the power is coupled with an interest. *MacGregor v. Gardner*, 14 Iowa, 328, 341.

## IRRIGATE.

"To irrigate" means primarily, according to the Latin word from which it is derived, to convey water to or upon anything, and, more generally, to wet or moisten anything; and the ordinary definition in our language is to water lands, whether by channels, by flooding, or simply by sprinkling. The method of obtaining the water with which to irrigate has nothing to do with the process of irrigation, or the meaning of the word, and will not be held to imply the conveying of water by ditches. *Charnock v. Higuerra*, 44 Pac. 171, 111 Cal. 473, 32 L. R. A. 190, 52 Am. St. Rep. 195.

## IRRIGATION.

The term in its primary sense is defined to be a sprinkling, a watering; but it has an agricultural or special signification, and is defined by Worcester to be "the watering of lands by drains or channels"; by Webster, "the operation or causing of water to flow over lands for nourishing plants." As used in the Colorado acts of 1879 and 1881, which provided for a system or procedure for the determining of the priority of rights to the use of water for irrigation between the owners of ditches, canals, and reservoirs taking the water from the same natural stream, it is used in its special sense, as denoting the application of water to lands for the raising of agricultural crops and other products of the soil. *Platte Water Co. v. Northern Colorado Irr. Co.*, 21 Pac. 711, 712, 12 Colo. 525.

As used in title of Act March 27, 1889, entitled "An act to provide for water rights and irrigation and to regulate the use of water for agriculture and manufacturing purposes," the word "irrigation" is apparently used in its popular sense, and denotes the application of water to land for the production of crops. *Paxton & Hershey Irrigation Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co.*, 64 N. W. 343, 345, 45 Neb. 884, 29 L. R. A. 863, 50 Am. St. Rep. 585 (citing *Platte Water Co. v. Northern Colorado Irrigation Co.*, 12 Colo. 525, 21 Pac. 711).

**As public purpose or use.**

See "Public Purpose"; "Public Use."

## IRRIGATION CANAL.

Any canal constructed for the purpose of developing water power, or any other useful purpose, and from which water can be taken for irrigation is an irrigation canal. *Cobbey's Ann. St. Neb. 1908*, § 6754.

## IRRIGATION DISTRICT.

As municipal corporation, see "Municipal Corporation."

**IS.**

See, also, "Are."

Defendant was convicted on an indictment charging him with playing cards at a public place, to wit, "a room which is" occupied by one H., and which was commonly used for gaming. The time of the offense was laid as about six months prior to the finding of the indictment. Held, that the verb "is" should be construed to refer to the time of the finding of the indictment, and not to the date of the alleged offense. *Tummins v. State*, 18 Tex. App. 13, 14.

The use of the word "is" in a certificate of a clerk of courts that a certain person is a commissioner duly authorized to take proof and acknowledgments of deeds is insufficient to show that the designated person was a commissioner at a previous time. *Hilgendorf v. Ostrom*, 46 Ill. App. 463, 470.

A rule of practice providing that in any case once continued, where an answer "is on file," any party desiring to bring such cause on for trial shall give notice, etc., refers to the condition of the case at the time of the continuance, and the rule does not apply to a case in which the answer was filed after the continuance. *Erickson v. Barber*, 49 N. W. 838, 839, 83 Iowa, 367.

Where, in a suit to decree that a trust created by a will be null and void, where the jury in their verdict declared that the trust "is void," this meant that the trust was void at the time the petition was filed and at the time of the trial. *Collins v. Carr*, 44 S. E. 1000, 1001, 118 Ga. 205.

An official bond of a bank treasurer, reciting the fact that he "is treasurer," estops the sureties to deny that he was treasurer when the bond was given. *Hall v. Brackett*, 62 N. H. 509, 511, 13 Am. St. Rep. 588.

**As are.**

Where two persons were jointly indicted, the use of the singular verb "is," instead of "are," in the clause "the said Lee Ping Bow and John Doe, whose true name is unknown to the grand jury, is accused by the grand jury of the crime of larceny, in that the said," etc., "did feloniously steal, take," etc., was immaterial, where it was apparent from the concluding portion of the indictment that both defendants were charged jointly with the offense. *State v. Lee Ping Bow*, 10 Or. 27, 28.

**As can be.**

In a statute permitting a party to testify in his own favor, though the other party were dead or insane, if a transaction on the other side (i. e., that of the dead or insane party) was had by an agent "whose testimony is received," the last phrase was held

in *Bigelow v. Ames*, 18 Minn. 527 (Gil. 471), to mean an agent whose testimony can be received or is receivable. *Griswold v. Edison*, 32 Minn. 436, 437, 21 N. W. 475.

**As must.**

Code Civ. Proc. § 2061, subd. 3, providing that a witness, false in one part of his testimony, is to be distrusted in others, means "must be distrusted." A thing that is to be must be, and the phrase is not to be construed as "may be distrusted." *White v. Disher*, 7 Pac. 826, 827, 87 Cal. 402.

**As shall be.**

The word "is," in the acts of Congress authorizing the removal from the state to the federal court of a suit in which there is a controversy between citizens of different states, means "shall be" when applied to suits arising after the passage of the act. *Hammond v. Buchanan*, 68 Ga. 728, 731.

In an action by a railroad company to recover on an insurance policy covering property of or in the possession of such company, provided the property "is on premises owned or occupied" by such company, the property lost being on premises which the company had leased since the policy was issued and was occupying at the time of the loss, the court said: "We must substitute 'shall be' for 'is' in the proviso, and read 'provided the property insured shall be upon premises owned,' etc., and held that the loss was covered by the policy. *Providence & W. R. Co. v. Yonkers Fire Ins. Co.*, 10 R. I. 74, 77.

**IS BEING HELD.**

Rev. St. § 6946, making it unlawful to sell intoxicating liquors within two miles of a place where any agricultural fair "is being held," should be construed to refer to the entire time from the opening to the close of the fair, and not only during the hours within which the gates of the grounds are open for the admission of the public. *Thels v. State*, 43 N. E. 207, 54 Ohio St. 245.

**IS CONSTRUCTED.**

The words "is constructed," in a statute authorizing the appointing of a receiver for a railroad company which fails to run daily trains on any part of its road for the space of 10 days, but providing that the act shall not apply to any railroad company whose road is constructed at any seaside resort, which was built and intended merely for the transportation of summer travelers and tourists, plainly indicates roads already in existence. *Delaware Bay & C. M. R. Co. v. Markley*, 16 Atl. 486, 488, 45 N. J. Eq. (18 Stew.) 139.

**IS HEREBY GRANTED.**

See "Hereby."

**IS VISITING.**

"Is visiting," as used in the following guaranty: "The bearer, B., is visiting your city, buying a few goods in your line, and anything you may be able to sell him will be paid for promptly as agreed, which I hereby guaranty"—is equivalent to the word "visits," and is construed to mean visits at the time of the guaranty, as it could not be supposed that the guarantor intended to give a guaranty neither limited in time nor amount. *Morgan v. Boyer*, 39 Ohio St. 324, 326, 48 Am. Rep. 454.

**ISLAND.**

An island is a body of land surrounded by water, and a body of submerged land, though covered by an aquatic vegetation, is not an island. *Webber v. Pere Marquette Boom Co.*, 30 N. W. 469, 472, 62 Mich. 628.

In a contest as to the ownership of certain land which was claimed to be an island, an instruction that if a parcel of land was surveyed as an island and so commonly known and designated, even if it was not usually surrounded by water, so that it could not be properly termed an island, yet the jury would be justified in considering that parcel as the island covered by the conveyance to plaintiff, was erroneous. *Goff v. Cougle*, 76 N. W. 489, 490, 118 Mich. 307, 42 L. R. A. 161.

**ISSUABLE.**

Previous to the Constitution of 1868, pleas to the merits need not be sworn to, but in all cases where the declaration or statement was not demurrable a jury was required to pass upon the issue presented by any plea to the merits. By the Constitution it was provided that the court should render judgment without the verdict of a jury in all civil cases founded on contract, where an "issuable defense" was not filed under oath. By the act of 1869 it was provided that in suits upon contract, if the defendant was resident out of the county, "issuable pleas" might be sworn to by the attorney. Held, that in view of the law prior to the Constitution, and in view of the technical meaning of "issuable defense" (i. e., defense going to the merits), both the terms "issuable defense," as it occurred in the Constitution, and "issuable plea," as it occurred in the statute of 1869, referred to the merits of the case, and had no bearing on pleas in abatement, which, prior to the Constitution and to the act, were required to be sworn to. *Colquitt v. Mercer*, 44 Ga. 432, 433.

A general demurrer may be an issuable plea, yet a special demurrer is not, at least if it does not go to the merits of the case.

*Welsh v. Blackwell*, 14 N. J. Law (2 J. S. Green) 344, 346.

**ISSUE.**

See "Duly Issued"; "Improperly Issued"; "Regularly Issued."

The word "issued" ordinarily means emitted or "sent forth," and in the absence of other definitions that must be taken to be the sense in which it is used in the legislation of Kansas. *Corning v. Meade County Com'rs* (U. S.) 102 Fed. 57, 60, 42 O. C. A. 154.

The word "issue," as used in the following undertaking: "The undersigned, J. L. H. and C. W., in consideration of the premises and of the issuing of the said injunction, do jointly and severally undertake, in the sum of \$10,000, and promise to the effect that, in case said injunction shall issue, the said plaintiffs will pay to the said parties enjoined such damages, not exceeding the sum of \$10,000," etc., is construed to mean "shall be continued in force." *Lambert v. Haskell*, 22 Pac. 327, 329, 80 Cal. 611.

A stipulation that a certain case should "abide by the issue" of a certain other case should be construed to mean that such case should abide the ultimate result or end of the other case; for in no other of the many senses in which the substantive "issue" is used could it be appropriate in the stipulation. *Niagara Fire Ins. Co. v. Scammon*, 35 Ill. App. 582, 586.

**Of bank bill or note.**

The terms "issued" or "put in circulation," in a statute providing that no banking association shall issue or put in circulation any bill or note, have a restricted, special, and almost technical meaning, relating exclusively to the moneyed currency of the country, and in the language of the general banking law to circulating notes in the similitude of banking notes. *Curtis v. Levitt* (N. Y.) 17 Barb. 309, 341.

**Of bonds, negotiable instruments, etc.**

The term "issue," as used in the negotiable instrument law, means the first delivery of the instrument, complete in form, to a person who takes it as a holder. *Rev. Laws Mass. 1902*, p. 653, c. 73, § 207; *Code Supp. Va. 1898*, § 2841a; *Ann. Codes & St. Or. 1901*, § 4592; *Bates' Ann. St. Ohio 1904*, § 8178; *Rev. Codes N. D. 1899*, § 1060 (citing *Neg. Inst. Law N. D.* § 191).

**Same—As deliver or put in circulation.**

"In financial parlance the term 'issue' seems to have two phases of meaning. 'Date of issue,' when applied to notes, bonds, etc., of a series, usually means the arbitrary date fixed as the beginning of the term for which

they are to run, without reference to the precise time when convenience or the state of the market may permit of their sale or delivery. When the bonds are delivered to the purchaser, they will be issued to him, which is the other meaning of the term." *Yesler v. City of Seattle*, 25 Pac. 1014, 1019, 1 Wash. St. 308; *Gage v. McCord (Ariz.)* 51 Pac. 977, 979.

The ordinary and commonly accepted meaning of "to issue" is to send forward, to put into circulation, to emit, as to issue bank notes, bonds, etc. To issue tax bills, as ordinarily understood, necessarily includes delivery through some one, just as municipal bonds may be written out or printed and signed, but are not issued until sent out, delivered, or put into circulation; and where tax bills are to be given to a contractor for a public improvement, and are prepared for delivery to the contractor, they are issued when he takes the same and gives his receipt on the face of the register of the engineer, whose duty it is to register the same in his office. *Folks v. Yost*, 54 Mo. App. 55, 59.

A county warrant or order is issued when made out and placed in the hands of a person authorized to receive it, or is actually delivered or taken out. So long as a county warrant or order is not delivered or put into circulation, it is not issued. If a warrant or order unlawfully directed to be issued by a board of county commissioners remains in the hands of the county clerk, and is not delivered, or sent out, or put into circulation by the county clerk, or any one else, the wrong attempted does not succeed, because there is no actual issuance of the warrant. *State v. Pierce*, 35 Pac. 19, 22, 52 Kan. 521.

"Issue," as applied to negotiable paper, means its delivery for use and circulation, so that bonds stolen are never issued. *Germania Sav. Bank v. Village of Suspension Bridge*, 26 N. Y. Supp. 98, 100, 73 Hun, 590.

In an action against a town to recover on bonds "issued" by it, the court said the bonds were presumed to have been executed at the time they bear date; but executing is not issuing, for they might be fully executed, but never issued. The bonds had no legal conception, and could not become valid obligations until actually delivered for a valuable consideration, and the delivery of the bonds determines the date when the bonds were issued. *Brownell v. Town of Greenwich*, 22 N. E. 24, 27, 114 N. Y. 518, 4 L. R. A. 685.

"Issue," as used in Comp. St. 1899, § 3509, requiring county commissioners to publish a notice of the adoption of the proposition of an irrigation company by the vote of the county before they issue the bonds to aid in the construction of the work, means to emit or send forth, and does not embrace the preliminary acts of signing and dating,

but is confined to the delivery of the bonds. *Perkins County v. Graff*, 114 Fed. 441, 444, 52 C. C. A. 243.

#### Same—As dispose of for value.

The word "issued," as applied to bonds, usually includes delivery, but it does not invariably do so. "Issued," the participle of the verb "to issue," has several meanings; among them, "to go forth as authoritative or binding," "to proceed as from a source," "to send out officially." The word "issued," as applied to bonds, may mean disposed of for value, and it was so used in chapter 4912, Acts 1901, relating to the validity of bonds issued by a county. *Potter v. Lainhart (Fla.)* 83 South. 251, 259, 260.

#### Same—Hypothecation.

The term "issue," as used in a constitutional provision that no corporation shall issue stocks or bonds except for money paid, labor done, or property actually received, is broad enough to give a pledge as well as a sale of the bonds. In contemplation of law, bonds pledged by a corporation are just as much issued as when they are sold. *Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co. (U. S.)* 79 Fed. 842, 847; *William Firth Co. v. South Carolina Loan & Trust Co. (U. S.)* 122 Fed. 569, 574, 59 C. C. A. 73.

Rev. St. § 1753, provides that no corporation shall issue bonds for less than 75 per cent. of their par value, and all bonds issued contrary to the provision of this section shall be void. It was held that when a corporation puts its bonds beyond its control by hypothecating them as security for lands, or for any other purpose or in any other manner, it "issues" them within the meaning and the intention of the statute. *Plaster v. Milwaukee Electric Ry. Co.*, 58 N. W. 27, 28, 83 Wis. 86; *National Foundry & Pipe Works v. Oconto Water Co. (U. S.)* 52 Fed. 29, 36; *Mowry v. Farmers' Loan & Trust Co. (U. S.)* 76 Fed. 38, 48, 22 C. C. A. 52.

#### Same—Registration.

City bonds legally executed, certified by the Attorney General, and registered by the Comptroller, though not yet sold, are issued; and hence a noncompliance with Gen. Laws 1899, p. 258, which took effect subsequent to such issuance, but prior to the sale, requiring a city, before issuing a bond, to submit the question of issuance to the vote of qualified taxpayers, does not affect their validity. The word "issued" can be construed in the sense of "delivered." *Moller v. City of Galveston*, 57 S. W. 1116, 1119, 23 Tex. Civ. App. 693.

Municipal bonds are not duly "issued" under the laws of Missouri unless the same have been duly registered in the office of the State Auditor. *Douglass v. Lincoln County (U. S.)* 5 Fed. 775, 776.

### Of corporate stock.

"Issued," as used in Act March 17, 1892, § 4, relating to taxation on capital stock issued and outstanding, has no technical meaning. To "issue," as defined by lexicographers, signifies to send out, to put in circulation. In a popular sense, a corporation engaged in organization is said to "issue" stock when it obtains subscriptions for it, and in the construction of tax laws words are to be interpreted in their popular sense. *American Pig-Iron Storage Co. v. State Board of Assessors*, 29 Atl. 160, 161, 56 N. J. Law (27 Vroom) 389 (citing *Evening Journal Ass'n v. State Board of Assessors*, 47 N. J. Law [18 Vroom] 36, 54 Am. Rep. 114).

### Of execution.

"Issued," as used in Gen. St. c. 64, § 12, requiring an execution to be dated on the day it was issued, means the day on which the execution is taken out of the clerk's office, and not the day of its delivery to the sheriff. *Mollison v. Eaton*, 16 Minn. 426, 428 (Gil. 383, 384), 10 Am. Rep. 150.

Where, under a statute declaring that a judgment of a court of record shall be a lien on the real estate of the judgment debtor for seven years from the time it is rendered, "provided that when execution is not issued on a judgment within one year from the time it becomes a lien it shall thereafter cease to be a lien," the clerk, within a year from the entry of the judgment, made out an execution, but it was never delivered to the sheriff to execute, and, when thereafter found, an indorsement was found on the back of the execution "Not called for," such act was not sufficient to preserve the lien. The word "issued," as used in the statute, has a more comprehensive meaning, and requires an execution to be made out, properly attested by the clerk, and delivered to the sheriff to be executed by him. The object of issuing an execution is to collect the judgment, but that object cannot be carried out unless the execution is placed in the hands of an officer for collection. An execution cannot be said to be "issued," within the meaning of the statute, until it is delivered to the sheriff to execute. *Pease v. Ritchie*, 24 N. E. 433, 434, 132 Ill. 638, 8 L. R. A. 566.

The word "issue," in Judiciary Act 1799, § 32 (Cobb's Digest, 509), "provided that in all cases where execution shall issue illegally and the person against whom such execution may issue shall make oath," etc., "the sheriff shall return the same to the next term of court," etc., "has always, to the best knowledge and information of this court, been considered and treated as having the sense of the word 'proceed.' The reason why the word 'issue' has been thus treated as having the sense of the word to 'proceed' is, perhaps, twofold: First, the word was

probably used in that sense in the acts from which it was adopted, viz., the judiciary acts of 1792, 1796, and 1797. Secondly, the statute using the word is a remedial one, and was intended, in all likelihood, to furnish a substitute for the remedy by *audita querela*—a remedy that lies for a man in execution, or in danger of it, when he has matter in fact or in writing to avoid such execution, and no other means to take advantage of it; that is, a remedy as much for matters arising after the issuing of the execution, as for matters arising after the judgment but before the issuing of the execution." Thus a statute furnishes a remedy whenever an execution may be proceeding illegally, though it has been issued legally. *Robison v. Banks*, 17 Ga. 211, 213.

### Of insurance policy.

The word "issue" means to deliver for use, and, as used in an allegation in an answer that plaintiff procured to be issued to her a policy of insurance, will be construed as equivalent to an allegation to deliver to and acceptance of such policy by the plaintiff. *Sisk v. Citizens' Ins. Co.*, 45 N. E. 804, 805, 16 Ind. App. 535.

The word "issue," used in reference to the issuing of a life policy, is undoubtedly used by the laity and the profession as not including within its meaning a technical delivery. Thus a warranty in an application for life insurance, stating that the applicant has never applied for insurance which has not been issued, is not broken by the fact that the applicant applied to another company for insurance and the company wrote out and sent to its representative a policy to be delivered to the applicant, but which was never delivered because of a controversy between the company and its agent. *Kansas Mut. Life Ins. Co. v. Coalson*, 54 S. W. 388, 392, 22 Tex. Civ. App. 64.

"Issued," as used in reference to the issuance of a life insurance policy, means that when the policy is made and delivered in pursuance with the laws of the state legalizing such policies, and is in full effect and operation, it is to be regarded as issued. *Spencer v. Myers*, 26 N. Y. Supp. 371, 375, 73 Hun, 274.

The term "issued, signed, or delivered in the state," in a statute providing that no policy of insurance shall be signed, issued, or delivered in the state by any foreign corporation, except by an agent of such company who shall have first obtained a license, does not apply to an insurance policy issued in another state by a foreign corporation in pursuance of an application for insurance taken from a resident of the first state by an agent of the foreign corporation residing in the latter state. *Hyde v. Goodnow*, 3 N. Y. (3 Comst.) 266, 267.

**Of legislative grant.**

The term "issued," when used with reference to a deed or patent, usually means delivered, but in considering a legislative grant the term does not apply. *Northern Pac. R. Co. v. Barden* (U. S.) 46 Fed. 592, 617.

**Of marriage license.**

"Issued," as used in speaking of a marriage license as having been issued, means filled up and handed to the person who is to use it; and a blank form of marriage license, though signed by the register of deeds, does not constitute the "issue" of such a license. *Maggett v. Roberts*, 16 S. E. 919, 920, 112 N. O. 71.

"Issue" is defined by Worcester as the act of passing out; egress, or passage out; and by Webster, the act of sending or causing to go forth; a moving out of any inclosed place, egress. The word in Code, § 1811, providing that every register of deeds shall upon application issue a license for the marriage of any two persons, provided it shall appear to him probable that there is no legal impediment to such marriage, etc., but providing a penalty for the issuing of a license to minors without the consent of a parent, includes the conditional delivery of such a license to a person applying therefor on behalf of a minor, with directions to hold the same until the written consent of the mother of the minor is obtained. *Coley v. Lewis*, 91 N. O. 21, 23.

**Of order.**

The requirement, under local option law, that there shall "issue" an order of the board of supervisors directing an election, is satisfied by the directing of such order by the general of the board, and the service of a copy of the order on the officials named in the act, and the publication thereof. *Thomas v. Abbott*, 63 N. W. 984, 985, 105 Mich. 687.

**Of process, summons, or writ.**

"Any process may be considered 'issued' if made out and placed in the hands of a person authorized to serve it, and with a bona fide intent to have it served." *Mills v. Corbett* (N. Y.) 8 How. Prac. 500.

"Issued," as used in the record in an attachment case reciting that the writ issued, should be construed not to mean that it was placed in the hands of the sheriff for service. "It might have been delivered by the clerk to the plaintiff or his attorneys, but the inference is that it remained in the clerk's office, as he copies it into the record." *Hancock v. Ritchie*, 11 Ind. 48, 51.

A writ or notice is "issued" when it is put in proper form and placed in an officer's hands for service, but it is not "served" until the officer has performed the acts which constitute service, or the party to whom it

is directed has waived the form and accepted service. Hence an abstract on appeal, stating that notice of appeal was issued on defendant and on the clerk on a certain date, does not show that the notice was served, so as to confer appellate jurisdiction, "issue" not being equivalent to "serve." *Oskaloosa Cigar Co. v. Iowa Cent. Ry. Co.* (Iowa) 89 N. W. 1065.

The term "issuing out of court," as applied to a writ, implies the sending out of the writ. It is defined as meaning to send out, to deliver by authority, as to issue an order from a department of war, to issue a writ or precept. A writ or order not sent out cannot be regarded as one issued. *Burton v. Deleplain*, 25 Mo. App. 376, 380.

The word "issue," as used in a provision that an action is commenced by issuing a summons, means going out of the hands of the clerk, express or implied, to be delivered to the sheriff for service. If the clerk delivers it to the sheriff to be served, it is then issued; or if the clerk delivers it to the plaintiff or some one else to be delivered by him to the sheriff, this is an issue of the summons; so that, where a summons was merely filled up and held by the clerk for a prosecution bond to be given, it is not issued. *Webster v. Sharpe*, 21 S. E. 912, 914, 116 N. O. 466.

The word "issued," as used in a docket entry of a justice that a writ was issued to one B., constable, does not import delivery. While the word in some connections does convey the meaning that the thing issued was delivered, it does not have that signification as used in the docket entry of the justice, but it was used in the sense of "directed to." *Heman v. Larkin*, 73 S. W. 218, 219, 99 Mo. App. 294. See, also, *Heman v. Larkin* (Mo.) 70 S. W. 907, 908.

The mere writing or filling up blank summons and lodging them in the clerk's office is not an issue of process. *White v. Reed*, 60 Mo. App. 380, 385.

The issuing of a summons in justice court is the commencement of the suit. *Boyce v. Morgan* (N. Y.) 8 Caines, 133. And this is true even though the justice tells the constable to delay the service of summons, if the justice has no authority so to do from the plaintiff. *Koon v. Greenman*, 7 Wend. 121, 124.

The issuing of a writ in this country is usually considered the commencement of the action. It differs from the English rule, which fixes the filing of the bill or declaration as the commencement of the suit. *Lowry v. Lawrence* (N. Y.) 1 Caines, 69, 72; *Carpenter v. Butterfield* (N. Y.) 3 Johns. Cas. 145, 146.

A writ is "issued" or a suit is "instituted" for some purposes at the time it

becomes a perfected process, and sometimes the service of a writ is the commencement of the suit. But the making a writ or petition without summons or citation, and signed by no magistrate or judicial authority, does not constitute the commencement of a suit or the bringing of a petition or bill. *Blaine v. Blaine*, 45 Vt. 538, 541.

# ISSUE (Descendants).

See "Die Without Issue"; "Failure of Issue"; "For Want of Issue"; "Immediate Descendants or Issue"; "Lawful Issue"; "Want of Issue."

It is well settled that in construing wills the word "issue" will be given either its enlarged or restricted sense as best exemplifies the wishes of the testator. In *re Cramer*, 68 N. E. 279, 280, 170 N. Y. 271.

The word "issue" is susceptible of three meanings: (1) It may describe a class of persons who are to take as joint tenants with the parties named; (2) it may be descriptive of a class who are to take at a definite and fixed time as purchasers; (3) it may denote an indefinite succession of lineal descendants who are to take by inheritance. Whenever this word is used in a deed or will, it must be used in one of these senses. *Mendenhall v. Mower*, 16 S. C. 303, 311.

"The term 'issue' is of very extensive import, and when used as a word of purchase, unexplained or uncontrolled by any clear indication of intention, will comprise all persons who can claim as descendants, whether as children, grandchildren, etc., from or through the person to whose issue the limitation is made, and, to restrict the legal meaning, of the term a clear intention must appear in the will." *Jordan v. Roach*, 32 Miss. 481, 604.

"Issue" is nomen collectivum and takes in the whole generation, unless some other intent can be drawn from the words of the will. *Emans v. Emans*, 3 N. J. Law (2 Penn.) 967, 972; *Tinsley v. Jones* (Va.) 13 Grat. 289, 292; *Kingsland v. Papelye* (N. Y.) 3 Edw. Ch. 1, 6.

"Issue" is a general name, including all, even to the remotest, descendants. *Wistar v. Scott*, 105 Pa. 200, 216, 51 Am. Rep. 197.

As defined by Bouvier, the word "issue" includes all persons who have descended from a common ancestor. It has also been said that, unless controlled by the context, it means lineal descent, without regard to the degree of proximity or remoteness from the original stock or source. *Ridley v. McPherson*, 43 S. W. 772, 773, 100 Tenn. 402; *United States Trust Co. v. Tobias*, 4 N. Y. Supp. 211, 213, 21 Abb. N. C. 392; *Matter of Cornell* (N. Y.) 5 Dem. Sur. 88, 89; *Pearce v.*

*Rickard*, 26 Atl. 33, 39, 18 R. I. 142, 19 L. R. A. 472, 49 Am. St. Rep. 755; *Kimball v. Penhallow*, 60 N. H. 448, 451.

"Wherever the term is used as a word of purchase, either in a deed or in a will, it is synonymous and coextensive with the term 'descendants,' and includes all persons who answer that description. Such is the legal construction of the term in all cases where its meaning is not controlled by a plain intent apparent on the face of the instrument." *Price v. Sisson*, 13 N. J. Eq. (2 Beas.) 103, 176.

While, in its primary signification, "issue" is synonymous with "descendants," the meaning to be given to it will depend upon the intention of the testator as ascertained by the context, or other facts or circumstances that can be considered, and, unless there is some slight indication that the testator intended to use the word in its restricted sense, it will be construed to mean "descendants" generally. *Drake v. Drake*, 3 N. Y. Supp. 760, 761.

The word "issue," as used in a will giving real estate to testator's daughters during their lives, and at their death to their lawful "issue," should not be confined to the sense of "children." "When one speaks of the 'issue' of a person deceased, in most cases he would intend his descendants in every degree. In the common use of language, as well as in the application of the word 'issue' in wills and settlements, it means all indefinitely. It is settled that under a gift to 'issue,' where the word is used without any words in the context to qualify its meaning, the children of the ancestor and the issue of such children, although the parent is not living, as well as the issue of deceased children, take in equal shares per capita, and not per stirpes, as primary objects of the disposition. In a case where there is a gift to the child for life, and over on the death of such child in default of 'issue,' it would be an unnatural construction which would exclude all but the immediate children of the first taker in favor of other branches of the family. The reasonable construction in such cases is that the gift over was intended to take effect only on the extinction of the line of descent from the first taker." *Soper v. Brown*, 32 N. E. 768, 769, 136 N. Y. 244, 32 Am. St. Rep. 731; *Soper v. Brown*, 20 N. Y. Supp. 30, 65 Hun, 155.

"The word 'issue,' says Jarman (*Jarman on Wills*, vol. 2, p. 33) when not restrained by the context, is coextensive and synonymous with 'descendants,' comprehending objects of every degree requiring a distribution per capita and not per stirpes. As used in deeds, the word invariably has a technical meaning, being always used as a word of purchase, and, when so used, uni-

versally includes descendants of every degree." *Fearne*, Rem. 107, 118; 4 Kent, Comm. 230; *Ram*, Wills, 115; *Wild's Case*, 6 Coke, 16, 17; *Doe v. Collis*, 4 Term R. 294, 299; *Bagshaw v. Spencer*, 2 Atk. 577, 582; Co. Litt. 20-6; 1 Rep. Leg. 158; 2 Spence, Eq. Jur. 154; *Butler v. Stratton*, 3 Brown, Ch. 367; *Cook v. Cook*, 2 Vern. 545; *Wyth v. Blackman*, 1 Ves. Sr. 196, 200; *Davenport v. Hanbury*, 3 Ves. Jr. 257, 260.

The word "issue," in legal as well as in common acceptation, comprehends all the descendants of an ancestor, however remote. The word is so used in Act May 24, 1780, providing that if any of the brothers or sisters of an intestate dying without issue have died before the intestate, leaving issue, the share of such brothers and sisters shall be inherited by such issue, as there is nothing in the act which limits the general signification of the word. *Rodman's Heirs v. Smith*, 2 N. J. Law (1 Penning.) 3, 5.

"In England, when the word 'issue' is used as the correlative of 'parent,' it is held that the word 'issue' means children; yet there, as well as here, the usual meaning of the word 'issue' is all lineal descendants. This is also the popular meaning in this commonwealth. We think that as a matter of verbal construction it would be as easy and natural to say that, where the words 'parent' and 'issue' are used in connection with each other, the word 'issue' means children; and in the construction of any instrument it is always necessary to look beyond the literal meaning of the words. The tendency of our decisions has been more and more to construe 'issue,' where its meaning is unrestricted by the context, as including all lineal descendants, and importing representation, and certainly, when the issue take as of a particular time after the death of the testator, and only the issue living at that time take, the issue of deceased issue take by a sort of substitution for their ancestors." As used in a will bequeathing personal property to testator's daughter, and directing that, if she survive her husband and leave no issue, the property shall then pass to all the testator's children then living and the issue of any deceased child, the word "issue" means all lineal descendants, and is not limited to children. *Jackson v. Jackson*, 26 N. H. 1112, 1113, 153 Mass. 374, 11 L. R. A. 305, 25 Am. St. Rep. 643.

The word "issue" ordinarily means descendants to any degree, and in a devise of the residue of an estate in trust for testator's children, the trustee to pay them equally the net income thereof until the youngest shall arrive, or would have arrived if living, at the age of 30 years, then the estate to be distributed equally among the heirs named, and the issue of any de-

ceased heir, it is used in such sense, and indicates an attempt to postpone the vesting of an estate for a certain period, not dependent upon any life or lives in being. *In re Cavarly's Estate*, 51 Pac. 629, 630, 119 Cal. 406.

In the common use of language, as well as the application of the word, "issue," in wills and settlements, means all indefinitely, and is not confined to children. *Freeman v. Parsley*, 3 Ves. 421, 423.

The word "issue," as applied to the descent of estates, includes all the lawful lineal descendants of the ancestor. Pub. St. N. H. 1901, p. 64, c. 2, § 20; *Ballinger's Ann. Codes & St. Wash.* 1897, § 4633; *Mills' Ann. St. Colo.* 1891, § 4185, cl. 4; *Ann. Codes & Sts. Or.* 1901, § 5590; V. S. 1894, 8; *Gen. St. Kan.* 1901, § 7342, subd. 7; *Code Iowa* 1897, § 48, subd. 7; *Rev. Laws Mass.* 1902, p. 88, c. 8, § 5, subd. 7; *Rev. St. Me.* 1883, p. 59, c. 1, § 6, subd. 8; *Ky. St.* 1903, § 463; *Rev. St. Wis.* 1898, § 4971; *Gen. St. Minn.* 1894, § 255, subd. 7; *Comp. Laws Mich.* 1897, § 50, subd. 8.

#### Adopted children.

The word "issue," in Rev. St. § 5971, providing that when a devise of real or personal estate is made to any child or other relative of the testator, and such child or other relative shall die leaving issue surviving the testator, such issue shall take the estate, means child of the body, or heir of the body, of the deceased relative of the testator, and does not include a child adopted by such decedent. The issue in such case must be of the blood of the testator, and of the deceased child or other relative by birth. Adoption does not make the adopted child of the blood of its adopter, nor of the blood of his ancestors. *Phillips v. McConica*, 51 N. H. 445, 446, 59 Ohio St. 1, 69 Am. St. Rep. 753.

The word "issue," as used in Pub. St. c. 124, § 3, providing that a widow shall receive a certain portion of the property of a husband who dies intestate leaving no issue living, is to be construed to mean children, and includes adopted children. *Buckley v. Frazier*, 27 N. H. 768, 769, 153 Mass. 525.

Under Gen. Laws, c. 1, § 19, declaring that the word "issue," as applied to the descent of estates, shall include all the lawful lineal descendants of the ancestor, the adoption of an illegitimate child by the father and his wife does not render such child his issue. *Jenkins v. Jenkins*, 14 Atl. 557, 64 N. H. 407.

The word "issue" means progeny or offspring, and, in a bequest that if a legatee leaves no "issue" his widow shall be entitled to the whole of his estate, a child adopt-



ed by the husband without the consent of the wife is not within the term. *Stanley v. Chandler*, 53 Vt. 619, 624.

The word "issue," used in a will, where nothing appears to limit its legal import, includes all descendants; and under the statute of adoption (Pub. Laws 1866, c. 627), which gives adopted children the legal status of descendants, except that they shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption, nor property from their lineal or collateral kindred by right of representation, an adopted daughter is entitled to a bequest, the use of which is given to her mother by adoption during her life, the principal to be paid on her death to her "lawful issue." *Hartwell v. Tefft*, 35 Atl. 882, 883, 19 R. I. 644, 34 L. R. A. 500.

Civ. Code, § 1386, subd. 1, provides that if the decedent leave no surviving husband or wife, but leaves "issue," the whole estate goes to such issue, and if such "issue" shall consist of more than one child, etc. Sections 227 and 228 entitle an adopted child to succeed to the estate of the adopted parent. Held, that the word "issue," as used in section 1386, should be construed to mean child or children, and to include an adopted child. In re Newman's Estate, 16 Pac. 887, 888, 75 Cal. 213, 7 Am. St. Rep. 146.

#### As children.

"In 2 Redf. Wills, c. 38, note 5, it is said 'the term "issue," in its primary signification, imports children, and that it has a secondary meaning, in which it has been held to include an issue of issue, in an indefinite descending line. It is susceptible, more naturally than "children," of including all descendants, but the primary sense certainly is that of direct issue, and it is only in a secondary sense that it includes descendants.'" *Thomas v. Levering*, 21 Atl. 367, 369, 73 Md. 451.

In *Palmer v. Horn*, 84 N. Y. 516, Judge Earl said (page 519): "The word 'issue' is an ambiguous term. It may mean descendants generally, or merely children; and whether, in a will, it shall be held to mean the one or the other, depends upon the intention of the testator as derived from the context or the entire will, or such extrinsic circumstances as can be considered. In England, at an early day, it was held, in its primary sense, when not restrained by the context, to be coextensive and synonymous with 'descendants' comprehending objects of every degree. But it came to be apparent to judges that such a sense given to the term would in most cases defeat the intention of the testator, and hence in the later cases there is a strong tendency, unless restrained by the context, to hold that it has the meaning of 'children.' It will, at least, be held to have such meaning upon a slight indica-

tion in the other parts of the will that such was the intention of the testator." In *Drake v. Drake*, 184 N. Y. 220, 32 N. E. 114, 17 L. R. A. 664, where, by a divided court, the broad construction was given to the word "issue" in its application to the donees of a power of appointment, Judge Bradley said (page 224, 184 N. Y., page 116, 32 N. E., and page 668, 17 L. R. A.): "In its general sense, unconfined by any indication or intention to the contrary, the word 'issue' includes in its meaning all descendants. It may, however, when such appears to have been the intent with which the word is used, have the restricted import of 'children.' \* \* \* The word 'issue' may be a word either of purchase or limitation, and will be construed the one or the other, as may be necessary to effectuate the intent with which it appears to have been used in the instrument where it is employed." In *Soper v. Brown*, 136 N. Y. 244, 32 N. E. 768, 32 Am. St. Rep. 731, Judge Andrews, referring to the word "issue," said (page 249, 136 N. Y., page 770, 32 N. E., and page 734, 32 Am. St. Rep.): "There are many authorities on wills in which the word has been construed to mean 'children' only. These authorities rest upon the undisputed principle that words used by a testator in his will are to be interpreted in the sense which he attributed to them, where it appears by the context that they were not used in their strict legal sense. It is but one of the applications of the doctrine that in the construction of wills the intention of the testator is to govern when not inconsistent with the rule of law." In *Ohwatal v. Schreiner*, 148 N. Y. 688, 43 N. E. 167, Judge Haight stated the proper rule of construction as follows: "The rule, therefore, is that the word 'issue,' in its general sense, in the absence of any indication of intention to the contrary, includes in its meaning descendants generally. But when it is apparent from the extrinsic circumstances proper to be considered, or the provisions of the will, that the testator intended 'children,' its meaning will be so limited." See, also, *Palmer v. Dunham*, 125 N. Y. 68, 25 N. E. 1081. Said James, L. J., in *Ralph v. Carrick*, 11 Ch. Div. 873, 883: "Now, the word 'issue' is an ambiguous word. In the ordinary parlance of laymen, it means 'children,' and only 'children.' When you talk of what 'issue a man has,' or what 'issue there has been of a marriage,' you mean 'children,' not 'grandchildren' or 'great-grandchildren.' But in the language of lawyers, and only in that language, it means 'descendants'; and in the case of *Sibley v. Perry*, 7 Ves. 524, Lord Eldon found ground for coming to the conclusion that the word 'issue' had, in the will before him, the laymen's meaning of 'children,' and not the lawyer's meaning of 'descendants.'" *Emmet v. Emmet*, 73 N. Y. Supp. 614, 615, 67 App. Div. 183. See, also, *Wright v. Mercen*, 69 N. Y. Supp. 936, 938, 34 Misc. Rep. 414; *Taft v.*

Taft (N. Y.) 8 Dem. Sur. 86, 88; Daly v. Greenberg, 23 N. Y. Supp. 582, 584, 69 Hun, 228; Arnold v. Alden, 50 N. E. 704, 708, 173 Ill. 229; Leigh v. Norbury, 18 Ves. 340.

The word "issue," in a will, *prima facie* means the same thing as "heirs of the body," and in general is to be construed as a word of limitation; but this construction will give way if there be on the face of the instrument sufficient to show that the words had a less extended meaning, and to be applied only to children or descendants of a particular class or at a particular time. Nes v. Ramsay, 26 Atl. 770, 771, 155 Pa. 628; Taylor v. Taylor, 63 Pa. (13 P. F. Smith) 481, 483, 3 Am. Rep. 565; McCann v. McCann, 47 Atl. 743, 744, 197 Pa. 452, 80 Am. St. Rep. 846; Reinohl v. Shirk, 12 Atl. 806, 808, 119 Pa. 108; Wistar v. Scott, 105 Pa. 200, 213, 51 Am. Rep. 197; Appeal of Elchelberger, 19 Atl. 1006, 1007, 135 Pa. 160; Shalters v. Ladd, 21 Atl. 596, 597, 141 Pa. 349; O'Rourke v. Sherwin, 27 Atl. 43, 44, 156 Pa. 285; Kleppner v. Lavery, 70 Pa. (20 P. F. Smith) 70, 74; Pearce v. Rickard, 26 Atl. 38, 39, 18 R. I. 142, 19 L. R. A. 472, 49 Am. St. Rep. 755.

Courts more readily interpret the word "issue" as the synonym of "children," and as a mere description of the person or persons to take, than they do the words "heirs of the body." Timanus v. Dugan, 46 Md. 402, 416.

The word "issue," in the Massachusetts statute of distributions, necessarily includes children. Bigelow v. Morong, 103 Mass. 287, 289. But where there is no extrinsic fact to make clear the intent of the testator, the word must be construed as limited to the children, and the surviving children take the legacy bequeathed to their father, to the exclusion of the grandchildren. Taft v. Taft (N. Y.) 8 Dem. Sur. 86, 88.

In the usual gift over upon the termination of a life estate or income for life to the "issue" of the person designated, "the issue of any deceased child or children to take the share the parent would have taken if living," the word "issue" is broad enough to include any descendants, and is not to be limited to children merely by the fact that the correlative term "parent" is used in connection with it. United States Trust Co. v. Tobias, 21 Abb. N. C. 392, 397, 4 N. Y. Supp. 211.

**Same—When used with "child or children."**

In an anti-nuptial contract reciting that certain property of the wife shall remain her individual property, but, in case there should be issue of the marriage, then the property should descend to such child or children equally, the word "issue" is not used in a technical sense, but means the is-

sue designated by the words "child or children" as used in such contract. It does not mean an indefinite number taking the estate in succession, but the children of the marriage. Aydlett v. Swope (Tenn.) 17 S. W. 208, 209. For a similar use in a deed, see Johnstone v. Tallafiero, 32 S. E. 931, 934, 107 Ga. 6, 45 L. R. A. 95.

The word "issue," in its usual sense, comprehends all issue to the latest time, and includes not only the descendants of the body of the person to whom the word is applied, but also more remote descendants. Thus, in a will in which the words "children" and "issue" were both used, and in which it appeared that great attention was paid to technical language, the word "issue" was held to have been used in its technical sense. Maxwell v. Call (U. S.) 16 Fed. Cas. 1200, 1202; see, also, Hall v. Hall, 2 N. E. 700, 701, 140 Mass. 267.

Testator provided that one-third of the proceeds of certain property should be invested for his daughter, and the interest paid to her free from control, liabilities, and debts of her husband; and, in case of her death without "issue," or issue of her children, then reversible to his consanguinary heirs. Held, that the word "issue" should be construed to mean children, and not heirs of the body, it being apparent from the context that the testator used it in such sense. Peirce v. Hubbard, 25 Atl. 231, 152 Pa. 18.

Where in a will testator devised property to one and his issue, or to the issue of any one, and in another clause speaks of the child or children of such person, the word "issue" will be construed to mean children. Palmer v. Horn, 84 N. Y. 516, 518; Daly v. Greenberg, 23 N. Y. Supp. 582, 583, 69 Hun, 228; Emmet v. Emmet, 73 N. Y. Supp. 614, 615, 67 App. Div. 183; Minter v. Wraith, 13 Sim. 52, 60; Maddox v. Staines, 2 P. Wm. 421, 422.

In gifts of personality, "issue" has a different meaning from that which it has in devises of realty. The remaindermen take as purchasers both as to personality and realty. When an absolute interest is given in remainder after a life estate to the children of the first taker, a limitation over on default of his issue does not raise an estate tail by implication. "Issue" means such issue; that is, children. In re Sheet's Estate, 52 Pa. (2 P. F. Smith) 257, 267; Foster v. Hayes, 2 El. & Bl. 27, 33.

Where a deed of trust provided that the income of the trust estate should, after the death of the settlor and his wife, go to the "children and issue" of the deceased's children, it is held that the words "children and issue" were intended to apply to the ones in being at that time. In re Eyre's Estate (Pa.) 55 Atl. 541, 542.

**Same—When used with “descendants.”**

The term “issue,” as used in a will providing that, if a certain one of his sons should leave no other issue or descendants than one son then living, the former’s power of disposition should be limited to a certain sum, is not used as a word of purchase, it being apparent that the testator evidently imagined that the word “issue” might be mistakenly read for “children,” and he therefore followed it in the disjunctive with “descendants.” *Appeal of Barry (Pa.)* 10 Atl. 128, 127.

“Issue,” as used in a will giving certain property to testator’s daughters, and at the death of any of them her share should pass to her issue, children, or descendants, should be construed to mean children. *Thomas v. Levering*, 21 Atl. 367, 369, 73 Md. 451.

The word “issue,” as used in a provision of a will providing that “if any of said grandchildren shall die previous to the decease of my daughter, leaving issue, then I direct that such issue shall take the share to which their parents would have been entitled, said share to be received by said grandchildren or their descendants free from any control or claim of any husband,” is used interchangeably with “descendants,” as used in such provision. *Cochrane v. Kip*, 46 N. Y. Supp. 148, 152, 19 App. Div. 272.

**Same—Direction to take shares of parents.**

Where the word “issue” is used with reference to the parent of such issue, as where the issue is to take the shares of the deceased parent, it must mean his children; that is, the word “parent” confines the word “issue” to the children of the taker. *Fairfield v. Bushell*, 32 Beav. 158, 160; *Sibley v. Perry*, 7 Ves. 522, 530; *Leigh v. Morbury*, 13 Ves. 340, 344; *Pruen v. Osborne*, 11 Sim. 132, 137; *Ross v. Ross*, 20 Beav. 645, 648; *Parkhurst v. Harrower*, 21 Atl. 826, 142 Pa. 432, 24 Am. St. Rep. 507; *King v. Savage*, 121 Mass. 303, 306; *Drake v. Drake*, 32 N. E. 114, 116, 134 N. Y. 220, 17 L. R. A. 684; *Madison v. Larmon*, 48 N. E. 556, 558, 170 Ill. 65, 62 Am. St. Rep. 356; *Harrison v. McAdam*, 76 N. Y. Supp. 701, 703, 38 Misc. Rep. 18; *Cochrane v. Schell*, 35 N. E. 971, 978, 140 N. Y. 516.

**Same—In gift to one for life with remainder to issue.**

The word “issue,” as used in a will making a bequest to a certain person during her natural life, and on her death to her lawful issue, should be construed to mean children. *Palmer v. Dunham*, 6 N. Y. Supp. 46, 47, 52 Hun, 468; *Palmer v. Dunham*, 25 N. E. 1081, 1082, 125 N. Y. 68; *Daly v. Greenberg*, 23 N. Y. Supp. 582, 583, 69 Hun, 228; *Shalters v. Ladd*, 21 Atl. 596, 597, 141 Pa. 349.

*Prima facie*, in a will the word “issue” means heirs of the body, and will be construed as a word of limitation, unless there be explanatory words showing it was used in a restricted sense. *Testatrix* devised property to her daughter for life, and after her death to the lawful issue of her daughter, “and the heirs and assigns of such issue.” *Held*, that the use of the expression “such issue” was not sufficient to show that by “issue” *testatrix* meant children. The effect was the same as though the limitation had been to A.’s issue and their heirs or assigns. Therefore, under the rule in *Shelley’s Case*, the daughter took an estate tail. *Carrol v. Burns*, 108 Pa. 386, 393, 15 Wkly. Notes Cas. 553, 555 (reversing 14 Wkly. Notes Cas. 272, 273).

Testator gave to each of his children \$8,000, to be held in trust for their sole and separate use, in such a way that the same might not be liable for the debts or contracts of either daughter, or of any of their husbands, and provided that, if either of the children die without issue, his or her share should be equally divided among the survivors. *Held* that, as the object of the daughters’ trusts was to protect the trust estate against the control or the debts of the daughters, the word “issue” should be construed as having been used in the sense of “child or children.” *In re Schively’s Estate (Pa.)* 16 Wkly. Notes Cas. 179.

**Same—In expression “leaving issue,” etc.**

Generally, words which create an estate tail on a devise of a freehold will confer an absolute interest in a gift of personal property; but where there are any words or expressions in the bequest showing that the testator did not intend the word “issue” or its equivalent in their technical sense, but used them in the popular sense of “children,” such words and expressions are sufficient to displace the operation of the rule, and limit the interest of the first taker to an estate for life; and, where the expression “leaving issue” has been used, it has been universally held to denote children. *In re Gerhard’s Estate*, 28 Atl. 684, 160 Pa. 253.

The word “issue,” in a devise to one for life, and on his death to be divided equally among his children, but if he should die without issue, then over to another, is used in the sense of children, the gift to whom the expression “die without issue” immediately follows, showing that the meaning is such issue. *In re Duffy’s Estate*, 16 Pa. Co. Ct. R. 300, 302.

“Issue,” as used in a will directing that the property be given over in case testator’s children shall die without leaving issue, means child or children. *Williams v. Teale*, 6 Hare, 239, 249.

In the phrase "die without leaving lawful issue surviving," where the time referred to is the death of the first taker, the word "issue" is never limited to any particular class of descendants. *Harrison v. McAdam*, 76 N. Y. Supp. 701, 703, 38 Misc. Rep. 18.

**Same—When used with words of limitation and distribution.**

In a will by which testator bequeathed to his son John certain property to hold during his natural life, and after his decease, "and if he shall die leaving lawful issue, I give and devise the same to his heirs as tenants in common, and their respective heirs and assigns forever," and the son died leaving children, the words "issue" and "heirs" should both be construed as meaning such children, and they would take the residuary estate. *Findlay v. Riddle* (Pa.) 3 Binn. 139, 143, 160.

A devise was "unto my daughter, for her natural life, and after her death to her issue and their heirs forever, in the proportions to which they would be entitled under the intestate laws of Pennsylvania, respectively, and free, clear, and discharged from any claim of any husband." Held, that the limitation to the heirs general of the issue, with the superadded words of distributive modification, clearly showed that by "issue" the testator meant children, and intended that they should take the remainder as purchasers, and not as heirs by descent. *Robins v. Quinliven*, 79 Pa. (29 P. F. Smith) 333, 335.

Where a testator devised all his real estate to his wife and daughter, or the survivor, during their lives, and, in case the daughter should die leaving lawful "issue," to descend to such lawful issue, their heirs and assigns forever, and if the daughter died before the widow, leaving lawful issue, such issue should inherit their mother's right from the time of her death, it was held that the word "issue" meant children, and that the daughter took an estate for life, remainder to her children in fee. *Taylor v. Taylor*, 63 Pa. (13 P. F. Smith) 481, 483, 3 Am. Rep. 565.

"Issue," as used in a will devising property to certain beneficiaries to hold during their natural lives, and after their death then to their lawful "issue" and the heirs and assigns of such issue, means children. *Carroll v. Burns* (Pa.) 42 Leg. Int. 153.

Where testator devised land to his son for the term of his natural life, and after his death, if he should die leaving lawful issue, then to such issue, if one, to him or her, his or her heirs and assigns, forever; but if more than one, to be equally divided amongst them for their heirs and assigns forever, and in default of lawful issue the land to be sold and the proceeds considered a part of his

estate, to be divided as directed—it was held that the word "issue" was one of purchase, and that the son took only a life estate. *Powell v. Board of Domestic Missions*, 49 Pa. (13 Wright) 46, 48, 49.

The word "issue" will be regarded as a word of purchase, and not of limitation, in a will in which testator devises the residue of his estate during the devisee's natural life, and directs that at her decease such portion shall be inherited by her surviving issue, share and share alike; and therefore the devisee takes a life estate in the residue. *Hill v. Giles*, 50 Atl. 753, 201 Pa. 215.

When used in a devise by which the ancestor takes a freehold without any words to modify or restrict its meaning and application, it is a word of limitation. A testator bequeathed certain property to his daughter during her life, and on her death unto the "lawful issue of his said daughter, his, her, or their heirs, executors, administrators, and assigns forever, equally to be divided among them, share and share alike." Held, that the direction that the "issue" should take distributively did not show that it was used in any other meaning than "heirs of the body," since there may be a tenancy in common in an estate tail, but that, even if such provisions were inconsistent with the technical meaning of the word "issue," the technical meaning would prevail, and an entail be vested in the daughter. *Kingsland v. Papelye* (N. Y.) 3 Edw. Ch. 1, 6.

**Children of living parent.**

The word "issue" is a word of broader interpretation than the word "descendant," and may include the children of a living parent, as well as the children or descendants of one who is dead. *Hillen v. Iselin*, 39 N. E. 363, 371, 144 N. Y. 365.

**Grandchildren.**

The word "issue," though in its general meaning it includes grandchildren as well as children, may be found, from other clauses of the instrument in which it is used, to designate a child or children only, and not to include grandchildren. *Ingraham v. Meade* (U. S.) 13 Fed. Cas. 50, 53.

"The word 'issue' is a general term, which, if not qualified or explained, may be construed to include grandchildren as well as children." *Adams v. Law*, 58 U. S. (17 How.) 417, 421, 15 L. Ed. 149.

Where a bequest is made to one, with remainder to any of lawful issue of certain others, and at the time the will was made the others were living and had children and a grandchild, it was held that the word "issue" included the grandchild. *Drake v. Drake*, 10 N. Y. Supp. 183, 187, 56 Hun. 590.

A deed conveyed land to the grantees in trust to permit the grantor and his family during their lives to enjoy the estate, and to take the rents and profits, and, after their death, in trust to convey the premises to the son of the grantor, "and to such other lawful issue as the grantor may then have living." Held, that the word "issue" in such conveyance was synonymous with "descendants," and embraced the grantor's grandchildren as well as children. *Weehawken Ferry Co. v. Alsson*, 17 N. J. Eq. (2 O. E. Green) 475, 486.

In a devise to a son for life, with remainder, after a life estate to the son's wife, equally to and among the issue of the son, the word "issue" means more than "children," and includes grandchildren. *Dextex v. Inches*, 17 N. E. 551, 554, 147 Mass. 324.

Where testator devised land in trust during the lives of his children, and until the youngest of the "issue" of any of them living at the death of one of them longest surviving, or born in due time afterwards, should be 21 years old, and, on termination of the trust, to his "grandchildren" and their "issue," who were to take "as if it had been the estate of the respective parents of such grandchildren \* \* \* and had descended to them and their lawful issue by inheritance," and no great-grandchildren were in being at the testator's death, the word "issue," as used in fixing the term of the trust, meant the testator's grandchildren. *Chwatal v. Schreiner*, 43 N. E. 166, 167, 148 N. Y. 683.

#### As heirs at law.

The word "issue" is one of doubtful import, but its legal sense is one of very general signification, and includes all persons having a common ancestor; but its true interpretation must be found from the connection in which it is used. It may be used in the sense of "heirs," and if, from its connection and association with words of reference, it is plain that it is used in that sense, it must be so taken. *Thomas v. Higgins*, 47 Md. 439, 440.

The word "issue," in its legal sense, is one of very general signification, and includes all persons having a common ancestry. Its true interpretation in a testamentary instruction must be found from the connection in which it is used. It may be used in the sense of "heirs," and, if from its connection and association with words of reference it is plain that it is used in that sense, it must be so taken. *Travers v. Wallace*, 49 Atl. 415, 417, 98 Md. 507.

Though the words "heirs at law" are broader and more comprehensive than the word "issue," yet the latter is always embraced in the former, though used in its most technical sense. And where a will denom-

inates certain substitutes who are to take in the case of death of legatees as heirs at law, and in the codicil the term "issue" is used for the same purpose, the two terms are not inconsistent with each other. *Bringham v. Orth*, 44 Atl. 783, 785, 7 Del. Ch. 178.

The primary meaning of the word "issue" includes all descendants, but would not include the heirs at law of a person dying without children. The word "heir" has a more extensive meaning, and means the person upon whom the law casts his estate in lands, tenements, and hereditaments immediately upon the death of his ancestor. Thus, while the word "issue" would be included within the broader definition of the word "heir," a devise to "heirs" might include a class not included within a devise to his "issue." Thus, as used in a devise over to the issue or heirs of children, the devise was alternative, and on the death of a child without issue his share was to be divided among his heirs at law. *Bodine v. Brown*, 42 N. Y. Supp. 202, 204, 12 App. Div. 335.

Testator devised his land in trust during the natural lives of his children, and until the youngest of the "issue" of his children living at the death of the longest liver of them, or born in due time afterwards, should be 21 years old. He further provided that the trustees should distribute part of the income of the estate in equal parts among his children and the lawful issue of any who might be dead, such issue to receive the share which the parent would be entitled to if living. After the expiration of the term of trust he devised the land to the lawful grandchildren, and the lawful issue of such grandchildren, to take said estate in like manner in every respect as if it had been the estate of the respected parents of such grandchildren and had descended to them and their lawful issue by inheritance. It was held that the word "issue" was used, not in the sense of descendants generally, but of heirs at law. *Chwatal v. Schreiner*, 28 N. Y. Supp. 206, 208, 8 Misc. Rep. 192.

#### As heirs of the body.

The word "issue" primarily means heirs of the body. In *re Robinson's Estate*, 24 Atl. 297, 299, 149 Pa. 418; *Granger v. Granger*, 44 N. E. 189, 147 Ind. 95, 36 L. R. A. 186; *Allen v. Craft*, 9 N. E. 919, 922, 109 Ind. 476, 58 Am. Rep. 425.

The term "issue" means heirs of the body, and embraces all of one's lineal descendants indefinitely. *Holland v. Adams*, 69 Mass. (8 Gray) 188, 193; *Hilliker v. Bast*, 72 N. Y. Supp. 301, 302, 64 App. Div. 552.

"Issue," when a word of limitation, means lineal descendants indefinitely, and hence heirs of the body. *Weybright v. Powell*, 39 Atl. 421, 422, 86 Md. 573; *Hertz v. Ab-*

rahams, 36 S. E. 409, 411, 110 Ga. 707, 50 L. R. A. 361.

The word "issue," in its natural signification and common use, includes all the offspring or descendants of a person, whether heirs or not, and includes "heirs of the body," though it is not identical with that term. *Black v. Cartmell*, 49 Ky. (10 B. Mon.) 188, 198.

"Issue," when used as a word of limitation, is equivalent to "heirs of the body," but where "issue" is not used as a word of limitation, its natural and primary meaning, without explanation, is descendants in every degree, whether heirs or not. *Beckham v. De Saussure* (S. C.) 9 Rich. Law, 531, 546.

The word "issue," according to all decisions in England and the United States, means heirs of the body or children, according to the intention of the testator, deduced from expressions contained in the will. *Obelton v. Henderson* (Md.) 9 Gill, 482, 486.

The word "issue," in a devise, is regarded primarily as a word of limitation, and as synonymous with the technical words "heirs of the body;" and, as used in a will devising lands to M. and her heirs forever, and providing that, in case there shall be issue of M. by any other marriage, they shall not be entitled to inherit, the word "issue" is used as synonymous with "heirs." *Allen v. Craft*, 9 N. E. 919, 922, 109 Ind. 476, 58 Am. Rep. 425.

"Issue," in a will, prima facie means heirs of the body. In a devise to the testator's son, and, in case the son should die without leaving issue, the bequest to him should go to others, the son took a defeasible estate, which terminated at his death without issue. *Middleswarth's Adm'r v. Blackmore*, 74 Pa. (24 P. F. Smith) 414, 419.

#### Illegitimate child.

A devise to "issue" means, prima facie, legitimate issue, and an intention to include illegitimate issue must be deduced from the language itself, without resort to extrinsic evidence. *Flora v. Anderson* (U. S.) 67 Fed. 182, 185.

Under Ky. St. § 4841, providing that the issue of a devisee dying before the testator shall take the share which the devisee would otherwise have taken, a bastard child of a daughter of testator, who died before the testator, took the share which the mother would have taken as devisee, if she would have survived the testator, as *Id.* § 463, providing that "the word 'issue' as applied to the descent of real estate shall be construed to include all the lawful lineal descendants of the ancestor," was intended to embrace in the word "issue" all persons who might lawfully inherit the estate. *Cherry v. Mitchell*, 55 S. W. 689, 690, 108 Ky. 1.

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The word "issue," as used in a will bequeathing property with a trust to the issue of a certain person, means legitimate children only. A trust to illegitimate children thereafter to be born is void as against good morals. *Kingsley v. Broward*, 19 Fla. 722.

#### As issue living at death of ancestor.

When a remainder is limited to take effect on the death of any person without heirs or heirs of his body, or without issue, the words "heirs" or "issue" mean heirs or issue living at the death of the person named as ancestor. Gen. St. Minn. 1894, § 4883; Rev. St. Wis. 1898, § 2046.

"Issue," as used by a testator in devising a lot to his two daughters during their life and the life of the survivor, and, after the decease of the survivor, the same "unto the male issue then living of my son Richard," meant such male issue as were alive at the death of the survivor of the two daughters. *Wistar v. Scott*, 105 Pa. 200, 42 Leg. Int. 48, 51 Am. Rep. 197.

In the bequest of personalty to one for life, after his death to his issue, and in default of issue then to another, the term "issue" primarily signifies children or their issue living at the first taker's death, and should not be construed "as of the body," so as to enlarge the interest of the life tenant. In re *Pennock's Estate* (Pa.) 11 Phila. 623, 628.

The first section of an act relative to the descent of real estate provided that if any child of a person dying seised of lands and intestate shall have died before the intestate, leaving issue, the share of the land which the child so dying would have been entitled to if she or he had survived the intestate shall descend to and be inherited by such issue. The second section provided that when any person shall die seised of land without will, and without leaving lawful issue, leaving a brother or sister, the inheritance shall descend to the brother or sister. It was held that the word "issue," in the phrase "without leaving lawful issue," in the second section, included the issue of a child who died before the intestate, since otherwise a brother or sister would take before a child of a deceased child, as provided by the first section. *Haring v. Van Buskirk*, 8 N. J. Eq. (4 Halst. Ch.) 545, 548; *Moseby's Adm'r v. Corbin's Adm'r*, 10 Ky. (3 A. K. Marsh.) 289, 291.

Where a testator devised lands to a son for life, without power to dispose of or render the same liable for his debts, and after his decease to such persons as he by will should direct, and on the son dying intestate, leaving issue surviving him, then to the issue in fee, and on failure of the issue then to the sister for life, the word "issue" meant only children of the son who should

be living at the time of his death, and not issue indefinite. *Nes v. Ramsay*, 26 Atl. 770, 771, 155 Pa. 628.

**As lineal or blood heirs.**

"If an estate be devised to A. and his heirs, or his heirs and assigns, but, if he die without lawful issue, then to B., the will creates an estate tail in A. by implication, for the words 'dying without lawful issue' imply an intent in the testator to limit the estate to the lineal or blood heirs, as distinguished from the collateral heirs of the devisee." *Arnold v. Brown*, 7 R. L. 188, 195.

**As taking per capita.**

Where a bequest is made to issue as purchasers, all those who answer the description will take per capita, in the absence of anything to show that they shall take per stirpes. *Davenport v. Hanbury*, 3 Ves. Jr. 257, 260; *Leigh v. Norbury*, 13 Ves. 840, 844; *Bisson v. West Shore R. Co.*, 88 N. E. 104, 105, 143 N. Y. 125.

**As within rule in Shelley's Case.**

The word "issue" is not, *ex vi termini*, within the rule in Shelley's Case, 1 Coke, 88, 104. It depends upon the context whether it will give an estate tail to the ancestor. As a word of limitation it is collective and signifies all the decedents in all generations, but as a word of purchase it denotes the particular person or class of persons to take under the devise. *Timanus v. Dugan*, 46 Md. 402, 417.

The word "issue," in a will, when so qualified by additional words as to evince an intention that it is not to be taken as descriptive of an indefinite line of descendants, but is used to indicate a new stock of inheritance, does not come within the rule in Shelley's Case, 1 Coke, 88, 104. *Boykin v. Ancrum*, 6 S. E. 305, 307, 28 S. C. 486, 13 Am. St. Rep. 698.

**As word of purchase or limitation.**

"Issue" is a word of purchase, and embraces all descendants. *Davenport v. Hanbury*, 3 Ves. Jr. 257, 260.

"The word 'issue' may be a word of either purchase or limitation, and may be construed to be one or the other as may be necessary to effectuate the intent with which it appears to have been used in the instrument where it is employed." *Drake v. Drake*, 32 N. E. 114, 116, 134 N. Y. 220, 17 L. R. A. 664; *Taylor v. Gould* (N. Y.) 10 Barb. 388, 395; *Hilliker v. Bast*, 72 N. Y. Supp. 301, 302, 64 App. Div. 552; *Appeal of Woelpper*, 17 Atl. 870, 871, 126 Pa. 562; *Findlay's Lessee v. Riddle* (Pa.) 3 Bin. 189, 148, 5 Am. Dec. 855; *Reinoehl v. Shirk*, 12 Atl. 806, 808, 119 Pa. 108; *Timanus v. Dugan*, 46 Md. 402, 416; *Lyles v. Digges' Lessee* (Md.) 6 Har. &

*J.* 364, 14 Am. Dec. 281; *Moseby's Adm'r v. Corbin's Adm'r*, 10 Ky. (3 A. K. Marsh.) 289, 291.

Undoubtedly in a will the word "issue" is regarded as primarily a word of limitation, and as synonymous with the technical words "heirs of the body." Hence it is presumed that when a testator devises an estate for life, with the remainder to the issue of the devisee in that estate, he intends the remaindermen to take as heirs of the body by descent from their ancestor, rather than as purchasers. This intent, however, is but a presumption, and the strictly technical words "heirs" or "heirs of the body" may be shown by the context of the will to have been used as merely descriptive of persons, in which case they are regarded as words of purchase, and not words of limitation. The intent of the testator to use them in such an abnormal sense must have unequivocally appeared. *Powell v. Board of Domestic Missions*, 49 Pa. (13 Wright) 46, 48.

It is well settled that the word "issue," in a will, *prima facie* means heirs of the body, and, in the absence of explanatory words showing that it is used in a restricted sense, it is to be construed as a word of limitation. *McCann v. McCann*, 47 Atl. 743, 744, 197 Pa. 452, 80 Am. St. Rep. 846; *Nes v. Ramsay*, 26 Atl. 770, 771, 155 Pa. 628; *Taylor v. Taylor*, 68 Pa. (13 P. F. Smith) 481, 483, 3 Am. Rep. 565; *Wistar v. Scott*, 105 Pa. 200, 218, 51 Am. Rep. 197; *Reinoehl v. Shirk*, 12 Atl. 806, 808, 119 Pa. 108; *Shalters v. Ladd*, 21 Atl. 596, 597, 141 Pa. 349; *Pearce v. Rickard*, 26 Atl. 38, 39, 18 R. L. 142, 19 L. R. A. 472, 49 Am. St. Rep. 755; *Ridley v. McPherson*, 43 S. W. 772, 773, 100 Tenn. 402; *Granger v. Granger*, 44 N. E. 189, 147 Ind. 95, 36 L. R. A. 186.

Since the rule in Shelley's Case has been abolished, the word "issue" is one of purchase, and not of limitation. *Whiting v. Whiting*, 44 N. W. 1030, 1031, 42 Minn. 548.

The word "issue," besides being, in common parlance, a word of more than one meaning, has also been the subject of much doubt and discussion as regards its legal signification, some of the judges being of the opinion that it was an apt word of limitation, while others were of opinion that it was presumptively a word of purchase. But the weight of authority being greatly against this last position, it has generally been abandoned. This is shown by the language of Judge Strong in *Angle v. Brosius*, 43 Pa. (7 Wright) 187, where he says: "The word 'issue' is well adapted for a word of limitation, having much more aptitude for such a use than it has to designate the objects of a gift. In signification, it very nearly resembles the technical phrase, 'heirs of the body,' and indeed the two were used as synonyms in the

statute de donis. Hence it has long been settled that when real estate is devised, by one or more limitations in the same will, to a person and his issue, the word "issue" will be construed as a word of limitation, so as to give the ancestor an estate tail, unless there are expressions in the will unequivocally indicative of a contrary intention." *Grimes v. Shirk*, 32 Atl. 113, 115, 169 Pa. 74. See, also, *Kleppner v. Laverty*, 70 Pa. (20 P. F. Smith) 70, 74; *Hilliker v. Bast*, 72 N. Y. Supp. 301, 302, 64 App. Div. 552; *In re James' Claim*, 1 U. S. (1 Dall.) 47, 48, 1 L. Ed. 31.

The word "issue," in a devise of real estate to testator's granddaughter and her "issue" and their heirs, and, if the granddaughter die before the age of 21 years leaving no issue then living, the property to pass to another, was construed to be used as a word of limitation and not a purchase, and therefore the will operated to pass an estate tail to the granddaughter, who lived until she became 21 years old, though she died without issue. The fact that in the natural course of events only one class of issue, namely, children, could have been intended in describing a contingency upon which the devise over was to take effect, does not show that the testator, in making the devise to the granddaughter and her issue generally, intended the word "issue" to be restricted to that class. *Harkness v. Corning*, 24 Ohio St. 416, 425.

"Issue," in a will, means children, and is a word of purchase. It is not a technical expression, implying, prima facie, words of limitation, but will yield to the intention of the testator, to be collected from the words of the will. The word does not have such a technical meaning in a will as in a deed or a grant. *McPherson v. Snowden*, 19 Md. 197, 228.

"Where an estate is limited to one and his issue, it amounts only to a description of that issue, for 'issue' is more properly a word of description than limitation. There can be no question but by this devise to Edward, and to his issue, he had an estate tail, because it is limited over, and, for want of such issue, then to another. A devise to one and to his issue is not restrained to the first one, but extends to all the issues in infinitum (for issue is nomen collectivum), descending from the devisee." *Goodright v. Wright*, 1 Strange, 25, 29.

In a devise to testator's son for life, and at his death the use and occupancy to be continued to his issue, the word "issue" is a word of limitation and not a word of purchase, and gives the devisee an estate in fee simple. *Armstrong v. Michener*, 28 Atl. 447, 448, 160 Pa. 21.

"Her issue," as used in a will authorizing a trustee to sell property and invest the pro-

ceeds thereof on good real or other security, and pay the interest to testator's daughter and her issue, if there be any, are words of limitation. They direct as to how the estate shall pass after the death of the mother—that it shall pass to her issue. *Atkinson v. McCormick*, 76 Va. 791, 796.

The word "issue," when used as a word of purchase, and where its meaning is not otherwise defined by the context, and there is no indication that it was used in any other than its legal sense, comprehends all persons in the line of descent from the ancestor, and has the same meaning as "descendants." And while it embraces the children of an ancestor, it is because they are descendants in common with all other persons who can trace direct descent from a common source. *Soper v. Brown*, 32 N. E. 768, 769, 136 N. Y. 244, 32 Am. St. Rep. 731.

#### As word of purchase in deed.

The word "issue," in a deed, is always a word of purchase. Thus a grant to a man and the issue of his body gives him but a life estate. *In re Bacon's Estate*, 52 Atl. 135, 138, 202 Pa. 535.

The word "issue," used in a deed, is construed to be a word of purchase, where it occurs without any controlling or modifying expression used in connection with it. *Thomas v. Higgins*, 47 Md. 439; *Price v. Sisson*, 13 N. J. Eq. (2 Beas.) 163, 177.

The word "issue," when used in a will, may be a word of purchase or a word of limitation, depending on the testator's intention as expressed in the context; but when used in a deed it is always a word of purchase. *McIlhinny v. McIlhinny*, 37 N. E. 147, 148, 137 Ind. 411, 24 L. R. A. 489, 45 Am. St. Rep. 186 (citing *Elph. Interp. Deeds*, 318, 319; *Bagshaw v. Spencer*, 2 Atk. 582; *Doe v. Collis*, 4 Term R. 299; *Bowles' Case*, 11 Coke, 79b; 11 Am. & Eng. Enc. Law, 876, 877, and authorities there cited; 2 Washb. Real Prop. [5th Ed.] top pp. 654, 655). In deeds and marriage settlements it is also treated as a word of purchase. *Ridley v. McPherson*, 43 S. W. 772, 773, 100 Tenn. 402.

"Issue," in a will, is either a word of purchase or inheritance, as will best answer the intention of the testator. Thus, in a deed, it is always taken as a word of purchase. Where a testator bequeathed certain land to his daughter, to have the rent and profit during her life, but without power of alienation, and provided that if she died leaving surviving any issue of her body the land should go to such issue, it was held that the word "issue" was a word of purchase, not equivalent to the word "heirs," and limits the first demised estate to a life estate. *In re McDonnell's Estate* (Cal.) Myr. Prob. 94, 95.



**As word of representation.**

The words "issue or children," as used in a devise to the issue or children of testator's two daughters who may then be living, to be equally divided among all such "issue or children," share and share alike, did not mean child or children, and all the issue of the daughters took per stirpes. *Hall v. Hall*, 2 N. E. 700, 701, 140 Mass. 267.

"Issue," as used by a testator in bequeathing a fund in trust to his son for life, and at his son's death to "his issue absolutely," should he leave any, and, if the son should die leaving no issue, the remainder to certain named beneficiaries, means lineal descendants taking by way of representation. *Hills v. Barnard*, 25 N. E. 91, 96, 98, 152 Mass. 67, 9 L. R. A. 211; *In re Cornell* (N. Y.) 5 Dem. Sur. 88, 89.

**ISSUE (In Practice).**

See "At Issue"; "Collateral Issue"; "Facts in Issue"; "Feigned Issue"; "General Issue"; "Immaterial Issue"; "Material Issue"; "Matter in Issue"; "Special Issue."

Sir Matthew Hale, in defining an "issue," says: "When, in the course of pleadings, they come to a point which is affirmed on one side and denied on the other, they are then said to be in issue." In 3 Bl. Comm. 313, it is said: "Issue is when both the parties join upon somewhat that they refer unto a trial to make an end of the plea." Where no plea or denial has been entered controverting the allegations of a declaration, there is no issue. *White v. Emblem*, 28 S. E. 761, 762, 43 W. Va. 819.

An "issue" is a single, certain, and material point arising out of the allegations or pleadings of the plaintiff and defendant. *Barth v. Rosenfeld*, 36 Md. 604, 617; *Richardson v. Smith*, 30 Atl. 570, 571, 80 Md. 94. And, generally, should be made up of an affirmative and negative. *Marshall v. Haney* (Md.) 9 Gill, 251, 258. It cannot be formed by a mere parol denial by one party of an allegation of the other. *Avon Mfg. Co. v. Andrews*, 30 Conn. 476, 488.

An "issue," in pleading, is a question, either of fact or of law, raised by the pleadings, disputed between the parties, and mutually proposed and accepted by them as the subject for decision. *Riggs v. Chapin*, 7 N. Y. Supp. 765, 767 (citing *Tyler*, Steph. Pl. 147).

An "issue" is a single material point of law or fact depending in the suit, which, being affirmed on the one side and denied on the other, is presented for determination. *People v. Slauson*, 83 N. Y. Supp. 107, 108, 85 App. Div. 166.

The word "issue," when used with reference to pleadings, signifies the disputed point in question. *Seller v. Jenkins*, 97 Ind. 430, 438.

"Issue" means a claim on one side, denied by the other. *Hays v. Hays* (N. Y.) 23 Wend. 363, 370.

Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and controverted by the other. *Ann. Codes & Sts. Or.* 1901, § 109; *Code Civ. Proc. Cal.* 1903, § 588; *Ann. St. Ind. T.* 1899, § 3229; *Clark's Code N. C.* 1900, § 391; *Balinger's Ann. Codes & St. Wash.* 1897, § 4962; *Rev. St. Wyo.* 1899, § 3602; *Leach v. Pierce*, 93 Cal. 614, 619, 29 Pac. 235; *First Nat. Bank v. Swan*, 23 Pac. 743, 749, 3 Wyo. 356; *McDermott v. Halleck*, 69 Pac. 335, 336, 65 Kan. 403; *Hume v. Woodruff*, 38 Pac. 191, 26 Or. 373.

In *Greenl. Ev.* § 51, it is laid down that the pleadings at common law are composed of the written allegations of the parties, terminating in a single proposition, distinctly affirmed on one side and denied on the other, called the "issue." *Hong Sling v. Scottish Union & National Ins. Co.*, 27 Pac. 170, 171, 7 Utah, 441; *Marshall v. Haney* (Md.) 9 Gill, 251, 258.

"Issue" is the question in dispute between the parties to the action and in the courts that is required to be presented by proper pleadings. *New York & Texas Land Co. v. Votaw*, 42 S. W. 138, 141, 16 Tex. Civ. App. 585.

The rule that in order to constitute a former judgment an estoppel, or, in other words, to render it conclusive on any manner, it is necessary that it should appear from the record itself that the precise point was "in issue and decided," refers and can only be practically applied to instances of special pleading where there is a precise averment on the one side and a precise denial on the other. *Supples v. Cannon*, 44 Conn. 424, 427.

The phrase "thereupon the court must try the issue" does not necessarily indicate that the proceeding with reference to which it is used is a suit in equity and not an action at law, since actions at law are often triable to the court without intervention of the jury. *Fenstermacher v. State*, 25 Pac. 142, 143, 19 Or. 504.

**As action.**

In a stipulation that a temporary injunction should be vacated, that the issues be referred to a referee named, and that, if the issues should be finally determined in favor of plaintiff, defendant should do certain things, the word "issues" is used in the sense of "action," and hence the determination of

the issues is not final on the mere determination of the referee, but a right to appeal is implied. *Laney v. Rochester Ry. Co.*, 30 N. Y. Supp. 893, 894, 81 Hun, 346.

**As issue of both law and fact.**

"Issue," as used in Rev. St. 1899, §§ 1549, 1550, providing for costs after verdict on any issue in the case, means not merely an issue of law, but of fact too, for the statutes authorize the discretionary taxation of costs, not only when a pleading, or part of it, is adjudged insufficient, but also when "any issue in the case" or "any issue joined" shall be found against the party tendering it. An issue of law arises on a demurrer to a pleading or on an uncontroverted allegation, and an issue of fact on a material allegation of the petition controverted by the answer, or of the answer controverted by the reply. *Schumacher v. Mehlberg*, 70 S. W. 910, 911, 96 Mo. App. 598.

**As matter in dispute.**

Rev. Laws, §§ 1001, 1003, provide that, when one of the original parties to the contract in issue and on trial is dead, the other shall not be admitted to testify in his own favor, except, etc. Held, that the words "contract in issue," as used in the statute, meant the same as "contract in dispute" or in question, and relate as well to the substantial issues made by the evidence as to the mere formal issues made by the pleadings. *Hollister v. Young*, 42 Vt. 406, 408, *Pember v. Congdon*, 55 Vt. 58, 59. *Barnes v. Dow*, 10 Atl. 253, 263, 59 Vt. 530.

The word "issue," in the law of pleading, means the point in dispute between the parties on which they put their cause to trial. And hence, where the title to real estate is the sole or principal thing to be determined, as in the former action of ejectment, there the title to real estate is "in issue," within the meaning of the act establishing the courts of common pleas, and those courts have no jurisdiction. Where the chief purpose of the action is not to determine title, and such question only arises incidentally, as in partition, the jurisdiction exists. *Wolcott v. Wigton*, 7 Ind. 44, 48.

**As matter put in issue by pleadings.**

Under a provision of the practice act that, when one party to an action files interrogatories to be answered on oath by the adverse party, the party interrogating may introduce into his answer any matter relevant to the issue to which the interrogatory relates, and may require that the whole of the answers upon any one subject-matter inquired of shall be read if a part of them is read, it is held that the issue and subject-matter mentioned in the statute is not the particular fact covered by any one or more interrogatories, but the matter put in issue by the

pleading. *Churchill v. Ricker*, 109 Mass. 209, 211.

**As nomen collectivum.**

The word "issue" is often used as a nomen collectivum. The "issue joined" between parties may embrace various distinct grounds of defense. Consequently, where the defendant pleaded two distinct pleas to the declaration, upon each of which issue was taken, it was not error that the jury was sworn to try the "issue," and that their verdict was that they found the "issue" in favor of the plaintiff, instead of using the word in the plural number. *Pointer v. Rust*, 28 Tenn. (7 Humph.) 532, 533.

**Particular question of fact distinguished.**

A "particular question of fact" which may be submitted to a jury for a special finding is something different from, and less than, an issue. So that a request that a jury give a special verdict in writing upon certain issues was properly refused. *Gale v. Priddy*, 64 N. E. 437, 66 Ohio St. 400.

**On preliminary hearing.**

Where a defendant had been arrested for a crime, the commissioner at the preliminary hearing, after having received the indictment against him as evidence, refused to receive evidence as to the question of guilt, on the ground that that would be trying an issue. The court held that there is no "issue" as respects the indictment until the defendants are committed, removed, and arraigned and plead not guilty. The inquiry before the commissioner was for the purpose of ascertaining whether there is sufficient ground to commit and remove the accused and oblige him to plead and stand trial, and to enable him under the state statute to arrest the proceedings in limine, if he can, by proving that there is no probable cause for the accusation. That was the only issue before the commissioner. *United States v. Greene* (U. S.) 100 Fed. 941, 944.

**ISSUE IN FACT.**

The words "issue in fact" are not necessarily the same as the phrase "issue of fact." An "issue in fact" may be either an issue of law raised by a demurrer, or of fact raised by a plea; but an "issue of fact" can only be on a plea presenting an issue to be decided by a jury or the court. *Blas v. Vickers*, 27 W. Va. 456, 463.

**ISSUE JOINED.**

As used in Rev. St. 953, providing that, if the plaintiff in any action die after issue joined and before final judgment, the said action shall not abate by reason thereof, the words "after issue joined" construed to mean

after the end of the pleadings. *Dickerson v. Stoll*, 24 N. J. Law (4 Zab.) 550, 551.

Under a statute providing that civil actions in which an issue has been joined and judgment rendered, except in cases otherwise provided, and such actions in which judgment has been rendered by agreement of parties, may be once reviewed, it is held that by the expression "issue joined" is meant an issue of fact reached by the parties, as distinguished from cases where the defendant does not plead or appear, and thus no issue is raised. *Solomons v. Chesley*, 57 N. H. 163, 164, 167.

There is in fact no issue joined until the milliter is filed, but it is held that the issue between the parties is raised without this. The act of filing it is merely formal. *Messer v. Smyth*, 60 N. H. 436, 439.

### ISSUE MALE OR FEMALE.

"Issue male," when used as words of limitation, are equivalent to "heirs male of the body"; but when not used in such sense, their natural and primary meaning, without explanation, is "male descendants." *Beckham v. De Saussure* (S. C.) 9 Rich. Law, 531, 546.

Where an estate was devised to M., "provided she leaving an issue male or female," and that, if she should "happen to die leaving no issue," then, etc., and that "the issue male or female" from the body of M. shall be next partaker, the words "issue male or female" meant the same as "heir of her body, whether male or female." *Emans v. Emans*, 3 N. J. Law (2 Penning.) 967, 971, 972.

The words "issue male and female," as used in a will by which testator gave property to his widow for life, with remainder to trustees to pay costs, and to divide the residue of the rents amongst all the testator's brothers and sisters living at the time of the widow's decease, and "to their issue, male and female," after the respective deceases of his brothers and sisters, forever, to be equally divided among them, were words of limitation and not of purchase, and the children of a sister of the testator who died in the lifetime of the widow took no interest. *Tate v. Clarke*, 1 Beav. 100, 105.

### ISSUE OF THE BODY.

"Issue of the body" is of the same meaning, and has precisely the same legal operation, as the expression "heirs of the body." *Zabriskie v. Wood*, 23 N. J. Eq. (8 C. H. Green) 541, 553; *Wynne v. Wynne*, 56 Tenn. (9 Heisk.) 308, 309.

"Issue" embraces all descendants, and is applicable to them as well in the lifetime of

the parent as after his death, so that as used in a deed conveying land to A., and after his death to the issue of his body, the words "issue of his body" are not synonymous with "heirs of the body," which embraces only a portion of the descendants, and does not embrace even them as long as the parent is living. *Bradford v. Griffin*, 19 S. H. 76, 77, 40 S. C. 468.

The words "issue of his body" are more flexible than the words "heirs of his body," and courts more readily interpret the former as the synonym of "children," and a mere descriptive personarum, than the latter. *Daniel v. Whartenby*, 84 U. S. (17 Wall.) 639, 21 L. Ed. 661. In *Carpenter v. Van Olinder*, 127 Ill. 42, 19 N. E. 868, 2 L. R. A. 455, 11 Am. St. Rep. 92, we construed the words "issue of their bodies" as meaning children. In *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 589, it was said that the words "issue" and "children" might be construed interchangeably in order to effectuate the intention of the testator. In *Summers v. Smith*, 127 Ill. 645, 21 N. E. 191, it was said that every part of the will might be taken into consideration for the purpose of showing that the words "heirs of body," which are less flexible than the words "issue of body," are used synonymously with "children." And in the *Summers Case* it was held that the words "dying without heirs of body" meant "dying without leaving such heirs of body as the estate would have vested in, in fee, instantly upon the death of the first taker, as children," etc. *Strain v. Sweeny*, 45 N. E. 201, 202, 163 Ill. 603.

A father conveyed to his son certain land during his life, and after his death to the lawful begotten "issue of his body, and should he die without leaving such issue, or should such issue die without leaving issue, then the said lands to return to my children or their lawful issue." Held, that the words "issue of the body" should be construed as denoting an indefinite succession of lineal descendants who are to take by inheritance. *Holman v. Weaner*, 45 S. H. 203, 207, 67 S. C. 307.

Under a deed conveying the land to M. in trust for his wife and the "issue of his body," the word "issue" means and was intended to describe the child or children of the donor, and so the only child of them was the sole beneficiary, and her children had no interest. *Park v. Humpich* (Ky.) 47 S. W. 768.

One not of the blood of the testator who has been designated an heir under favor of Rev. St. § 4182, is not "issue of the body" of such testator within the meaning of section 5915, providing that certain bequests executed within one year of the decease of the testator are void if testator dies leaving issue of his body. *Theobald v. Fugman*, 60 N. E. 606, 608, 64 Ohio St. 473.

# ISSUE OF FACT.

An issue of fact arises (1) upon a material allegation in the complaint, controverted by the answer; or (2) upon new matter in the answer, controverted by the reply; or (3) upon new matter in the reply, except an issue of law is joined thereon. Clark's Code N. O. 1900, § 393; Ann. Codes & St. Or. 1901, § 111.

An issue of fact arises: First, upon a material allegation in the complaint, controverted by the answer; second, upon new material in the answer, except an issue of law is joined therein. Comp. Laws Nev. 1900, § 3250.

An issue of fact arises (1) upon a plea of not guilty, or (2) upon a plea of a former conviction or acquittal of the same crime. Or. Code N. Y. 1903, § 354.

An issue of fact arises on a material allegation in the complaint controverted by the answers, or upon new matter or a set-off controverted by the reply, or upon new matter in the reply. J. F. Hart Lumber Co. v. Rucker, 50 Pac. 484, 485, 17 Wash. 600 (citing 2 Hill's Code, § 409, subd. 8); McDermott v. Halleck, 69 Pac. 335, 336, 65 Kan. 403 (citing Code Kan. art. 14).

An issue of fact arises when the allegations in an indictment are denied by the defendant, or the allegations of any subsequent pleading are controverted. State v. Brown, 63 Mo. 439, 444.

An "issue" is defined as a single, certain, and material point arising out of the allegations or pleadings of the parties, but generally made by an affirmative allegation and denial. Whenever the parties come to a point in the pleading which is affirmed on one side and denied on the other, they are said to be "at issue"; and, when a material fact is thus affirmed and denied, an issue of fact is formed for trial, and its determination usually results in a judgment for one party or the other. The entry of judgment on stipulation of the parties, where the only evidence had is in regard to the execution of the stipulation, is not a trial of an issue of fact within the meaning of Rev. St. Ill. 1889, c. 37, § 25, allowing appeals from the Appellate Court in certain cases. Washington v. Louisville & N. R. Co., 26 N. E. 653, 654, 136 Ill. 49.

An "issue of fact" consists of an assertion on one side and a denial of that assertion on the other, and the fact that the denial is in the affirmative makes no manner of difference; and where plaintiff in a contract under seal alleged nonpayment of the sum agreed on, and defendant in his answer pleaded non est factum and payment, it created an issue of fact. McCart v. Regester, 13 Atl. 361, 363, 68 Md. 429.

By "issues in fact" are meant questions in fact, as distinguished from questions in

law, which the result of the proceedings in each case show to be in dispute or controversy between the parties. When the facts constituting the rights violated or duty neglected are alleged upon one side and denied upon the other, they form the issue to be tried by the jury; but when such facts are admitted there is no issue to be tried by a jury, and the plaintiff's right to damages stands confessed, and its determination does not constitute a trial. Dean v. Willamette Bridge Co., 29 Pac. 440, 442, 22 Or. 167, 15 L. R. A. 614.

The phrase "issue of fact," as used in Const. art. 11, § 13, providing for a waiver of jury trial in all issues of fact, includes not only such issues as are made up by the pleadings, but also those in a compulsory reference and similar ancillary proceedings. State v. Brown, 70 N. O. 27, 30.

The expression "issue of fact," as used in the definition of a "new trial" as a "re-examination of an issue of fact," used in its broadest sense would include every issue of fact, whether arising upon formal pleadings or upon a motion. State v. District Court of Second Judicial Dist., 72 Pac. 613, 616, 28 Mont. 227.

## Question of evidence.

Within Rev. St. § 2538, requiring only questions relating to material issues of fact to be propounded to the jury in asking for a special verdict, the expression "issues of fact" excludes mere items of evidence tending to prove or disprove some material fact. Of course, in the trial of cases, many questions are put to witnesses which are material because the answers may tend to prove or disprove some issuable fact; but it does not follow that every question so put to a witness is in itself a material issue of fact, and to submit each of such questions to a jury would in many cases elicit from them nothing more than an abstract of the evidence. "An issue of fact," says Blackstone, "is where the fact only, and not the law, is disputed, and when he that denies or traverses the fact pleaded by his antagonist has tendered that issue." When, therefore, the section in question directs that special verdicts shall be submitted to the jury in the form of questions relating only to material issues of fact, it limits such questions to such facts as are controverted and put in issue by the pleadings, or, at most, to such as might properly have been put in issue by the pleadings; that is, issuable facts, in contradistinction to mere evidence. Eberhardt v. Sanger, 51 Wis. 72, 76, 8 N. W. 111.

## ISSUE OF LAW.

An issue of law arises only upon a demurrer. Pach v. Gilbert, 9 N. Y. Supp. 543, 547.

An issue of law arises on demurrer or an allegation of fact in a pleading by one party, not controverted by the other. *State v. Brown*, 63 Mo. 439, 444.

An issue of law arises upon a demurrer to the complaint, answer, or reply, or to some part thereof. *Ann. Codes & St. Or.* 1901, § 110; *Clark's Code N. C.* 1900, § 392; *J. F. Hart Lumber Co. v. Rucker*, 50 Pac. 484, 485, 17 Wash. 600.

An issue of law arises upon a demurrer to the complaint, or an answer as to some part thereof. *Comp. Laws Nev.* 1900, § 3249.

An issue of law arises upon a demurrer to the petition. *Code*, art. 14. And under *Code*, § 84, defining "pleadings" as written statements by the parties of the facts constituting their respective claims and defenses, which are limited to the petition, the answer, or demurrer, and the demurrer or reply by plaintiff, and the demurrer by defendants or reply, an issue is not raised by a motion for a new trial. *McDermott v. Halleck*, 69 Pac. 335, 336, 65 Kan. 408.

An objection that a declaration should not have counted against defendant jointly but separately is an issue of law to be raised only by demurrer. *Foster v. Leach*, 36 N. E. 69, 160 Mass. 418.

The issue of law named in *How. Ann. St.* § 9004, prescribing the fee fixed for the trial of an issue of fact if separate from the trial of the issue of law, is one framed upon the record. *Beem v. Newaygo Circuit Judge*, 97 Mich. 491, 492, 56 N. W. 760, 761.

### ISSUE OF MARRIAGE.

In a conveyance by deed of land to one as trustee for his wife and children, issue of their marriage, the expression "issue of their marriage" can mean nothing more or less than to designate the particular children of the trustee and his wife, so as not to include others which might possibly have been the issue of any former marriage, and will not include any children of the marriage born after the execution and delivery of the deed. *Hollis v. Lawton*, 32 S. E. 846, 848, 107 Ga. 102, 73 Am. St. Rep. 114.

### ISSUES (Of Property).

See "Rents, Issues, and Profits."

In a will by which a husband devised to trustees certain property, to collect the income, "issues," and profits thereof, and, after paying all necessary expenses and repairs, pay the income to his wife, the omission of the word "rents" in the gift to the life tenant has no special signification, for the reason that "income, issues, and profits" include the rents of the whole estate. The word "issues" is an apt term to indicate the rents and profits derived from realty. Ap-

peal of *Lindley*, 102 Pa. 235, 255, 13 Wkly. Notes Cas. 65, 69, 40 Leg. Int. 303.

A devise of half the "issues and profits" of land amounts to half the land. *Earl v. Rowe*, 35 Me. 414, 419, 58 Am. Dec. 714 (citing *Parker v. Plummer*, *Oro. Eliz.* 190).

### IT.

In *Pen. Code*, § 490, providing that the burning of a building under circumstances which show beyond a reasonable doubt that there was no intention to destroy "it" is not arson, the word "it" should be construed to mean not only the entire building, but "any part of it," the whole being put for a part under a figure of speech. *People v. Fanshawe*, 19 N. Y. Supp. 865, 871, 65 Hun. 77.

*Pen. Code*, art. 724, declares that to constitute theft there must be an intent on the part of the person taking the property at the time of the taking to deprive the owner of the property of the value of the same, and to appropriate "it" to the use or benefit of the person taking it. Held, that the word "it" should be construed as referring to the antecedent property. *Goodson v. State*, 32 Tex. 121 (cited in *Thompson v. State*, 16 Tex. App. 74).

An objection to the use of the word "it" in an allegation in an indictment that "defendant knew such statements to be false when he made it," in place of the word "them," is hypercritical and without merit. *Hollins v. State (Tex.)* 69 S. W. 594.

In construing the clause in a will directing that certain money be loaned out during the life of the wife of testator, and that at her death "it shall be divided" among certain legatees, the court said that the term "it" was intended to refer to both principal and interest in the sum so loaned. *Willett's Adm'r v. Rutter's Adm'r*, 1 S. W. 640, 642, 84 Ky. 317.

In a will giving to testator's wife the dwelling house in which they were living, and all there was therein, to have and to hold the same until her death, when "it" should go to testator's two daughters, with the exception of the organ, which should go to his son, "it" refers to the contents of the house only, and not to the house and contents, though it is not a correct word to describe the contents of the house, but it is no worse for that purpose than to describe both house and contents. *Hart v. Stoyer*, 30 Atl. 497, 499, 164 Pa. 523.

### IT IS CONSIDERED.

See "Consider"; "Consideratum Est Per Curiam."

The words "it is considered" are not sacramental words, and therefore they are not

essential to a judgment convicting a defendant of a crime. *State ex rel. Pringle v. Lake*, 34 La. Ann. 1069, 1070. See, also, to the same effect, *State v. Bassett*, 34 La. Ann. 1103, 1109, in which case the court held that the word "ordered," as used in a sentence, was equivalent to the words "it is considered."

The words "it is therefore considered by the court," in the sentence in a criminal cause, are the approved formal expression and judgment of the court pronouncing the sentence of the law, and are not a mere recital by the clerk of what the court did. *Lovett v. State*, 11 South. 172, 173, 29 Fla. 358.

#### IT IS HEREBY AGREED.

It is well settled that the words "it is hereby agreed" make of the words that follow a covenant. *Blood v. Crew Levick Co.*, 33 Atl. 344, 346, 171 Pa. 323.

#### IT IS SAID.

Where a lot of land is conveyed by boundaries, and it is stated in the conveyance that the contract contains a certain number of acres, "it is said" the whole tract will pass, although it contains more than the specified number of acres. *Mann v. Pearson* (N. Y.) 2 Johns. 37, 44.

#### IT'S NOT SO.

The meaning of the words "it's not so," uttered in the courtroom by a party to an action in response to the testimony of a witness, being susceptible of either an innocent or an offensive meaning, is for the jury. *Dedway v. Powell*, 67 Ky. (4 Bush) 77, 78, 96 Am. Dec. 283.

#### ITS OFFICE.

Where a bond given in Virginia to a New York building association, provided for the payment of the principal "at its office" in the city of New York, and a subsequent clause provided for the payment of interest "at its office," it was held that the latter phrase, "at its office," should be construed in connection with the former, and meant the payment of the principal at its office in the city of New York. *Ware v. Bankers' Loan & Investment Co.*, 29 S. E. 744, 745, 95 Va. 680, 64 Am. St. Rep. 828.

#### ITA QUOD.

"For time out of mind, conditions have usually been preceded by such words as 'proviso,' 'ita quod,' and 'sub conditione,' or their modern equivalents." *Graves v. Deterling*, 24 N. E. 655, 657, 120 N. Y. 447 (quoted in

*Trustees of Union College of Town of Schenectady v. City of New York*, 73 N. Y. Supp. 51, 53, 65 App. Div. 553).

#### ITEM.

An "item" is a separate particular of an account. *Lovell v. Sny Island Levee Drainage Dist.*, 42 N. E. 600, 602, 159 Ill. 188.

An "item," as used with reference to an itemized account, means an article, a separate particular in an account. *Baldwin v. Morgan*, 18 South. 919, 920, 73 Miss. 276.

As used in Const. art. 4, § 16, granting the government power to disapprove of any "item" or items of any bill making appropriations of money embracing distinct items, and a part or parts of the bill approved shall be void, the term "item" means the particulars, the details, the distinct and severable parts of the appropriation, and is used interchangeably in the same sense with the word "part." *Commonwealth v. Barnett*, 43 Atl. 976, 977, 199 Pa. 161, 55 L. R. A. 882.

#### In wills.

"Item" is the usual word in a will to introduce new distinct matter. *Horwitz v. Norris*, 60 Pa. 261, 282.

The word "item" in a will is introductory of a new clause, and divides, so far from connecting it with the precedent. *Casteldon v. Turner*, 3 Atk. 257, 258.

The word "item," or "further," or "moreover," is commonly used in the beginning of a separate devise or bequest in a will, merely for the purpose of indicating that it is the commencement of a new bequest, and not as connecting the preceding with the following bequest. *Burr v. Sim* (Pa.) 1 Whart. 252, 264, 29 Am. Dec. 43.

The word "item" is used to mark and distinguish the different clauses in a will. When the different portions of a will are separated by the word "item," words of limitation added in one portion cannot be carried over and applied to a devise in the second portion. *Edelen's Lessee v. Smoot* (Md.) 2 Har. & G. 235, 239; *Hoxton's Lessee v. Gardiner* (Md.) 1 Har. & McH. 437, 451.

"Item" is a general word in a will to introduce new distinct matter; therefore a clause thus introduced is not influenced by, nor to influence, a precedent or subsequent clause, unless it be of itself imperfect and insensible without reference. *Hopewell v. Ackland*, 1 Salk. 239; *Hart v. White*, 28 Vt. 260, 268.

The introduction of the word "item" shows that the testator is dealing with a new subject, and that the words following apply to that only, and not to the preceding matter, unless the intention that they should do so is

plain. *Ellam v. Westley*, 4 Barn. & C. 667, 669.

"Item," as used in a will, is not equivalent to "in the same manner." The word imports nothing more than "moreover," "beside," or "in addition thereto," and is used to show that what follows it is intended to be in addition to that which precedes, or otherwise. In other words, it is only made use of to distinguish the clauses in the will. *Evans v. Knorr* (Pa.) 4 Rawle, 66, 70.

The word "item" in a will has never been construed as disjunctive, but is only made use of to distinguish the clauses in the will. *Cheeseman v. Partridge*, 1 Atk. 436, 438.

#### ITEMIZE.

To "itemize" is to state in items or by particulars. *Lovell v. Sny Island Levee Drainage Dist.*, 42 N. E. 600, 602, 159 Ill. 188.

Under a city charter providing that no claim shall be audited against the city unless it is in proper and fully "itemized" form, a bill "for current expenses of the police department, \$200, police and all other salaries and current expenses," is not an itemized bill, and should not be audited or paid. An "itemized" account is one which states the items making up the aggregate of the demand. *State ex rel. Francis v. Smith*, 89 Mo. 408, 14 S. W. 557.

#### ITER.

In England an "iter" was a kind of public way over which the public passed on foot. *Boyden v. Achenbach*, 79 N. C. 539, 540.

#### ITINERANT.

One acting as agent in North Carolina for the sale of lightning rods manufactured in another state, and who puts up rods without extra charge whenever the purchaser requests it, is an "itinerant putting up lightning rods," within Acts 1893, c. 294, § 27, imposing a license tax "on every itinerant who puts up lightning rods." *State v. Gorham*, 20 S. E. 179, 115 N. C. 721, 25 L. R. A. 810, 44 Am. St. Rep. 494.

One who travels over the country selling patent rights or the privilege to sell such rights, though he has a definite residence in the state, is an "itinerant person" selling such rights and privileges, within the statutes thus defining a peddler. *Bohon's Assignee v. Brown* (Ky.) 49 S. W. 450.

The words "transient or itinerant," in a city charter authorizing a tax on "itinerant or transient" merchants, and steamboats or other vessels remaining in said corporation less than a year, are not to be accepted in

their broadest sense. If they were, they would embrace every merchant traveling to or passing through the city on his business, though his actual locality was elsewhere, and every vessel that might touch at the city, though driven there by stress of weather. The purpose was to subject to taxation property which, because of its incorporation with the property of the city, derived protection and benefit from the municipal government. Under this charter a ferryboat plying daily between the eastern shore of Mobile Bay and the city of Mobile in the transportation of freight and passengers, and returning each night to the eastern shore, where its owner resided, and from which it commenced its daily trips, was not liable to taxation as an itinerant or transient steamboat. *City of Mobile v. Baldwin*, 57 Ala. 61, 69, 29 Am. Rep. 712.

#### ITINERANT DEALER OR TRADER.

Within the meaning of a statute imposing a penalty upon any one engaged in or carrying on, without a license, the business of "a transient or itinerant" dealer in goods, other than that of a licensed peddler or traveling agent of a wholesale dealer in such articles, one who has gone from one county to another in the state, dealing in goods, is a transient or itinerant dealer, although he had sold goods at but one place in the county within which he was arrested. *Shiff v. State*, 84 Ala. 454, 457, 4 South. 419, 420.

As used in a city charter authorizing it to levy and collect such tax from itinerant traders who, by themselves or others, sold any goods, wares, or merchandise in the city, as to them should seem proper, the words "itinerant traders" should be construed as including merchants who ship bacon and corn from another city into such city to an agent who sells the goods so shipped by going about the city to engage it, and then delivering it from the cars or freight depot, and who has no store or warehouse or other place of business in such city. *Burr v. City of Atlanta*, 64 Ga. 225, 227.

The term "itinerant trader," within the meaning of the charter of Atlanta or the General Statutes, does not include a trader who opens a house within the city for the purpose of selling out therein a stock of goods, and who deposits in the house a large stock, and proceeds to sell it in the one place by auction or otherwise, and who does not convey any of the goods or carry samples thereof about in the city for the purpose of sale, exhibition, or taking orders. *Gould v. City of Atlanta*, 55 Ga. 678.

#### ITINERANT DOCTOR.

The expression "itinerant doctor," as found in Code, § 700, giving cities power to

license itinerant doctors, itinerant physicians and surgeons, is to be classed with the succeeding expression "itinerant physicians and surgeons," and both relate to those persons who in some form, or following some school, practice either medicine or surgery, or both. *City of Cherokee v. Perkins*, 92 N. W. 63, 69, 118 Iowa, 405.

#### ITINERANT MERCHANT.

Within Act June 16, 1877, authorizing cities to license "itinerant merchants," "itinerant merchants" cannot be construed as synonymous with "peddler," but includes a merchant shipping goods from city to city, and transacting his business in each place for only a few weeks, though he opens a store in each place, and during the time transacts his business as is done by other merchants. *City of Carrollton v. Bazzette*, 42 N. E. 837, 840, 159 Ill. 284, 81 L. R. A. 522.

The term "itinerant merchant," within the meaning of Elgin city ordinance prohibiting such merchants from pursuing their vocation within the city limits without a license, and defining itinerant merchants or transient vendors as including every person who goes from one city or village to another, stopping only a limited time in each for the purpose of selling goods, wares, or merchandise, does not include a person who goes from place to place soliciting orders for the enlargement and framing of pictures, to be paid for on delivery, if satisfactory. *Twining v. City of Elgin*, 88 Ill. App. 356, 357.

The terms "itinerant merchant" or "transient vendor of merchandise" in a municipal ordinance requiring itinerant merchants and transient vendors of merchandise to take out a license, do not include an employé of a foreign firm who solicits and takes orders for the sale of coffee, tea, and spices, to be delivered on a future day, to householders, for their own consumption, although the orders are taken and the goods delivered and paid for within the limits of the city. *City of Waterloo v. Heely*, 81 Ill. App. 310, 315.

One who delivers an article already sold, and collects the price, or who sells articles without traveling about, is not a peddler or itinerant merchant. *City of Greensboro v. Williams*, 32 S. E. 492, 493, 124 N. C. 167.

The occupation of the itinerant or transient merchant, or the mode of conducting it, closely resembles the business of hawkers and peddlers, and the methods generally practiced by them in disposing of their goods and wares. The transient merchant has no office or place of business, but migrates from town to town, remaining only long enough to dispose of his stock of goods. He is usually a stranger in the community where

he offers his goods and makes his sales, and is often wholly irresponsible. *Levy v. State*, 68 N. E. 172, 175, 161 Ind. 251.

An itinerant or unsettled merchant or trader, within the meaning of the act relating thereto, shall include every person, firm, or corporation, who, either in person or by agent, sells or offers to sell any goods, wares, or merchandise, then in the state, without any manifest intention of permanently settling, locating, or residing at some one place in the state, and who is not permanently located and regularly taxed therein. *Comp. Laws Nev. 1900*, § 1243.

#### ITINERANT MUSICIAN.

St. 1878, c. 244, § 2, providing that the board of police commissioners may also be empowered by the council to exercise certain powers in relation to licensing, regulating, and restraining "itinerant musicians," includes a person who plays the cornet in the streets as one of the participants in a procession or parade of the Salvation Army. *Commonwealth v. Plaisted*, 19 N. E. 224, 225, 148 Mass. 375, 2 L. R. A. 142, 12 Am. St. Rep. 566.

#### ITINERANT SALESMAN.

A person who solicits orders for stoves similar to a sample which he carries in his wagon is not an "itinerant salesman," nor a peddler exposing for sale goods on the street or in a house temporarily rented, within *Laws 1893*, § 23, imposing a tax upon peddlers and every itinerant salesman who shall expose for sale, either on the street or in a house rented temporarily for that purpose, goods, wares, or merchandise. *State v. Gibbs*, 20 S. E. 172, 173, 115 N. C. 700.

#### ITINERANT VENDOR.

As engaged in practice of medicine, see "Practice of Medicine."

The words "itinerant vendors" shall be construed to mean and include all persons, both principals and agents, who engage in a temporary or transient business in the state, either in one locality or in traveling from place to place selling goods, wares and merchandise, and who, for the purpose of carrying on such business, hire, lease or occupy any building or structure for the exhibition and sale of such goods, wares and merchandise. *V. S. 1894*, 4748.

The term "itinerant vendor," for the purposes of the chapter relating to itinerant vendors, hawkers, and peddlers, shall mean and include any person, either principal or agent, who engages in a temporary or transient business in the commonwealth, either in one locality or in traveling from place to place selling goods, wares, and merchandise,



and who, for the purpose of carrying on such business, hires, leases, or occupies a building or structure for the exhibition and sale of such goods, wares and merchandise. Rev. Laws Mass. 1902, p. 595, c. 65, § 1; Pub. St. N. H. 1901, p. 388, c. 46, § 1; Gen. St. Conn. 1902, § 4662.

A merchant having a permanent place of business within the state, who temporarily opens a store during the holiday season at another town, and there sells merchandise, is an itinerant vendor. *State v. Foster*, 22 R. I. 163, 165, 46 Atl. 833, 50 L. R. A. 339.

A traveling party, consisting of a physician, a comedian, and others, who hired a hall for two weeks, and held entertainments there to advertise a patent medicine, and sold bottles of such medicine during the entertainments and afterwards, are "itinerant vendors," within St. 1890, c. 448. Common-

wealth v. Newhall, 41 N. E. 647, 648, 164 Mass. 338.

A person who owns a drug store in one town of the state, which he superintends and personally manages a part of the year, but who during the rest of the year travels throughout the state selling his drugs and nostrums at county fairs, etc., is an itinerant vendor. To constitute an itinerant vendor it is not necessary that the person should travel all the time, and have no fixed place of sale. *Snyder v. Closson*, 50 N. W. 678, 84 Iowa, 184.

The term "itinerant vendor" includes any one who goes from place to place to peddle or retail goods, wares, or other things, without regard to the distance between the different places visited in so selling. *West v. City of Mt. Sterling (Ky.)* 65 S. W. 120, 122.

## J

## J. P.

The characters "J. P." indicate the office of Justice of the Peace. *Rowley v. Berrian*, 12 Ill. (2 Peck) 198, 200.

The initials "J. P." in the jurat of an officer will be construed to be a sufficient indication of his office as justice of the peace. *Hawkins v. State*, 36 N. E. 419, 136 Ind. 630.

The common and known use and appropriation of the letters "J. P." is to signify, in an affidavit, "Justice of the Peace," and is sufficient to show that one signing his name, followed by such letters, intended to designate his office. *Scudder v. Scudder*, 10 N. J. Law (5 Halst.) 340, 344.

The initials "J. P." following the signature of persons who have approved a recognition are understood to be an abbreviation of the term "Justice of the Peace." Such abbreviation is in common use, and clearly indicates that that office is intended, and it sufficiently appears that the bond was entered into before and approved by the justice. *Shattuck v. People*, 5 Ill. (4 Scam.) 477, 481.

A certificate of an alleged justice of the peace by whom a marriage ceremony was alleged to have been performed, containing the letters "J. P., C. Co. Ga." written after his name, held insufficient to prove his official character, there being no explanation in evidence as to the meaning to be attached to the letters J. P., C. Co. Ga. *Miller v. Miller*, 21 S. E. 254, 256, 43 S. C. 306.

## JACK.

The word "Jack" "prima facie at least stands for 'John.'" As used in an indictment of a man under the name of "Jack," it is sufficient to designate the defendant, though the given name of the holder is "John." *Walter v. State*, 5 N. E. 785, 787, 105 Ind. 589.

## JACK—JACKASS.

The condition in a shipping contract that the value of horses and mules does not exceed \$100 for each, and that the carrier should not be liable for loss or damage to a greater amount, was construed not to include a "jack." The court said: "The contention of counsel for defendant, that the word 'horse' is to be taken in a generic sense, and made to include the jack shipped over defendant company's road, is untenable. Horses and jacks are different animals, and the distinction is recognized by defendant in

its freight classifications. Horses and mules were taken at 2,000 pounds each, while stallions and jacks are charged for as weighing 3,000 to 4,000 each. The fixing of arbitrary weights for these animals, and the very fact that the term 'jack' is employed, instead of 'horse,' in naming the animal shipped, indicated that the parties did not use the term 'horse' in a general sense, so as to include all quadrupeds of a similar description." *Richardson v. Chicago & A. R. Co.*, 149 Mo. 311, 323, 50 S. W. 782-785.

"Mr. Webster, in his Unabridged and Illustrated Dictionary, defines a jackass to be a quadruped of the genus equus—that is, equus asinus—having a peculiar harsh bray, long, stretching ears, and being usually of an ash color, with a black bar across his shoulders. The tame or domesticated ass is patient to stupidity, and slow." Such animals are included in the term "horses" in statutes exempting horses from execution. *Robinson v. Robertson (Tex.)* 2 Willson, Civ. Cas. Ct. App. §§ 253, 254.

## JACTITATION.

"Jactitation" is a technical word of the medical profession, meaning an involuntary convulsive muscular movement. *Leman v. Manhattan Life Ins. Co.*, 15 South. 388, 389, 46 La. Ann. 1189, 24 L. R. A. 589, 49 Am. St. Rep. 348.

## JACTUS.

The word "jactus" is used in the maritime law to designate a portion of a cargo or vessel which is drawn overboard at time of peril for the purpose of preventing the loss of the vessel and cargo. It is also used to designate the act of throwing such goods overboard. *Barnard v. Adams*, 51 U. S. (10 How.) 270, 303, 13 L. Ed. 417.

## JAIL

See "County Jail"; "State Jail or Penitentiary"; "Sufficient Jail."

A jail is a house or building used for the purpose of a public prison, or where persons under arrest are kept. *State v. Bryan*, 89 N. C. 531, 534.

The word "jail" means any place of confinement used for detaining a prisoner. *Pen. Code Tex.* 1895, art. 242.

## City jail.

The word "jail," as used in *Pen. Code* 1895, § 227, punishing any person who shall

break into a jail, refers to and is intended as well to protect the calaboose or the city jail as the county jail. *Starks v. State*, 42 S. W. 379, 381, 38 Tex. Cr. R. 233.

#### **Dedication to public use.**

The words "court house and jail," used to designate a certain block on a plat of a town made in pursuance of Act June 14, 1839, requiring the president of the republic of Texas to appoint an agent, and survey into town lots certain lands, and to make plats of such survey, to be deposited in the general land office, was construed to operate as a dedication of the block to the county as long as the county may elect to occupy it for the designated purpose, but it was held that the fee remained in the state. *State v. Travis County*, 21 S. W. 1029, 1030, 85 Tex. 485.

A designation of certain blocks on a map of the city of Austin purporting to have been filed in 1840, when an act was in effect requiring certain eligible lots to be set aside for public purposes, which map was on file in the land office since 1850, was construed to show a dedication of such lot not to the republic of Texas or the city of Austin, but to the county of Travis, which alone could require such buildings. *Travis County v. Christian (Tex.)* 21 S. W. 119, 121.

#### **As house or public house.**

See "House"; "Public House."

#### **Workhouse.**

"Workhouses" and "jails," being both used for the purpose of penal confinement, are not unfrequently regarded as identical. *State v. Ellis*, 28 N. J. Law (2 Dutch.) 219, 220.

#### **JAIL BREAKING.**

As felony, see "Felony."

#### **JAIL CELL.**

As building, see "Building."

#### **JAIL LIBERTIES.**

A space of ground in a square, the center of each of whose sides shall be one mile distant from the jail, is declared as the liberties of the jail of each county of the state. Rev. St. Wis. 1898, § 4321.

#### **JAIL LIMITS.**

A bond was given to the sheriff by a prisoner in execution to remain a faithful prisoner within the liberties of the prison. The prisoner afterwards accidentally walked 16 feet over the prescribed limits, which in

many parts were bounded by an imaginary line, and returned immediately, without the knowledge of the sheriff, and before any action was brought. It was held that no action could be maintained on the bond, which was given for the indemnity only of the sheriff, and, this being a mere voluntary escape and voluntary return before action brought, the sheriff could not be damnified. *Dole v. Moulton (N. Y.)* 2 Johns. Cas. 205.

#### **JAIL YARD.**

The terms "debtor's liberties" and "jail yard" are used in the statutes relative to poor debtors as synonyms. *Codman v. Lowell*, 3 Me. (3 Greenl.) 52, 56.

#### **JANITOR.**

"A janitor is understood to be a person employed to take charge of rooms or buildings, to see that they are kept clean and in order, to lock and unlock them, and generally to care for them." *Fagan v. City of New York*, 84 N. Y. 848, 852.

#### **JAPANESE.**

As white person, see "White Person."

#### **JAS.**

"Jas.," as used in the name of a grand juror signed to an indictment, is equivalent to the name "James." *Stephen v. State*, 11 Ga. 225, 240.

#### **JEOPARDY.**

Plea of once in jeopardy, see "Once in Jeopardy."

"The signification of the word 'jeopardy' in its common use is exposure to death, loss, or injury, hazard, danger, peril." *State v. Connor*, 45 Tenn. (5 Cold.) 311, 317; *Ex parte Glenn (U. S.)* 111 Fed. 257, 258.

The word "jeopardy" is defined to be danger; to expose to loss or injury; peril. "Jeopardy" is to put in danger; expose to loss or injury. "Jeopardize" is putting in danger. The word "danger" is, then, the equivalent of "jeopardy." *United States v. Mays*, 1 Idaho, 763, 770.

"Jeopardy has been held to mean danger, peril, reasonable fear, and well-grounded apprehension." *United States v. Reeves (U. S.)* 38 Fed. 404, 406.

For a thing to be in jeopardy is in danger of being lost. The word suggests an even game, or a game in which the chances are even. *Gorman v. Banigan*, 46 Atl. 38, 41, 22 R. I. 22.

One is in jeopardy, within the meaning of the statute providing for the punishment of those who, in robbing the United States mail, put in jeopardy the life of the person having charge thereof, etc., when there is created in the mind of the person robbed a well-grounded apprehension of danger to his life in case of resisting or refusing to give up the mail, if his life is actually in danger, or if he really believes it to be so, the robbery is committed by putting his life in jeopardy. *United States v. Wilson* (U. S.) 28 Fed. Cas. 699, 708.

#### **JEOPARDY (In Criminal Law).**

Jeopardy, in its constitutional and common-law sense, has a strict application to criminal prosecution only. In *re McClaskey*, 37 Pac. 854, 858, 2 Okl. 568.

#### **Arraignment.**

Where a jury was impaneled and sworn to try an indictment before the defendant had been arraigned or had pleaded to the indictment, the defendant was not put in jeopardy, so as to preclude his trial by a new jury after he had pleaded. *United States v. Riley* (U. S.) 27 Fed. Cas. 810, 811.

A defendant in a criminal case cannot be said to be in "jeopardy," so as to entitle him to plead a final acquittal or conviction to a subsequent trial for the same offense, unless he has been arraigned, or waived arraignment, and pleaded not guilty, or had such plea entered for him; and therefore when a trial had been had without an arraignment of the accused or a waiver of it by him, and without a plea of not guilty, or the entry of it for him, he cannot be said to have been in jeopardy. *State v. Rook*, 59 Pac. 653, 61 Kan. 382, 49 L. R. A. 186.

#### **Award of punitive damages.**

An award of punitive damages for a tort which has been punished as a crime is not a violation of the constitutional provision that no person shall, for the same offense, be twice put in "jeopardy" of punishment. The prohibition against double jeopardy for the same offense uses the term "offense" in the sense of a criminal offense. The jeopardy in which the party is placed on the criminal trial is a jeopardy for the offense against the public, while the recovery in the action for tort is for the offense against the private individual who has been damaged. *Brown v. Swineford*, 44 Wis. 282, 287, 28 Am. Rep. 582; *Brown v. Evans* (U. S.) 17 Fed. 912, 915. Contra, see *Taber v. Hutson*, 5 Ind. 322, 325, 61 Am. Dec. 96; *Butler v. Mercer*, 14 Ind. 479; *Humphries v. Johnson*, 20 Ind. 190, 192; *Austin v. Wilson*, 58 Mass. (4 Cush.) 273, 274, 50 Am. Dec. 766.

The word "jeopardy" in its strict technical sense is applied only to criminal prose-

cutions by indictment, information, or otherwise, and does not apply to a suit in which vindictive damages may be awarded. *Smith v. Bagwell*, 19 Fla. 117, 123, 45 Am. Rep. 12.

The word "jeopardy," as used in the Constitution, providing that no person shall be twice put in jeopardy for the same offense, is used in its defined technical sense at common law, and in this use it is applied only to strictly criminal prosecutions by indictment, information, and otherwise, and this also includes the obtaining of exemplary damages in case of any action for which a person may be tried criminally; but, where a statute fixes the amount of liability which an officer will be subject to on his official bond in case of malfeasance in office, such liability is not in the nature of a punishment, and hence is not included within the meaning of the word "jeopardy." *State v. Stevens*, 2 N. E. 214, 217, 103 Ind. 55, 53 Am. Rep. 482.

#### **Bringing indictment or information.**

A party is put in jeopardy, danger, hazard, liability to be punished, by the commencement of a prosecution against him. The bringing in of an indictment is, to use the language of an eminent judge, an attack by the commonwealth upon the life or liberty of the person; but we believe that no authority can be found which maintains so broad a proposition as that the mere finding of an indictment constitutes the jeopardy referred to in the Constitution. It is everywhere conceded that the jeopardy there contemplated does not begin until a petit jury is sworn and charged with the offense; and if the jury be afterwards discharged on account of the illness or death of a juror or of the judge, or because that term of the court has expired, it is settled that the person has not been in jeopardy, and may again be put upon his trial. *State v. Nelson*, 26 Ind. 366, 368.

A defendant is not in legal jeopardy, within the meaning of the constitutional restriction, until he has been put upon his trial before a court of competent jurisdiction, upon an indictment or information which is sufficient in form and substance to sustain a conviction. Thus a plea of former jeopardy, which merely alleged that defendant had formerly been informed against for the same offense, but did not allege that he had been put on trial, was demurrable. *Klein v. State*, 60 N. E. 1086, 1087, 157 Ind. 146 (citing *Cooley*, Const. Lim. [6th Ed.] 899; *Rowland v. State*, 126 Ind. 517, 26 N. E. 485; *Dye v. State*, 130 Ind. 87, 29 N. E. 771).

#### **Change of judge.**

While one of the justices of the peace of the court organized under the act of 1832 for the trial of slaves withdrew from the bench after the trial was entered upon, and his

place was supplied by another, and for that cause a judgment of condemnation was reversed, the prisoner could not be said to have been in jeopardy, and he may be tried again. *State v. Abram*, 4 Ala. 272, 277.

#### Commencement of trial.

In the legal as well as the popular sense a prisoner is in jeopardy the instant he is called to stand on his defense. *Commonwealth v. Clue* (Pa.) 3 Rawle, 497, 501.

Jeopardy cannot begin before the case is open before the jury and the indictment read. *State v. Nash*, 14 South. 607, 608, 46 La. Ann. 194.

The books speak of the jeopardy of a prisoner commencing when the jury is sworn and charged with his trial. His jeopardy then arises from the fact that the court and the jury are a full tribunal fully organized, and have taken the prisoner in charge, and have entered upon the trial, which, if nothing interferes, may result in an acquittal or conviction; but, in the event that the jury or the court or the prisoner in the progress of the trial become unable to proceed with the trial, his jeopardy ceases. If it were known, when the trial was entered upon, that the judge would be stricken down or die, so that there would be no competent court to finish the trial, or that the panel would be disqualified by the sickness or death of one of the jurors, or that the jury would be unable to find the verdict, or that the respondent would be unable to proceed with the trial because of sickness, or escape from custody, the respondent would not be put in peril or jeopardy by the commencement of the trial. The jeopardy of the respondent by the commencement of such trial is dependent upon the presumption that the court or tribunal will remain legally organized to the end of the trial, and in the end pronounce a valid judgment for or against the respondent. *State v. Emery*, 7 Atl. 129, 131, 59 Vt. 84.

"Jeopardy," as the phrase is used at common law, means nothing more than that when there has been a final verdict, either of acquittal or conviction, on an adequate indictment, the defendant cannot the second time be placed in jeopardy for the particular offense; but, as used in the constitutional provision prohibiting a defendant from being twice placed in jeopardy, it has by many respectable authorities been held to mean more than the common law means: that the accused shall not be twice tried for the same offense, and that putting him on trial merely was putting him in jeopardy of life or limb. *State v. Connor*, 45 Tenn. (5 Cold.) 311, 315.

#### Conviction for distinct offense.

One charged with an assault with a deadly weapon with intent to commit bodily

injury was found guilty of battery, and on his appeal the judgment was reversed, and the cause remanded for a new trial. On the second trial he was found guilty as charged. Held that, since battery is not included within assault with intent to commit bodily injury, the first conviction did not operate as an acquittal of the charge of assault with intent to commit bodily injury, and that, therefore, his second trial under the indictment charging such offense did not put him twice in jeopardy for the same offense. *People v. Helbing*, 61 Cal. 620, 621.

#### Direction of verdict.

Jeopardy attaches when a defendant is placed upon his trial before a competent court and jury upon a valid indictment, unless the jury be discharged from rendering a verdict by legal necessity, or by his consent, or, in case a verdict is rendered, it be set aside at his instance. Thus, where a defendant was placed on trial for forgery, and the court erroneously excluded the instrument upon which the charge was based, and directed a verdict for the defendant, he was placed in jeopardy, and could not thereafter be tried for the same offense. *People v. Terrill*, 64 Pac. 894, 895, 132 Cal. 497.

Accordingly, where one was placed on trial for perjury, and the evidence showed that the trial in which he was alleged to have perjured himself occurred on the 11th of April, while the indictment charged the crime to have been committed on the 12th of April, and, in accordance with a peremptory instruction, the jury found him not guilty, jeopardy attaches. *People v. Webb*, 38 Cal. 467, 477, 480.

#### Discharge of jury.

A person is "in jeopardy" when put on trial under an indictment not defective, and hence a discharge of the jury without absolute necessity will sustain a plea of autrefois acquit. *O'Brian v. Commonwealth*, 72 Ky. (9 Bush) 833, 842, 15 Am. Rep. 715.

Jeopardy does not attach even after the jury has been impaneled and sworn, if they are discharged with defendant's consent. *People v. Travers*, 19 Pac. 268, 77 Cal. 176.

When a jury has once been impaneled and charged with the trial of the prisoner, the discharge of the jury, unless by the consent of the prisoner or in case of legal necessity, will operate as an acquittal, and prevent his being again put on trial. *State v. Connor*, 45 Tenn. (5 Cold.) 311, 315 (citing 1 Whart. Am. Cr. Law [5th Ed.] 573); *Pizano v. State*, 20 Tex. App. 139, 144; *Whitmore v. State*, 43 Ark. 271, 272; *People v. Webb*, 38 Cal. 467, 477; *People v. Terrill*, 64 Pac. 894, 895, 132 Cal. 497; *Robinson v. Commonwealth*, 11 S. W. 210, 211, 88 Ky. 386. Where the dismissal is necessary it does

not operate as a bar. For example, a juror may absent himself, or be taken sick or die; so, too, may the judge; or the prisoner may become too ill to proceed; or it may be impossible for the jury to agree upon a verdict. *Robinson v. Commonwealth*, 11 S. W. 210, 211, 88 Ky. 386. See, also, *People v. Travers*, 19 Pac. 268, 77 Cal. 178.

The accused in a criminal case can only be subjected to another trial, after the discharge of the jury, where he has consented to the discharge, or been guilty of such fraud in respect to the conduct of the trial that he was in no real peril, or where there is urgent necessity for the discharge, such as the death or serious illness of the presiding judge or a juror, the serious illness of the prisoner, the ending of term before verdict, or the inability of the jury to agree, after spending such length of time in deliberation as, in the opinion of the judge, sustained by the facts disclosed in the record, renders it unreasonable and improbable that there can be an agreement. *Mitchell v. State*, 42 Ohio St. 383, 386, 387.

On the completing and swearing of the panel, the indictment being good, and the preliminary things of record being perfect, jeopardy in the case begins; but where, after the jury was impaneled and sworn, and the indictment being read, the defendant was called on to enter his plea, and instead moved to quash the indictment whereupon the jury was discharged, and the indictment amended, the defendant was not in jeopardy. *Yerger v. State* (Tex.) 41 S. W. 621, 622.

#### Same—For illness, etc.

Jeopardy is not considered as attaching, although the jury has been sworn, if during the trial the presiding judge becomes so ill as to be unable to proceed. *Lovett v. State*, 14 South. 837, 838, 33 Fla. 389.

Defendant's jeopardy, after the jury is impaneled and sworn, is real unless it shall subsequently appear that a verdict could never have been rendered by reason of the death or illness of a judge or juror, or by reason of some other like overruling necessity, which compels their discharge without the consent of the defendant. *People v. Hunckeler*, 43 Cal. 331, 334. Such a necessity arises when the prisoner, by absenting himself, makes it impossible for the jury to render a verdict in the case, and hence, under such circumstances, no actual jeopardy ever attached. *People v. Higgins*, 59 Cal. 357, 358.

Jeopardy is not considered as attaching, although the jury has been sworn, if during the trial a juror's illness prevents him from sitting further on the trial. *Lovett v. State*, 14 South. 837, 838, 33 Fla. 389.

Jeopardy begins only when the panel is full. Sometimes, however, the jeopardy

is more apparent than real; as when, by reason of the sickness of the judge or of a juror, the trial is prevented and falls. In the case of the sickness of a juror it falls because of his discharge when his condition requires it, which discharge reduces the jurors below the number necessary to make a panel full, and compels the parties to begin the trial anew. In such case the discharge of the juror does not entitle the defendant to a discharge. *Mixon v. State*, 55 Ala. 129, 132, 28 Am. Rep. 606.

Where the illness of a juror after the impaneling of the jury is proved by his own and his physician's evidence, the court was authorized to discharge the entire panel, and to immediately call the case again for trial, and such action did not put the prisoner twice in jeopardy for the same offense. *Doles v. State*, 97 Ind. 555, 557.

Code Cr. Proc. art. 737, providing that the jury in a felony case may be discharged where a juror becomes so sick as to prevent a continuance of his duty, or where any accident or circumstance occurs to prevent their being kept together, is not in conflict with Const. art. 1, § 14, declaring that no person shall be twice put in jeopardy of life and liberty for the same offense; and the serious illness of a child of one of the jurors, and the probability that it would die, created such necessity as justified a discharge of the jury. *Woodward v. State*. 58 S. W. 185, 189, 42 Tex. Cr. R. 188

#### Same—For inability to agree.

A discharge of the jury when the court is satisfied that there is no reasonable probability that the jury can agree pretermits the jeopardy as effectually as would a discharge from legal necessity evidenced by physical facts alone. *Ex parte McLaughlin*, 41 Cal. 211, 215, 10 Am. Rep. 272 (citing *Commonwealth v. Purchase*, 19 Mass. [2 Pick.] 521, 13 Am. Dec. 452; *People v. Goodwin* [N. Y.] 18 Johns. 187, 9 Am. Dec. 203; *Hoffman v. State*, 20 Md. 425; *State v. Updike* [Del.] 4 Har. 581; *State v. McKee* [S. C.] 1 Bailey, 651, 655, 21 Am. Dec. 499; *Williford v. State*, 23 Ga. 1; *State v. Barrett*, 35 Ala. 406; *Price v. State*, 36 Miss. 531, 533, 72 Am. Dec. 195; *Dobbins v. State*, 14 Ohio St. 493; *State v. Walker*, 26 Ind. 346; *State v. Nelson*, 26 Ind. 366. Contra, see *Commonwealth v. Cook* [Pa.] 6 Serg. & R. 577, 9 Am. Dec. 465; *Commonwealth v. Clue* [Pa.] 3 Rawle, 498; *McCreary v. Commonwealth*, 29 Pa. [5 Casey] 323; *Williams v. Commonwealth* [Va.] 2 Grat. 567, 44 Am. Dec. 403; *State v. Ephraim*, 19 N. C. [2 Dev. & B.] 162; *Mahala v. State*, 18 Tenn. [10 Yerg.] 532, 31 Am. Dec. 591; *State v. Lovett*, 14 So. 837, 838, 33 Fla. 389.

The discharge of the jury, duly sworn, without a verdict, unless by consent of the accused, entered of record, must necessarily

result in an acquittal. Thus a prisoner once tried before a jury regularly impaneled, which failed to agree and was discharged by the court without the prisoner's consent, and without any actual imperious necessity, cannot be retried for the same offense. *Ex parte Glenn* (U. S.) 111 Fed. 257, 258.

The discharge of the jury without verdict after jeopardy attaches, unless by consent of the defendant, or through some unavoidable accident or necessity, is equivalent to an acquittal. Among those unavoidable necessities is the inability of the jury to agree after a reasonable time for deliberation, and the close of the term of court. The power of the court to discharge a jury by reason of their inability to agree is undisputed, but it must be exercised in accordance with legal rules and sound legal discretion. Accordingly, where a sheriff was ordered to proceed to the door of the jury room and inquire of them if they had agreed upon a verdict, and he reported that they could not agree upon a verdict, his report as to their inability to agree was extraofficial, and not evidence on which the court was authorized to decide that they were in fact unable to agree, and to discharge the jury before verdict. Such action by him was not based upon an unavoidable necessity, and had no effect to pretermitt the jeopardy of the defendant. *People v. Cage*, 48 Cal. 323, 324, 326, 17 Am. Rep. 436.

"Jeopardy" is the peril in which a defendant is put when he is regularly charged with crime before a tribunal properly organized and competent to try him. He must, under such circumstances, submit the sufficiency of his defense to the discretion of a jury of his peers. He is in their hands exposed to the danger of conviction, with all its consequences, or, in the language of the Bill of Rights, he is in jeopardy. From this jeopardy he is to be relieved, if relieved at all, by the verdict of the jury. Unless some overriding necessity arises after the jeopardy begins, the trial must proceed until it ends in a conviction or an acquittal. The mere inability of the jury to agree within a few hours or days is not such a necessity, nor is the fact that the regular term is approaching an end, for the courts have power to continue the term until the case can be properly ended; so that where, after five days, the jury still failed to agree, and were dismissed in a capital case, the defendant was in jeopardy, and could not be tried again. *Commonwealth v. Fitzpatrick*, 15 Atl. 466, 467, 121 Pa. 109, 1 L. R. A. 451, 6 Am. St. Rep. 757.

The rule now seems to be pretty well settled in the American courts that whenever the accused has been placed upon trial upon a valid indictment, before a competent court and a jury duly impaneled, sworn, and

charged with the case, he has then reached the jeopardy from the repetition of which this constitutional provision protects him, and provides that no person shall be subject to be twice put in jeopardy for the same offense, and therefore the discharge of the jury before verdict, unless with the consent of the defendant, or the intervention of some unavoidable accident, or some overruling necessity, operates as an acquittal; but the inability of the jury to agree upon a verdict is recognized as creating such a necessity. *Ex parte Maxwell*, 11 Nev. 423, 434.

It is well settled that a jury charged with a cause on an indictment for felony may be discharged of it without a verdict in cases of necessity, and the accused may be tried again for the same offense; and such acts do not constitute putting him twice in jeopardy within the meaning of the Constitution. The necessity which will authorize the discharge of the jury is not physical only. It is a moral necessity, arising from the impossibility of proceeding with the cause without producing evils which ought not to be sustained. According to the practice of England in ancient, if not modern, times, it may be doubtful whether the mere disagreement of a jury would constitute the necessity in question; for by that law the jury, after the cause is committed to them, are to be kept without meat or drink, fire or candle, until they shall have agreed; and, if this shall not be until the term of the court is closed, they may be made to follow the judge in carts to the next shire, and so until they shall have agreed. Under this severe coercion it will be rare that a jury withholds a verdict beyond a reasonable time, though it may well be doubted whether a verdict so obtained would do any honor to the administration of justice. This manner of dealing with juries is not practiced in this commonwealth. In all cases committed to them they are made as comfortable as circumstances will admit of; are accommodated with fire and light, and are allowed reasonable refreshments at proper intervals. Practically, as well as theoretically, there is now a trial by jury. The members of it are deemed to be sound and intelligent men. It is supposed that their minds and faculties are to be exercised on the subjects committed to them, and that their verdict is the truth, as found by the evidence submitted to them. This change in the manners of the times of necessity produces a change in the course of trials. If a jury cannot now be starved into a verdict, if they cannot be carried in the train of the judge from county to county, it seems necessarily to follow that when they have applied their minds to the case as long as attention can be useful, and have come to a settled opinion resulting in a disagreement, the cause must be taken from them; and

public justice demands that another trial be had. *Commonwealth v. Purchase*, 19 Mass. (2 Pick.) 521, 525, 526, 13 Am. Dec. 452.

#### **Same—On expiration of term.**

The adjournment of court, and the consequent discharge of the jury at the close of the term time, does not pretermit jeopardy properly attached, unless it is effectually proved that there was some necessity for such final adjournment. *People v. Cage*, 48 Cal. 323, 326, 17 Am. Rep. 436.

Whatever doubt may exist in other states, it is well settled here that submission to a lawful and legal jury and a subsequent willful or unlawful dismissal of that jury constitutes former jeopardy, and entitles the party to a final discharge. It is equally well settled that this effect will not follow when the discharge of the jury is compelled by a physical or legal necessity, as by the death or sickness of a juror, by the failure of the jury to agree after full and sufficient deliberation, or by the legal termination of the term. Some such necessity, however, must compel the discharge in order to make it permissible. The expiration of the term in a case where the cause was submitted to the jury at 9 o'clock at night on the last day of the term did not require the discharge of the jury at 12 o'clock, the Code providing that "when the trial or hearing of any case, civil or criminal, has been commenced and is in progress in any court, and the time for the expiration of the term as prescribed by law shall arise, the court may proceed with such trial or hearing, and bring it to a conclusion in the same manner and with the same effect as if the stated term had not expired." *Whitten v. State*, 61 Miss. 717, 722, 723.

#### **Dismissal of prosecution.**

Where an indictment was so defective that, if the defendant had been convicted under it, he could have had any judgment entered up against him reversed, there is no jeopardy, and the solicitor is authorized to ask for a nolle pros. and indict anew. *White v. State*, 49 Ala. 344, 347.

Where an indictment is dismissed by the prosecuting attorney with the presumed consent of the court, even after a jury is sworn to try the case, the accused is not, in a constitutional sense, either acquitted or put in jeopardy, and hence the first indictment is not a bar to a second. *Wilson v. Commonwealth*, 86 Ky. (3 Bush) 105, 106.

Being in jeopardy means a jeopardy which is real, and has continued through every stage of one prosecution, as fixed by existing laws relating to procedure. While such prosecution remains undetermined, the jeopardy has not been exhausted. The jeopardy is not exhausted by an indictment followed by a nolle after the trial has commen-

ced when the prisoner does not claim a verdict. Hence a plea of former acquittal or former conviction, not being a matter involved in the general issue, nor being matter which goes to the question of guilt, a judgment sustaining it cannot be in the nature of an acquittal, so as to constitute jeopardy. *State v. Ellsworth*, 42 S. E. 699, 700, 131 N. O. 773, 92 Am. St. Rep. 790.

Under the Constitution, providing that "no person shall, for the same offense, be twice put in jeopardy of life or limb," the question of difficulty is to ascertain when this jeopardy begins, because, until it does begin, it cannot be said to exist, and the constitutional protection cannot be invoked. Happily, the embarrassment that once incumbered this question has been long since removed. At an early day in the judicial history of this state this court settled the law to be that the unwarrantable discharge of a jury after the evidence is closed in a capital case is equivalent to an acquittal. *Bishop's Criminal Law* lays down the rule that when the jury, being full, is sworn, and added to the other branch of the court, and all the preliminary things of record are ready for the trial, the prisoner has reached the jeopardy from the repetition of which our constitutional rule protects him. During the trial the prosecuting officer is not authorized to enter a nolle prosequi, or, if he enters it, even with the consent of the judge, or if he withdraws a jurymen, and so stops the hearing, the legal effect is an acquittal. *Grogan v. State*, 44 Ala. 9, 13, 14. See, also, *Whitmore v. State*, 43 Ark. 271, 272.

If a person is indicted for manslaughter, and on his trial the court, without the consent of the defendant, discharges the jury because it is of opinion that the evidence shows that the defendant is guilty of murder, and the defendant is again indicted for murder for the same killing, he is "twice put in jeopardy for the same offense," and is entitled to an acquittal. *People v. Hunckeler*, 48 Cal. 331, 332.

Defendants have been placed in jeopardy when they have been tried for petty larceny, but the court, believing they have been guilty of a greater offense, which includes the crime charged, dismisses the case. They cannot be rearrested and tried for any offense involving the same facts. *People v. Ny Sam Chung*, 29 Pac. 642, 94 Cal. 304, 28 Am. St. Rep. 129.

The dismissal of a prosecution for felony, after the jury had been impaneled, by reason of a mistake as to which of several cases against defendant was being tried, was held not to constitute a former jeopardy. *Scott v. State*, 20 South. 468, 469, 110 Ala. 48.

#### **Failure to find on all counts.**

The language of the Constitution that no accused person shall be twice put in



jeopardy for the same offense embraces all indictments, whether for capital crimes or otherwise. It was formerly maintained in England that a jury, when once sworn in a criminal case—at least in a capital one—could not be discharged without returning a verdict. It would seem to follow from this doctrine that, should a jury be discharged, the defendant could not be again tried for the same offense. But the rule of law as thus laid down by Lord Coke has not been invariably followed. Many cases, both in this country and in England, have occurred in which, either by the consent of the defendant or from strong necessity, the jury have been discharged without rendering a verdict, and the defendant again put upon his trial. It is evident that, unless such were the law, the guilty would often escape punishment, and justice be defeated. But none of these exceptions are embraced in a case where the defendant was placed on trial under an indictment containing three counts, and the jury found him guilty on one count, making no mention of the other two. In such case the defendant was tried on the three counts, and, if the jury did not render a valid verdict in reference to the two counts not mentioned by them, the omission was not occasioned by the consent of the defendant, nor by the necessity of the case, and as to such two counts the defendant had been placed in jeopardy. Not having been found guilty, he was entitled to his discharge as to them, as much as though the jury had found him not guilty on such counts. *Weinzorpfen v. State* (Ind.) 7 Blackf. 186, 189, 190.

#### Judgment of forfeiture.

A judgment of forfeiture, entered against a vessel for an act of the master in bringing Chinese laborers from a foreign port and landing them in the United States, cannot be produced by the owner of the vessel in bar to an indictment for aiding and abetting the act of a master, such forfeiture not constituting jeopardy. *United States v. Olsen* (U. S.) 57 Fed. 579, 582.

#### Impanelling and swearing jury.

In general it may be said that jeopardy begins when a trial jury upon a sufficient indictment in a court of competent jurisdiction has been impaneled and sworn to try the cause. *Lovett v. State*, 14 South. 837, 838, 33 Fla. 389; *People v. Traversa*, 19 Pac. 268, 77 Cal. 176; *Pizano v. State*, 20 Tex. App. 139, 144, 54 Am. Rep. 511; *Williams v. Commonwealth*, 78 Ky. 93, 97; *Ex parte Glenn* (U. S.) 111 Fed. 257, 258; *State v. Sommers*, 61 N. W. 907, 60 Minn. 90; *Mixon v. State*, 55 Ala. 129, 132, 28 Am. Rep. 605; *People v. Webb*, 38 Cal. 467, 477, 480; *People v. Cage*, 48 Cal. 323, 324, 326, 17 Am. Rep. 436; *People v. Higgins*, 59 Cal. 357, 358; *Whitmore v. State*, 43 Ark. 271, 272. Jeopardy therefore attaches before, but ordinarily immediately preceding, the taking of

any step in the nature of a direct investigation into the truth of the charge. *Lipscomb v. State*, 25 South. 158, 163, 76 Miss. 223. When the jury has been charged with the prisoner's deliverance. *Moore v. State*, 50 Tenn. (3 Heisk.) 493, 509. And when all the machinery of the court has been fully organized for trial and judgment. *McKenzie v. State*, 26 Ark. 334, 343.

When a jury are impaneled on the trial of a person charged with a capital offense, and the indictment is not defective, his life is in peril or jeopardy, and continues so throughout the trial, and this is the legal understanding of the term as used in the Constitution, prohibiting that a person shall be twice put in jeopardy for the same offense. "Twice put in jeopardy" and "twice put on trial" conveys to the mind several and distinct meanings, for we can readily understand how a person has been put in jeopardy on whose case the jury have not passed." *In re Spier*, 12 N. C. (1 Dev.) 491, 502.

After the names of 49 jurors had been drawn from the box, which had contained 60, and 8 jurors had been separately sworn, it appeared that 11 of the paper pellets had been clandestinely removed, whereupon the court directed the clerk to prepare 11 pellets in place of those which had been removed, and again put all the pellets in the box, and that the drawing of the jury be commenced de novo. The defendant complained that the tendency of that order was to put him twice in jeopardy, and that the court had no power to make it. He was not in jeopardy at the time of making the order. The trial begins when the jury is charged with the defendant, and that is at the moment a full jury is impaneled and sworn. He is not in jeopardy before. Up to that point the court may postpone the trial as lawfully at one stage of the proceedings as another. A man is not in peril from the verdict of a jury until the full number are qualified to harken unto the evidence and make deliverance. *Alexander v. Commonwealth*, 105 Pa. 1, 9.

A person accused of crime is properly said to have been placed in jeopardy when a full and properly constituted jury is sworn and added to the other branch of the court, and all the preliminary things of record are ready for the trial. A party has not been placed in jeopardy until a full jury has been impaneled, set apart and sworn for that particular case. *State v. Robinson*, 15 South. 146, 46 La. Ann. 769 (citing *Wright v. State*, 7 Ind. 324; *Morgan v. State*, 13 Ind. 215; *McKenzie v. State*, 26 Ark. 334; *Hines v. State*, 24 Ohio St. 134); *Scott v. State*, 20 South. 468, 469, 110 Ala. 48.

#### Invalid indictment.

A party placed on a trial under an invalid indictment has not been put in jeopardy.

Kearney v. State, 48 Md. 16; People v. Travers, 19 Pac. 268, 77 Cal. 176.

An accused is not in jeopardy when placed upon trial under an indictment found by a grand jury illegally constituted. Finley v. State, 61 Ala. 201.

It would be a contradiction in terms to say that a person was in jeopardy by an indictment under which he could not be convicted; and so where one was put on trial under a second indictment, where during the trial under the first indictment, after the introduction of a witness for the prosecution, it appeared that there was a misnomer of the party injured, he was not twice in jeopardy within the meaning of the constitutional inhibition. People v. McNealy, 17 Cal. 332, 335.

After a jury was impaneled to try the defendant on his plea of not guilty to an indictment, at his request permission was given to him to withdraw his plea of not guilty and file a plea of misnomer in abatement, and the indictment was abated on that ground. He was thereby relieved from being put in jeopardy, and the proceedings in that case were, therefore, no bar to a subsequent prosecution for the same offense. Commonwealth v. Farrell, 105 Mass. 189, 191.

Where an indictment is quashed on demurrer, the defendant is not in jeopardy under it, and may be prosecuted under a second indictment for the same offense. State v. Gill, 33 Ark. 129, 181.

#### Same—Acquittal

To entitle a prisoner to the benefit of the plea of autrefois acquit it is necessary that the crime charged in the last bill of indictment be precisely the same as that charged in the first, and that the first bill of indictment is good in point of law. The true test by which the question whether such a plea is a sufficient bar may be tried is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. Therefore, where a prisoner was indicted and acquitted for stealing a note payable on demand at the "Merchants' and Traders' Bank of New Orleans," such acquittal was not a bar to a trial under a second indictment, charging him with having stolen a note, otherwise described in same words as in the first indictment, but payable at "Mechanics' and Traders' Bank of New Orleans." While the place of payment in a bank note charged to have been stolen need not have been stated, when it was stated it became material, and therefore evidence which would have been sufficient to convict under the second indictment would not have supported a conviction under the first. Elite v. State, 17 Tenn. (9 Yerg.) 357, 375.

"Jeopardy" is not synonymous with the words "twice put on trial," and there is a wide difference between a verdict given and jeopardy as a verdict. Whenever the jury are charged with the person, and the offense is punishable by death, and the indictment is not defective, he is in jeopardy of life, and accordingly, if discharged without a verdict, he cannot be tried again. But where a person is put on trial under a bad indictment he may be tried again, though acquitted, because his life was not in jeopardy, and the court could not have given judgment against him if he had been convicted. United States v. Gibert (U. S.) 25 Fed. Cas. 1287, 1300.

#### Same—Conviction.

Jeopardy of life is when one is put upon his trial upon a valid indictment for a capital offense. It may result in his condemnation. Hence he is in jeopardy. But a prisoner is never on his trial unless there is a good indictment, and therefore no judgment can be pronounced on a verdict of conviction if the indictment is not good. From the time the trial commences, it is a mere form that cannot result in his condemnation, and, if the indictment is not good, the prisoner is not in jeopardy. State v. Ray (S. O.) Rice 1, 5, 33 Am. Dec. 90.

Conviction on an insufficient indictment, and therefore set aside, is no bar to another prosecution for the same offense. The accused in such a case was never in jeopardy. Barring v. Commonwealth, 63 Ky. (2 Duv.) 93, 94.

#### Jurisdiction of court.

Though a competent jury has been impaneled and sworn, jeopardy does not attach if the court had no jurisdiction of the cause. People v. Travers, 19 Pac. 268, 77 Cal. 176.

A person is not in legal jeopardy until put on trial before a court of competent jurisdiction under an information or indictment sufficient in form and substance to sustain a conviction, and the jury has been charged with his deliverance; that is, impaneled and sworn. Though a defendant has been tried and convicted and sentenced and incarcerated in the penitentiary, he has not been in jeopardy where he is subsequently remanded to the trial court for further proceedings on the ground that such trial court had not jurisdiction. The incarceration does not have the effect of rendering such a trial a legal one, or investing jurisdiction, when in law it had never existed. In re McClaskey, 37 Pac. 854, 858; 2 Okl. 568.

Where a former trial for larceny was void by reason of the relationship of one of the members of the court to defendant,

it cannot be said that defendant was once in jeopardy, within the legal and constitutional meaning of that term, since it implies a verdict or a trial before some court possessing jurisdiction. *People v. Connor*, 36 N. E. 807, 808, 142 N. Y. 130.

#### **New trial or setting aside judgment.**

If a person be acquitted by a jury he cannot again, for the same offense, be placed upon trial, for this would be to put him in jeopardy within the direct terms of the Constitution. But where the defendant moved for a new trial after the jury had found him guilty, and new trial was granted, he may again be put on trial upon the same facts before charged against him, and the proceedings had will constitute no protection. *State v. Patterson*, 88 Mo. 88, 90, 57 Am. Rep. 374.

Jeopardy does not attach if, after a verdict against accused, it has been set aside on his motion for a new trial. *People v. Travers*, 19 Pac. 268, 77 Cal. 176.

Where a defendant is tried and convicted of a minor offense, the granting of a second trial on his own motion is not a violation of the constitutional provision against double jeopardy. *Johnson v. State*, 29 Ark. 31, 46, 21 Am. Rep. 154.

Jeopardy does not attach if, after a verdict against accused, it has been set aside on arrested judgment. *People v. Travers*, 19 Pac. 268, 77 Cal. 176.

#### **Preliminary proceedings.**

It is well settled under the Constitution that a man cannot be twice put in jeopardy of life or limb for the same offense. But one who has not been put upon his trial upon the merits before a legal court of competent jurisdiction has not legally been put in jeopardy. Therefore, if the circuit court erred in any judgment or ruling made at the instance of the defendant before a trial is reached upon the merits, he cannot be heard to complain if such error is corrected, and the case remanded for further proceedings. *State v. Cheek*, 25 Ark. 206, 207.

#### **Reversal of judgment.**

Jeopardy is not considered as attaching, although the jury has been sworn, if the defendant is erroneously convicted and obtains a reversal of judgment. *Lovett v. State*, 14 South. 837, 838, 33 Fla. 389; *People v. Travers*, 19 Pac. 268, 77 Cal. 176.

By "jeopardy," within the meaning of the Constitution, is meant lawful jeopardy from the commencement of the proceedings until their termination by a proper judgment and sentence or acquittal, or what the law regards as such. Where, either for want of jurisdiction, or from some defect in the

indictment, or from such error in the course of the proceedings, the verdict is set aside, or the judgment arrested on a writ of error brought by the defendant, or on a motion made by him, and he is tried again, he is not thereby put in jeopardy a second time. *Commonwealth v. Wheeler*, 2 Mass. 172, 174; *Commonwealth v. Peters*, 53 Mass. (12 Metc.) 387; *Commonwealth v. Roby*, 29 Mass. (12 Pick.) 496, 502; *Commonwealth v. Lahy*, 74 Mass. (8 Gray) 459; *Commonwealth v. Gould*, 78 Mass. (12 Gray) 171; *McKee v. People*, 32 N. Y. 239; *People v. McKay* (N. Y.) 18 Johns. 212; *State v. Walters*, 16 La. Ann. 400; *Jones v. State*, 15 Ark. 261; *Turner v. State*, 40 Ala. 21; *Gerard v. People*, 4 Ill. (3 Scam.) 362; *State v. Redman*, 17 Iowa, 329; *State v. Sutton* (Md.) 4 Gill, 494; *Cooley*, Const. Llm. (3d Ed.) 327; *Sedg. St. & Const. Law* (2d Ed.) 572, 573, note "a." In *McKee v. People*, 32 N. Y. 239, 245, it was held that the term has no relation to the reversal of an erroneous judgment, and pronouncing a legal one pursuant to a legal conviction. Accordingly, where a final judgment is reversed on account of an erroneous sentence, and the case remanded for a proper sentence, the resentence does not put the prisoner twice in jeopardy within the meaning of the Constitution, though he has served a part of his time under the original sentence. *Commonwealth v. Murphy*, 54 N. E. 860, 861, 174 Mass. 369, 48 L. R. A. 393, 75 Am. St. Rep. 353.

#### **Submission to jury.**

"Jeopardy" within constitutional provisions declaring that a man shall not be twice put in jeopardy for the same offense means that the case of the defendant was submitted to the jury, at which time jeopardy attaches. *Foster v. State*, 7 South. 185, 33 Ala. 182.

#### **Trial by judge.**

One who has been tried on a criminal charge before the judge, as contradistinguished from the court, has not been put in jeopardy within the meaning of the constitutional prohibition, since such proceeding was absolutely coram non iudice, and void. *Dunn v. State*, 2 Ark. (2 Pike) 229, 256, 35 Am. Dec. 54.

#### **Verdict received after term.**

When a valid indictment has been returned by a competent grand jury to the court having jurisdiction, and the defendant has been arraigned and pleaded, a jury has been impaneled and sworn and charged with the case, and all the preliminary things of record are ready for the trial, the jeopardy contemplated by the Constitution has then attached, and the defendant is entitled to verdict. When, in such a case, the verdict was received, and the judgment entered on the Monday after the term expired although

the record showed that the verdict was agreed upon during the term, and was not returned into court because of the absence of the judge, and the record failed to show any legal reason for such absence, or for the prolongation of the term beyond the regular time fixed by law, the reception of the verdict at that time was void, and the defendant, having been in jeopardy, is entitled to his discharge. *Morgan v. State*, 13 Ind. 215, 216.

### JEOPARDY OF LIMB.

"Jeopardy of limb," as used in Const. U. S. Amend. 5, which provides, "nor shall any person be subject for the same offense to be twice put in 'jeopardy of limb,'" refers to the nature of the offense—that is, to offenses which in former ages were punishable by dismemberment—and it comprises the crimes denominated in the law felonies. *People v. Goodwin* (N. Y.) 18 Johns. 187, 201, 9 Am. Dec. 203.

### JERK.

By "jerking a car in" is meant giving it a jerk with the engine and letting it run without the engine being attached to it. *Louisville & N. R. Co. v. Logsdon* (Ky.) 71 S. W. 905.

### JERKY.

A "jerky" is a concord mail wagon or canvas hack without windows, with canvas cover and sides. *Sanderson v. Frazier*, 5 Pac. 632, 635, 8 Colo. 79, 54 Am. Rep. 544.

### JETSOM.

Jetsom is when a ship is in danger of being sunk, and, to lighten the vessel, the goods are cast into the sea. *Lacaze v. Pennsylvania* (Pa.) Add. 58, 62.

### JETTISON.

See "Equitable Jettison."

As peril of the sea, see "Perils of the Sea."

Jettison means the throwing overboard of a portion or all of the cargo of the ship for the purpose of lightening it so that it may better endure the stress of weather. *Gray v. Walm* (Pa.) 2 Serg. & R. 229, 254, 7 Am. Dec. 642.

Jettison, in its largest sense, signifies any throwing overboard, but in its ordinary sense it means a throwing overboard for the preservation of the ship and cargo, and the term includes throwing property overboard or setting fire to a ship to prevent them

from falling into the hands of an enemy. *Butler v. Wildman*, 3 Barn. & Ald. 324, 326.

The word "jettison" is used in the maritime law to designate a portion of a cargo or vessel which is drawn overboard at time of peril for the purpose of preventing the loss of the vessel and cargo. It is also used to designate the act of throwing such goods overboard. *Barnard v. Adams*, 51 U. S. (10 How.) 270, 303, 13 L. Ed. 417.

A carrier by water may, when, in case of extreme peril, it is necessary for the safety of the ship or cargo, throw overboard or otherwise sacrifice any or all the cargo or appurtenances of the ship. Throwing property therefrom for such purpose is called "jettison," and the loss incurred thereby is called a "general average loss." Civ. Code Cal. 1903, § 2148. Rev. Code N. D. 1899, § 4214; Civ. Code S. D. 1903, § 1567.

### JEWEL—JEWELRY.

"Jewelry" is not found in any English dictionary, and is probably an Americanism. It is defined in Webster to be jewels in general. *Commonwealth v. Stephens*, 31 Mass. (14 Pick.) 370, 373.

"The word 'jewelry' is generally used as including articles of personal adornment, and the word imports that the articles are of value in the community where they are used. A belt of cowry shells, a necklace of bears' claws, a head ornament of sharks' teeth, though possessing no value in themselves, are esteemed valuable in the communities where they are worn; and we therefore constantly find them referred to in books written in the English language—books of travel, standard works, encyclopædias, and scientific dissertations upon sociology—we find those articles described in those books as jewelry. The articles of value used for personal adornment in our civilization are, and for centuries have been, the precious metals—gold and silver, to which, I think, platina is now generally added—and what are known as precious stones—the diamond, sapphire, ruby, etc. Articles manufactured from those for the purpose of personal adornment are known as articles of jewelry." *Robbins v. Robertson* (U. S.) 33 Fed. 709, 710.

#### Gems distinguished.

Jewels are valuable stones set and prepared for wear, and differ from gems in that the latter are kept for curiosity only. *Cavendish v. Cavendish*, 1 Brown's Ch. 409.

#### Personal ornaments.

Hat pins, hair pins, breast pins, buckles, and other similar ornaments adapted for personal use or otherwise, and composed of base metal or imitation of precious metals

and otherwise, some being set with imitation precious stones, are dutiable as jewelry. *A. Bader & Co. v. United States* (U. S.) 118 Fed. 541, 542.

#### Plate or silverware.

In a will by which testatrix gave her plate to certain grandchildren the word "plate" cannot be deemed to include her "jewels." Jewels cannot be deemed plate. *Conner v. Ogle*, 4 Md. Ch. 425, 454.

The term "jewels or ornaments" in Laws 1897, c. 305, relieving an innkeeper from liability from loss of money, jewels, or ornaments, where he furnishes a safe in the office of his hotel, posts notice, etc., and the guest neglects to deposit such articles in the safe, does not include silver table forks and a silver soup ladle. *Briggs v. Todd*, 59 N. Y. Supp. 23, 26, 28 Misc. Rep. 208.

#### Watch and chain.

"Jewels," as used in Laws 1855, c. 42, which exempts innkeepers who have provided a safe and posted notice of the fact in accordance with the act from liability for money, "jewels, and ornaments" of a guest not deposited in the safe, does not include a watch. It applies to certain property which is particularly valuable in itself; takes but small space, compared with its value, for its safe-keeping; is easy of concealment and removal; and which holds out great temptation to the dishonest, and is not necessary to the comfort or convenience of the guest while in his room. *Ramaley v. Leland*, 43 N. Y. 539, 541, 8 Am. Rep. 728.

A gold watch and chain worn by a traveler, and stolen from his room at a hotel, are not jewels or ornaments within the meaning of a statute providing that the proprietors of hotels shall not be liable for the loss of money, jewels, or ornaments of their guests when the proprietors have provided a safe for the deposit of such articles. Webster defines jewels as "an ornament of dress, in which the precious stones form a principal part." *Bernstein v. Sweeny*, 33 N. Y. Super. Ct. (1 Jones & S.) 271, 276.

Under an act exempting keepers of hotels from liability for jewels stolen in their establishments, unless the same are deposited for the purpose of being placed in the safe, a watch and chain and a gold pen and pencil case are not considered as jewels, but a part of the guest's personal clothing and apparel. *Gile v. Libby* (N. Y.) 86 Barb. 70, 77.

"Jewelry," as used in Tariff Ind. 459, does not include silk vest chains in which silk is the component of chief value. *Zimmerman v. United States* (U. S.) 69 Fed. 497.

A watch is not within the statute requiring a guest in a hotel, in order to charge the proprietor with the loss of money, "jewels," or ornaments, to deposit the same with the clerk for safe-keeping. *Becker v. Warner*, 85 N. Y. Supp. 739, 741, 90 Hun, 187; *Briggs v. Todd*, 59 N. Y. Supp. 23, 26, 28 Misc. Rep. 208; *Ramaley v. Leland*, 43 N. Y. 539, 542, 8 Am. Rep. 728. Even though a state coat of arms is engraved on the watch, and a picture of the guest's mother is on the inside of the case. *Briggs v. Todd*, 59 N. Y. Supp. 23, 26, 28 Misc. Rep. 208.

#### As wearing apparel.

See "Wearing Apparel."

### JOB.

The term "job" in Rev. St. § 8188, providing that a mechanic's or materialman's lien on oil wells, etc., may be obtained by several persons on the same job in the manner prescribed, etc., includes drilling or constructing an oil well. *Devine v. Taylor*, 4 O. C. Dec. 248, 250.

In a contract whereby one party agreed to put all the men at work on a certain building at a stipulated sum per day, and then put them at work to complete any carpenter's work the other party should wish at specified prices, including the work upon said building (being the making of a number of windows, door panels, etc.), the contract, after sundry recitals, concluding thus: "Finally when the job is finished the said S. will pay on settlement the balance," etc., such clause relates to the job or work specified in the contract to be done. It cannot be understood as referring to the finishing of the building, for that is not provided for or mentioned in any part of the contract. *Stickney v. Cassell*, 6 Ill. (1 Gilman) 418, 421.

### JOBBER.

See "Stock Jobber."

Dr. Webster defines a "jobber" to be a merchant who purchases goods from importers and sells to retailers. He differs from an auctioneer, who does not purchase at all, but sells the goods of others for a commission. *Steward v. Winters* (N. Y.) 4 Sandf. Ch. 587, 590.

### JOBGING BUSINESS.

See "Stock Jobbing."

"Jobbing business," as used in a lease for a store to be occupied for the regular dry goods "jobbing business," and for no other, cannot be construed to include the auction business. Dr. Webster defines a "job-

ber" to be a merchant who purchases goods from importers and sells to retailers. An auctioneer does not purchase at all. He sells goods of others for a commission. *Steward v. Winters* (N. Y.) 4 Sandf. Ch. 587, 590.

## JOCK

The word "Jock" is ordinarily only a diminutive name for "John." *Walter v. State*, 5 N. E. 735, 737, 105 Ind. 589.

## JOCKEY.

"Jockey," as contained in a condition for a race that the riders should be "gentlemen, farmers, or tradesmen never having ridden as regular jockeys or paid riders," means one who follows the business of a jockey for a livelihood, and did not apply to one who had been in the habit of riding at races, but had never been paid for his services, though he had sometimes received his expenses. *Walmsley v. Mathews*, 3 Man. & G. 133, 138.

## JOIN.

See "Issue Joined."

"Join and unite," as used in Rev. St. c. 114, § 19, authorizing a railroad corporation to cross, intersect, "join and unite" its railroad with any other railroad before constructed at any point on its route, merely authorizes the bringing together or forming of a physical union or connection between the tracks of the proposed road and those of the one already built, and did not mean that the railways may join in the use of any property, or co-operate together for any purposes. *Illinois Cent. Ry. Co. v. Chicago, B. & N. Ry. Co.*, 13 N. E. 140, 144, 122 Ill. 473.

"Join," as used in Laws 1875, c. 606, providing that every corporation formed thereunder shall have power to "join" and unite its railroad with another railroad, is synonymous with "united" or "connect," and such terms are used interchangeably. *Gallagher v. Keating*, 58 N. Y. Supp. 366, 370, 27 Misc. Rep. 131.

### Join in conveyance.

The word "join," as used in a statute requiring the husband and wife to join in the conveyance of the wife's separate property means must unite—that is, act together—in the execution of the deed. *Nolan v. Moore*, 72 S. W. 583, 96 Tex. 341, 97 Am. St. Rep. 911.

Act Ill. Feb. 22, 1847, requiring a non-resident married woman to join with her husband in the execution of conveyances of her property, is satisfied by the fact that both sign and properly acknowledge the

deed, though the wife's name appears only in the body thereof. *Schley v. Pullman Palace Car Co.*, 7 Sup. Ct. 730, 120 U. S. 575, 30 L. Ed. 789.

Within the meaning of the Arkansas statutes (Gantt, Dig. § 839) which provides that, to make a valid relinquishment of dower by the wife in the real estate of the husband, she must "join him in the deed of conveyance," and acknowledge it in the manner prescribed, etc., would include a case where the wife's name was not mentioned in the first part of the deed of conveyance, but the said deed closed with the following paragraph: "And I, E. G., wife of J. G., for the consideration aforesaid, do hereby release and relinquish unto the said R. T. all my right and claim to dower in and to said lands," the deed being signed by both the husband and wife. *Meyer v. Gosett*, 38 Ark. 377, 380.

Gen. St. 1878, c. 69, § 2, providing that no conveyance or contract for the sale of real estate or any interest therein by a married woman, except, etc., shall be valid unless her husband joins with her in such conveyance, means to unite as a party in the execution of the conveyance, and hence a mere consent by the husband to the execution by the wife to her sole conveyance is not sufficient. *Gregg v. Owens*, 33 N. W. 216, 217, 37 Minn. 61.

The word "join," as used in stating that a husband must join in a conveyance by his wife of the property of the latter or a mortgage thereof, "means to join in the execution." *Collins v. Cornwell*, 80 N. E. 796, 797, 131 Ind. 20.

## JOINDER.

In Rev. St. c. 61, § 1, providing that real estate directly or indirectly conveyed to a wife by her husband, or paid for by him, or given or devised to her by his relatives, cannot be conveyed by her without the joinder of her husband, the term "joinder" implies that the assent of the husband "is to be expressed in writing in her deed," but it is enough if he express his assent thereto under his own hand and seal in such conveyance without his being a formal party to the deed. *Bray v. Clapp*, 13 Atl. 900, 80 Me. 277, 6 Am. St. Rep. 197.

## JOINT.

"Joint" is defined as united; combined; done by or between two or more unitedly; shared by or between two or more. *Kansas City v. Fife*, 60 Kan. 157, 161, 55 Pac. 877.

The words "joint" and "general" import unity, as distinguished from the word "separate," which implies division and dis-

tribution. *Merrill v. Pepperdine*, 86 N. E. 921, 922, 9 Ind. App. 413.

Joint means, according to Bouvier, a common property interest enjoyed or a common liability incurred by two or more persons. As applied to real estate, it involves the idea of survivorship. *State v. Malck*, 89 N. W. 183, 186, 113 Wis. 239.

#### JOINT ADVENTURE.

A joint adventure is a limited partnership; not limited in a statutory sense as to liability, but as to its scope and duration. *Ross v. Willett*, 27 N. Y. Supp. 785, 786, 76 Hun, 211.

#### JOINT BALLOT.

The expression "joint ballot," as used in Const. art. 4, § 13, providing for the election of judges by "joint ballot" of the General Assembly, is used merely for the purpose of showing that the two branches of the body which are to elect are to act together, and not separately, as they do in performing their usual and ordinary duties. The term means jointly by ballot. *State v. Shaw*, 9 S. C. 94, 144.

#### JOINT BOND.

A joint bond is one executed and delivered by two or more persons jointly. If a bond on its face purport to be a joint bond, but is executed and delivered by one person only, it is his several bond, and if he sign thereto the names of all the obligors, but without their authority, it is good against him only. *Ogden v. Wood*, 16 N. J. Law (1 Har.) 453.

On a "joint bond" all the obligors must be sued, but on a "joint and several bond" a creditor may sue all jointly or one separately for the whole amount. It is the same as though all had given a joint bond, and each a separate bond, and the creditor could elect on which bond he would sue. *Municipal Court v. Whaley* (R. L.) 55 Atl. 750, 63 L. R. A. 235.

#### JOINT CONTRACT.

A contract with several persons for the payment to them of a sum of money is a joint contract with all, and all the payees have therein a joint interest, so that no one can sue alone for his proportion. *Rainey v. Smizer*, 28 Mo. 310 (citing Par. Con. [7th Ed.] 13); *Thieman v. Goodnight*, 17 Mo. App. 429, 435; *Slaughter v. Davenport*, 51 S. W. 471, 472, 151 Mo. 26.

Whether a contract is joint or several may depend upon the use of those terms, or upon the obvious nature of the undertaking. *Bartlett v. Robbins*, 46 Mass. (5 Metc.) 184, 186.

If the interests of the obligees is joint, it matters not that the contract in its terms is several. *Slaughter v. Davenport*, 51 S. W. 471, 472, 151 Mo. 26. For example, where one who had a horse stolen offered a reward of \$25 for the capture of the thief, and afterwards certain parties acting together captured the thief, there was a joint contract. *Thieman v. Goodnight*, 17 Mo. App. 429, 435.

An agreement by which A. agreed to pay B. and C. a certain sum, "also \$105 due the said B." for work done for a third party who had previously been engaged in the same employment, is a joint contract, and B. cannot sue for the \$105, unless C. joins him as party plaintiff. *Rainey v. Smizer*, 28 Mo. 310, 311.

#### JOINT COVENANT.

A joint covenant is one where the legal interest in the covenant and in the cause of action thereon is joined, though in its terms the covenant may be several or joint and several. When the covenant is in its terms several, but the interest of the covenantees is joint, they must join in suing on the covenant. *Capen v. Barrows*, 67 Mass. (1 Gray) 376, 379. See, also, *In re Silingsby*, 5 Coke, 18b; *Anderson v. Martindale*, 1 East, 497.

#### JOINT DEBTOR ACTS.

"Joint debtor acts" are legislative acts, which, as a substitute for outlawry, provide that, if process be issued against several joint debtors or partners, and served on one or more of them, and the others cannot be found, the plaintiff may proceed against those served, and, if successful, have judgment against all." *Hall v. Lanning*, 91 U. S. 160, 168, 23 L. Ed. 271.

#### JOINT DEBTORS.

A surety as well as a principal may be a debtor, although the right of action on the obligation has not matured; and the phrase "other joint debtors" is broad enough to embrace all persons who are jointly indebted, except partners. *Walsh v. Miller*, 38 N. E. 381, 387, 51 Ohio St. 462.

#### JOINT DECREE.

Within the rule that all parties against whom a joint judgment or decree is rendered must join in proceedings for review in an appellate court, the fact that the decree or judgment is joint in form, but in law or fact separable, will not make such a decree a "joint decree." *The New York* (U. S.) 104 Fed. 561, 563, 44 C. C. A. 88.

#### JOINT DEED.

The Code, § 3015, providing that the husband and wife by their "joint deed" may

convey the real estate of the wife in like manner as she might do by her separate deed, etc., does not require that the husband's name appear in the body of the deed. It is sufficient if he join in signing, sealing, and acknowledging. *Clark v. Clark*, 18 Pac. 1, 5, 16 Or. 224.

#### JOINT DISTRICT SEWERS.

"Joint district sewers," as defined in a city charter establishing a sewer system, are those constructed or acquired under the authority of an ordinance uniting one or more districts or unorganized territory for the purpose of providing main outlet sewers for the joint benefit of such districts or territory, and paid for by special assessments. *Prior v. Buehler & Cooney Const. Co.*, 71 S. W. 205, 206, 170 Mo. 439.

#### JOINT EMPLOYMENT.

The term "joint employment" is constantly used like the term "conjoint use" to denote a use in the same machine or apparatus. This is the meaning of the latter term in a bill for the infringement of five patents, in which it is alleged that the things so patented are so nearly allied in character as to be capable of conjoint as well as separate use. *Union Switch & Signal Co. v. Philadelphia & R. R. Co.* (U. S.) 69 Fed. 833, 834.

#### JOINT EXCEPTION.

An exception to the giving of the third and fourth instructions asked by the defendant, assigned as error on a motion for a new trial is a "joint exception," and does not bring up for review the correctness of each separate instruction; and, one being correct, the other will not be examined by the Supreme Court. *State v. Gregory*, 31 N. E. 952, 132 Ind. 387.

#### JOINT EXPENSE.

Laws 1857, p. 88, providing that, where any two or more towns shall be liable to build a bridge, it shall be done "at the joint expense" of the towns, imports that the expense is to be equally borne by the towns chargeable. *Lapham v. Relst*, 55 N. Y. 472, 479.

#### JOINT HEIRS.

The joint heirs of two persons are the heirs of both at the death of the survivor. Their joint heirs cannot be determined before that time, for one who died before the death of the survivor would not be his or her heir. *Gardiner v. Fay*, 65 N. E. 825, 182 Mass. 492.

#### JOINT INTEREST.

A "joint interest" is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. Civ. Code 1903, Cal. § 683; Civ. Code Mont. 1895, § 1105; Rev. Codes N. D. 1899, § 3283; Civ. Code S. D. 1903, § 199.

A deposit in a bank, made by the wife, of money which is her separate property in the names of the husband and wife, payable to either, does not give the husband a joint interest in the deposit. *Denigan v. San Francisco Sav. Union*, 59 Pac. 390, 392, 127 Cal. 142, 78 Am. St. Rep. 35.

#### JOINT LIVES.

"Joint lives," as used in a decree in equity by which a husband and wife are to receive certain proportions of a fund arising from the sale of land belonging to the wife during their joint lives, means the time of their coverture, and in contemplation of law that period is reached when the wife has secured a divorce as completely as if the husband had died. *Highley v. Allen*, 8 Mo. App. 521, 524.

#### JOINT MAKER.

The term "joint maker," when used to designate the third person who indorses a note before delivering, is used interchangeably with "original promisor," and he is not a joint maker in the sense that thereby the instrument becomes a joint instrument. By indorsing his name on the back he promises to do the same thing as the original promisor, who signs on the face, to wit, to pay the money at the specified time; and in this sense they may be deemed as joint makers, and as, in point of form, each promises for himself, the undertaking may be treated as several as well as joint. *Wade v. Creighton*, 36 Pac. 289, 25 Or. 455.

#### JOINT OBLIGATION.

"A joint obligation under the law of Louisiana binds the parties thereto only for their proportion of the debt, while a solidary obligation, on the contrary, binds each of the obligors for the whole debt." *Groves v. Sentell*, 14 Sup. Ct. 898, 901, 153 U. S. 465, 38 L. Ed. 785.

#### JOINT OWNERS.

The words "joint owners" of personal property as used in St. 1891, c. 383, describe the ownership where the property belongs or may belong to two or more persons in undivided shares, and are not limited to cases



where there is a joint tenancy in the strict and technical sense of those words. *Haven v. Haven*, 64 N. E. 410, 412, 181 Mass. 573.

In an action to decide the ownership of an account at a savings bank the entry in the passbook read, "M. & J., joint owners, payable to either or survivor." It appeared that the former was the aunt of the latter; that she was a domestic in a family, and in the habit, when opening an account in a savings bank, to put a second name on the bank-book as a matter of convenience in case of illness; that the deposit was the bulk of her savings for years; that the niece never obtained possession of the passbook until after the aunt's death; and that the latter made a will, which would be of no effect if she intended to give the deposit to the niece. Held that, notwithstanding the meaning of the phrase "joint owners," they could not be construed, under the circumstances, as indicating joint ownership of the savings fund. *Gorman v. Gorman*, 39 Atl. 1038, 1039, 87 Md. 338.

#### JOINT PROPERTY.

"Joint property," as used in the statute providing that the joint property of all the defendants may be taken in execution for the satisfaction of the judgment, the term "joint property" means partnership property. *Kleinschmidt v. Freeman*, 2 Pac. 275, 277, 4 Mont. 400.

A judgment which a town had obtained against a village therein for the benefit of the entire town, including the village, is joint property of the town and village, within Rev. St. 1878, § 852, providing for a village becoming a separate municipality, and the division of joint property between the town and the village situated therein. *State v. Maick*, 89 N. W. 183, 186, 113 Wis. 239.

#### JOINT RIGHT.

In a deed of water rights, by which a party conveys to another the joint right with him to all the water in the stream at a certain point, the words "joint right" express the purpose of the grantor to give to these parties an equal right to the water in the stream, to be used successively, as subsequently provided in the deed. *Butler Hard-Rubber Co. v. City of Newark*, 40 Atl. 224, 229, 61 N. J. Law, 32.

#### JOINT SESSION.

The term "joint session" in relation to a legislature has a well-recognized meaning, and implies the meeting together and commingling of the two houses, which, when so met and commingled, act as one body. Each member of that body, when it has been once properly and lawfully convened, has equal

rights, and his vote has equal weight with that of any other member. *Snow v. Hudson*, 43 Pac. 260, 262, 56 Kan. 378.

#### JOINT-STOCK COMPANY.

Any joint-stock company, see "Any."  
Other joint-stock company, see "Other."

A "joint-stock company" is an association of individuals for the purpose of profit, possessing a common capital contributed by the members composing it, such capital being commonly divided into shares, of which each member possesses one or more, and which are transferable by the owner. The business of the association is under the control of certain selected individuals called directors. *Allen v. Long*, 80 Tex. 261, 16 S. W. 43, 26 Am. St. Rep. 735; *Willis v. Chapman*, 35 Atl. 459, 461; *Adams Exp. Co. v. Schofield*, 64 S. W. 903, 904, 111 Ky. 832.

A "joint-stock company" is an association of individuals possessing a common capital divided into shares, of which each member possesses one or more. These shares represent the interest of the members, and are transferable only by the owners, without the consent of the other members or the creditors of the association. An indictment for embezzlement alleged that the owner of the property, an express company, was a joint-stock association and corporation. It was shown that the company had transacted business as such an association, having a president, treasurer, and secretary, and that the laws of the state under which the company assumed to act provided that such associations should be deemed corporations. Defendant, as agent of the company, had received its money orders to sell, and had embezzled the proceeds. Held, that the proof of the de facto existence of the company was sufficient to sustain the indictment. *Kossakowski v. People*, 53 N. E. 115, 117, 177 Ill. 563.

In joint-stock companies the death or withdrawal of a member or transfer of his interest does not involve a dissolution of the company, as in ordinary partnerships. In such companies there is no *delectus personarum*. *Willis v. Chapman*, 35 Atl. 459, 461, 63 Vt. 459.

A "joint-stock association" is hybrid in its character. It is regarded for some purposes as a corporation and for other purposes as a partnership. In *re Jones*, 59 N. Y. Supp. 983, 984, 28 Misc. Rep. 356.

The words "joint-stock company" include every corporation having a joint stock or capital divided into shares owned by the stockholders respectively. Code W. Va. 1899, p. 544, c. 53, § 1.

St. 1874, c. 222, relating to dividends of joint-stock, fire, and marine insurance com-

panies, does not apply to insurance companies established under special charters. The distinction is observed throughout the General Statutes between corporations established under special charters and those organized under general laws, and when the term "joint-stock company" is used it clearly refers to the latter class. *Attorney General v. Mercantile Marine Ins. Co.*, 121 Mass. 524, 525.

#### **As association.**

See "Association."

#### **Corporations and partnerships distinguished.**

As corporation, see "Corporation."

As partnership, see "Partnership."

A joint-stock company at the common law lies midway between a corporation and a copartnership. It is an association of persons for the purpose of business, having a capital stock divided into shares, and governed by articles of association, which prescribe its objects, organization, and procedure, and the rights and liabilities of its members, except that the articles cannot release the members from their liability as partners to the creditors of the company. There is an essential difference between a joint-stock company as it existed at the common law and a joint-stock company having extensive statutory powers conferred upon it by the state within which it is organized. *Lyon v. Denison*, 45 N. W. 358, 361, 80 Mich. 371, 8 L. R. A. 358.

A joint-stock company is not a pure partnership, and its members are recognized as an aggregate body; and neither is it a corporation, as their members are liable to contribute to the debts of the collective whole. A joint-stock company is an association of persons intermediate between corporations and ordinary partnerships, and partakes of the nature of both. *Oliver v. Liverpool & London Life & Fire Ins. Co.*, 100 Mass. 531, 540 (citing *Lindl. Partn.* [2d Ed.] 6).

A joint-stock company is an association of individuals for business purposes, in which the capital invested is divided into shares, which are distributed to the members in proportion to the amount contributed; the association having a common name, in which it may sue and be sued. But while, in these points, it is like a corporation, it is not so in fact, since it differs from a corporation both in the fact that it is not a legal entity separate and distinct from its stockholders, but also in the fact that all of its members are jointly and severally personally liable for its debts. *Sandford v. Board of Sup'rs of New York* (N. Y.) 15 How. Prac. 172.

A "joint-stock association" is well defined in *Lindley on Partnership* as consisting

of many persons having transferable shares in a common fund, and the same writer says (chapter 5) that the principal difference between a copartnership and a joint-stock association is that there is in the latter, as a rule, no *delectus personarum*, and a transfer of the shares on the death of a member does not dissolve it. The essential difference between a corporation and a joint-stock association lies in the fact that a corporation drowns the individual rights, while the association leaves the individual rights unchanged and unimpaired. *Lane v. Albertson*, 79 N. Y. Supp. 947, 953, 78 App. Div. 607.

Joint-stock companies are distinguishable from "partnerships," as that term is ordinarily used, only in the respect that the death or withdrawal of one or more members does not effect a dissolution, and stock can be bought and sold without affecting the integrity of the concern. *Industrial Lumber Co. v. Texas Pine Land Ass'n*, 72 S. W. 875, 878, 31 Tex. Civ. App. 375.

#### **JOINT-STOCK PLAN.**

The joint-stock plan referred to in Act May 1, 1878, providing that companies incorporated thereunder must be organized on a "joint stock or mutual plan," and that one company cannot insure on both plans, applies to companies issuing policies, selling on a credit of the capital stock of the company to one who may be an entire stranger to the company, and who acquires no right to membership by reason of his policy, or to participate in its profits, and he should subject himself to no liability by reason of its loss. *Given v. Rettew*, 29 Atl. 703, 704, 162 Pa. 638.

#### **JOINT TENANCY.**

An estate in "joint tenancy" is an estate arising by purchase or grant to two or more persons. The great incident of joint tenancy is survivorship, by which the entire tenancy on the decease of any joint tenant runs to the survivors, and at length to the last survivor. *Simons v. McLain*, 32 Pac. 919, 920, 51 Kan. 153.

A "joint tenancy" is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent in rents and profits. But upon the death of one his share vests in the survivor or survivors until there should be but one survivor, when the estate becomes one in severalty in him, and descends to his heirs upon his death. It must always arise by purchase, and cannot be created by descent. Such estates may be created in fee for life or years, or even in remainder. *Thornburg v. Wiggins*, 84 N. E. 999, 1000, 135 Ind. 178, 22 L. R. A. 42, 41 Am. St. Rep. 422.

In order to constitute an estate in "joint tenancy," the tenants thereof must have one and the same interest, arising by the same conveyance, commencing at the same time, and held by one and the same undivided possession. The chief peculiarity of this interest is the right of survivorship, by which, upon the death of one joint tenant, the entire tenancy remains to the surviving co-tenants, not to the heirs or other representatives of the deceased, the last survivor taking the whole estate. *City of Louisville v. Coleburne*, 56 S. W. 681, 682, 108 Ky. 420; *Farr v. Trustees of Grand Lodge A. O. U. W.*, 53 N. W. 738, 740, 83 Wis. 446, 18 L. R. A. 249, 35 Am. St. Rep. 73. Thus a mutual benefit insurance certificate payable to the wife and daughter of deceased creates a joint tenancy in the beneficiaries, with the right of survivorship. *Farr v. Trustees of Grand Lodge A. O. U. W.*, 53 N. W. 738, 740, 83 Wis. 446, 18 L. R. A. 249, 35 Am. St. Rep. 73.

#### **Estate by entirety distinguished.**

A joint tenancy implies seisin per my et per tout, while an estate in entirety implies only a seisin per tout. *Appeal of Lewis*, 48 N. W. 580, 581, 85 Mich. 340, 24 Am. St. Rep. 94.

#### **As estate of inheritance.**

See "Estate of Inheritance."

#### **Grant to husband and wife.**

In contemplation of law the husband and wife for most purposes are considered as but one person. Chancellor Kent, in his Commentaries, says: "If an estate in land be given to the husband and wife, or a joint purchase be made by them during coverture, they are not properly joint tenants, nor tenants in common, for they are but one person in law, and cannot take by moieties. They are both seised of the entirety, and neither can sell without the consent of the other, and the survivor takes the whole." So the statute which abolishes estates in joint tenancies, except where the conveyance to two or more persons especially provides that they shall take and hold as joint tenants, does not affect a conveyance to a husband and wife or the estate by entirety which they take thereunder. *Ketchum v. Walsworth*, 5 Wis. 95, 102, 68 Am. Dec. 49.

Conveyances to husband and wife, by reason of the unity of husband and wife, are not strictly joint tenancies, but conveyances to one person. *City of Louisville v. Coleburne*, 56 S. W. 681, 682, 108 Ky. 420.

#### **Tenancy in common distinguished.**

The only practical difference between the estates of joint tenancy and tenancy in common is the right of survivorship, and, as the statute has abolished this, and provided

that the estate holden should be considered in the same manner as if they had been tenants in common, all distinction has been destroyed. *Redemptorist Fathers v. Lawler*, 54 Atl. 487, 488, 205 Pa. 24.

#### **JOINT TENANTS.**

Where each tenant in common is seised per my et per tout, such tenure would make each tenant a joint tenant. *Lytle Creek Water Co. v. Perdew*, 4 Pac. 426, 430, 65 Cal. 447 (citing 2 Bl. Comm. 182).

The use of the words "joint tenants" in the appropriate places in a deed of conveyance is sufficient to create an estate of joint tenancy under the statutes of this state, without the use of the words "and not an estate of tenancy in common" or their equivalent. *Coudert v. Earl*, 18 Atl. 220, 221, 45 N. J. Eq. (18 Stew.) 654.

#### **JOINT THROUGH RATES.**

"Joint through rates," as used in Acts 27th Gen. Assem. c. 17, § 283, amendatory of Acts 27th Gen. Assem. c. 28, providing for the establishment by the board of railroad commissioners of "through joint rates" between points on connecting lines, are joint rates of charges for the transportation of freight from cars, covering all the charges for the transportation over the two or more roads, as though they constituted one road, the rates fixed determining the whole charges. These joint rates consisting of the separate rates of each separate road, as their services in the transportation of the freight on cars are not always equal because of difference in the distances of transportation, and for other reasons the reasonable charges which each ought to make cannot be equal. The railroad commissioners, when establishing joint through rates, establish a rate for each road, which, when united, will be the joint through rates. *Burlington, O. R. & N. Ry. Co. v. Dey*, 48 N. W. 98, 102, 82 Iowa, 312, 12 L. R. A. 436, 31 Am. St. Rep. 477.

#### **JOINT TRESPASS.**

Black's Law Dictionary defines "joint trespass" as two or more persons who unite in committing a trespass. Hence, where various property holders who ran water from their premises into an underground pipe which ran into an open sewer along plaintiff's wall, flooding his premises, acted entirely independent of each other, none of them believing that any injury would result therefrom to plaintiff's property, they were not joint trespassers. *Bonte v. Postel*, 58 S. W. 536, 538, 109 Ky. 64, 51 L. R. A. 187.

Trespass by several persons being joint and several in its nature, the injured person has his remedy against all or any of them,

and may enter a nolle prosequi as to any of them at any time before final judgment. *Allen v. Craig*, 13 N. J. Law (1 J. S. Green) 294, 298.

### JOINT TRESPASSERS.

"Joint trespassers," means persons who unite in the commission of trespass. *Kansas City v. File*, 60 Kan. 157, 161, 55 Pac. 877.

### JOINT WILL.

A joint will is a will executed by two or more owners of land in common "as a means of transferring their several titles to one devisee. The validity of a joint will was at one time denied in England, and has been denied in some of the United States, but the reasons for such denial relate rather to questions of probate than to power of the several testators, and do not seem to have been regarded as settling the question in the countries where the decisions were rendered." In *re Cawley's Estate*, 20 Atl. 567, 568, 136 Pa. 623, 10 L. R. A. 93.

### JOINTLY.

"Jointly," as used in Act Cal. March 28, 1868, § 33, requiring the commissioners to "jointly view and assess upon each and every acre to be reclaimed or benefited thereby a certain tax," etc., qualifies the words "view" and "assess," and means merely that the three commissioners, acting jointly or together, shall view and assess, etc. *Reclamation Dist. No. 3 v. Parvin*, 8 Pac. 43, 44, 67 Cal. 501.

"Jointly," in a claim of invention, as follows: "Two or more type wheels moving independently and controlled by magnetism and arranged so as to print jointly or separately on one strip of paper in two or more lines," etc., is construed to mean by united action, or acting in co-operation, and not to mean simultaneously. *Gold & Stock Tel. Co. v. Commercial Tel. Co.* (U. S.) 23 Fed. 340, 342.

Where a farm dwelling and farm implements are insured by a fire policy issued to a wife and husband, and the dwelling is used and occupied as a farm homestead, and the implements are used on the farm where the dwelling is situated, the word "jointly," as used in a representation and warranty in the application that the property is owned by them "jointly," should, unless the contrary intent is manifest, be construed in the popular, and not in a legal, technical sense, and, when so construed, will not be held to be untrue simply because the title to the dwelling is wholly in the wife, and the title to the personalty wholly in the husband. *Webster v. Dwelling House Ins. Co.*, 42 N. E.

546, 547, 53 Ohio St. 558, 30 L. R. A. 719, 53 Am. St. Rep. 658.

"Jointly" in a will making a bequest to "H. and family jointly," signifies a collective body as joint heirs. *Langmaid v. Hurd*, 15 Atl. 136, 64 N. H. 526.

### As creating joint tenancy.

A money legacy to two "jointly and between them" is not a joint tenancy, but a tenancy in common, the words meaning the same as "to be equally divided between them." *Perkins v. Baynton*, 1 Brown, Ch. 118.

A deed to a husband and wife, which conveys and warrants to them jointly the premises, etc., will not be construed to create in them an estate in joint tenancy, according to the law of Indiana, but one of entireties; the word "jointly" being mere surplusage. *Simons v. Bollinger*, 56 N. E. 23, 24, 154 Ind. 83, 48 L. R. A. 234.

"Jointly," as used in a deed to two persons jointly, creates an estate of joint tenancy, under Rev. St. 1894, § 3341 (Rev. St. 1881, § 2922), which provides that a conveyance of land to two or more persons shall be construed to create an estate in common, unless an estate by joint tenancy is expressly created, or it appears from the instrument that such an estate was intended; since to hold otherwise would render void and of no effect the word "jointly." *Case v. Owen*, 38 N. E. 395, 139 Ind. 22, 47 Am. St. Rep. 253.

The word "jointly," found in a devise of certain land to testator's daughter and wife, is not sufficient to show clearly and explicitly that the testator intended that the estate devised should possess the attributes of survivorship. Tenants in common hold the estate jointly until a severance is effected, and it is consistent with the use of the word to construe it as indicating only an intent to devise the estate to both devisees. *Mustain v. Gardner*, 67 N. E. 779, 780, 203 Ill. 284.

### JOINTLY AND SEVERALLY.

In a bond reciting, "We bind ourselves, our heirs, etc., jointly and severally," the words "jointly and severally" must be construed distributively, so as to apply as well to the obligors as to their heirs. Jointly and severally apply to all the parties bound, and appear to have been added in order to express an intention so to bind as well the obligor as each and every of their heirs. *Mitchell v. Darrocott* (S. C.) 3 Brev. 145.

A promissory note was in the following form: "For value received we jointly and severally promise to pay R., or order, the sum of \$100.00 on demand with interest.

[Signed] P. and J. for G." It was contended that the words "jointly and severally" in the note indicated a personal promise by P. and J., and could have no proper application to a promise by G. alone. In answer to this contention the court said that: "If there were not other words in the contract indicating more strongly the purpose to bind G., then perhaps the words 'jointly and severally' should control the construction to be given to these notes; but that the form of the signature of the notes so clearly manifested the purpose to be the execution of a contract binding solely upon G. that, if either was to be rejected as surplusage and of no effect, it should be the words 'jointly and severally.'" *Rice v. Gove*, 39 Mass. (22 Pick.) 158, 161, 162.

Where a note recited that "on demand we jointly and severally promise to pay to — the sum of —," and the same was signed by two parties, and after their signatures appeared the word "directors," the words "jointly and severally" were equivalent to "jointly and personally," and hence the signers were personally liable on the note. *Healey v. Story*, 3 Exch. 2, 3.

#### JOINTLY INDEBTED.

Within the meaning of Code, § 375, which provides that when a judgment shall be recovered against one or more of several persons jointly indebted on a contract, by proceedings as provided in section 136, those who are not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment in the same manner as if they had been originally summoned, the words "jointly indebted" do not include the surviving partner of a partnership and the executors of the deceased partner, as the surviving partner at the time had the control of the business and the legal right to settle the partnership debts. *Richter v. Poppenhausen*, 42 N. Y. 373, 376.

#### JOINTURE.

"Jointure is defined by Bouvier to be a competent livelihood of freehold for the wife of lands and tenements, to take effect in profit or possession presently after the death of the husband, for the life of the wife at least," *Griider v. Eubanks*, 75 Ky. (12 Bush) 510, 513; *Saunders v. Saunders*, 46 S. W. 428, 429, 144 Mo. 482; *Bryan v. Bryan*, 34 S. W. 260, 261, 62 Ark. 79, unless she herself be the cause of its determination. *Vance v. Vance*, 21 Me. 364, 369, 370.

The word "jointure" signifies an estate or property settled on a woman in consideration of marriage, to be enjoyed by her after her husband's decease, and such is its use in the statutes of Nebraska relating

to the rights of married women. *Fellers v. Fellers*, 74 N. W. 1077, 1078, 54 Neb. 694.

A jointure that bars dower is a provision made for the wife whereby an estate may pass to her presently after the death of the husband. *Chaffee v. Chaffee*, 40 Atl. 247, 248, 70 Vt. 231.

Jointure is sometimes called legal, as when made before a marriage, and sometimes equitable, as when made after marriage. Originally it took the form of a conveyance to husband and wife during their lives, and after the husband's death to the wife. Jointure is a vested interest in the land, and the wife takes it as a purchaser. *Saunders v. Saunders*, 46 S. W. 428, 429, 144 Mo. 482.

#### As barring dower.

Originally the word "jointure" denoted a joint estate limited to husband and wife for life or in tail, which was not created for the purpose of barring dower, but to secure a competent provision for the wife after the husband's death, in view of the fact that the greater part of the land at that time was held by trustees, and that a wife was not dowable of uses. Indeed, if a man in consideration of marriage to be had, created an estate in jointure in full satisfaction of all dower, and they intermarried, that was no bar of dower at common law. But the word "jointure" has now been so extended by the statutes of England and of New York as to include a sole estate limited to the wife alone, or a pecuniary provision in lieu of dower. There are two sorts of jointures created by the statutes—first, by an antenuptial agreement, created by both parties, which prevents the right of dower from every right; second, a jointure created before marriage, but not assented to by the betrothed wife, or created after marriage, which, when accepted in lieu of dower, bars it, but not before. *Graham v. Graham*, 22 N. Y. Supp. 299, 300, 67 Hun. 329.

A statute of Ohio provided that, if any estate be conveyed to a woman as jointure, in lieu of her dower, to take effect immediately after the death of her husband, and to continue during her life, such conveyance should bar her right of dower. The section was the adoption of a similar provision in 27 Henry VIII, c. 1056, which enacted that, where lands were settled to the use of the wife, every woman having such jointure should not have title to any dower in the residue. This act of Parliament was enacted to prevent a woman from having both dower and jointure, since before its passage a jointure was not a bar. Under such act of Parliament the jointure had a definite and well-defined legal meaning. It was an estate made to the wife in satisfaction of dower, and, as Sir Edward Coke said, "that

to the making of a perfect jointure six things were to be observed: (1) It is to take effect for her life, in possession or profit, presently after the death of the husband. (2) It must be for her own life, or for a greater estate. (3) It must be made to herself, and to no other for her. (4) It must be made in satisfaction of her whole dower, and not of part of her dower. (5) It must be expressed or averred to be in satisfaction of her dower. (6) It may be either before or after marriage." Held, that an estate to be conveyed as jointure in Ohio must possess the usual requisites enumerated and the estate must be such a one as to certainty and kind that the wife on the death of her husband, may take possession of, and hold in severalty, and not in common with others. *Grogan v. Garrison*, 27 Ohio St. 50, 61.

Jointure is one mode of barring dower, but to have such effect it must take effect immediately on the death of the husband. *Bryan v. Bryan*, 84 S. W. 260, 261, 62 Ark. 79.

#### As barring right as heir.

One mode of barring the claim of a widow to dower is by settling on her an allowance previous to marriage, to be accepted in lieu thereof. This is called a "jointure." A jointure is merely a bar to the wife's possible right of dower. Hence, under a statute providing that, if the wife accept any jointure from her husband, or may within one year after his death allege whether she shall take such jointure or other provision or retain her statutory right to the third, the fact that she has been given a jointure will not deprive her of her right as heir to her husband when he died seised of other lands, leaving neither father nor mother. *Glass v. Davis*, 21 N. E. 319, 320, 118 Ind. 593.

#### Enjoyment before husband's death.

The word "jointure" in a will giving a person an annuity of £300 for his own benefit, and providing that in case such person should marry it should be lawful for him to settle an annuity of £300 on his wife for life, by way of jointure, meant that the annuity should be given, not to the popular notion of a jointure as something from which she was to derive no benefit until her husband's death, but an annuity to take effect immediately. *Jamieson v. Trevelyan*, 10 Exch. 269, 279.

#### As estate in lieu of satisfaction of dower.

No conveyance to or for the benefit of the wife can operate as a jointure unless the estate limited to the wife be expressed or averred to be in satisfaction of her whole dower. *Perry v. Perryman*, 19 Mo. 469,

470, 473; *Grogan v. Garrison*, 27 Ohio St. 50, 61.

The term "jointure," as applied in a statute providing that a conveyance or devise of real or personal estate by way of jointure may bar the wife's right of dower, etc., was intended to designate such estate whether created by conveyance or devise as may be settled upon or transferred to the wife in lieu of dower. *Tevis' Ex'rs v. McCreary*, 60 Ky. (8 Metc.) 151, 153.

"Jointure," as used in general statutes providing that conveyance or devise of real or personal property by way of jointure may debar the wife's dowry, but in certain circumstances she may waive the jointure, means such an estate as may be conveyed or devised to the wife in lieu of dowry. It must be in satisfaction of it, and, if transferred to her without any intention or purpose that it shall be so, it does not operate to debar her claim. *Pepper v. Thomas*, 4 S. W. 297, 299, 85 Ky. 539.

#### As freehold.

A jointure, to operate as a bar of dower under the statute, must consist of a freehold estate; but a woman under no legal disability may stipulate to substitute anything she pleases in place of it. *Gelzer v. Gelzer* (S. C.) *Bailey*, Eq. 379, 380, 23 Am. Dec. 180.

The statute provides that the widow may claim dower in lands, tenements, and hereditaments of which the husband was seised in fee at any time during the marriage, except where such widow, by her own consent, may have been provided for by way of jointure prior to the marriage. The word "jointure" must have been used in its well-known and established legal sense. There are important differences in the law of jointure between the English statute and that of this state. By the former a jointure made in conformity to its provisions would not be binding on the widow without her consent if made before marriage, and also if made after marriage, and not assented to by the widow, after the death of her husband. By the latter no jointure could prevent the widow from claiming her dower unless made before marriage, and with the consent of the intended wife. There is, however, no authority in either of them for considering why the legal jointure can be composed partly of a freehold estate and partly of an annuity not secured on any estate. *Vance v. Vance*, 21 Me. 364, 369, 370.

## JOURNAL

See "Public Journal."

The journal of the legislative assembly is "the official record of what is done and

passed." *Oakland Paving Co. v. Hilton*, 11 Pac. 3, 9, 69 Cal. 479.

"The official record of what is 'done and passed,' in a legislative assembly is called the 'journal.' It is so called, because the proceedings are entered therein in chronological order as they occur from day to day; the business of each day forming the matter of a complete record by itself. Hence the record is frequently spoken of in the plural as the 'journals.' \* \* \* In the two houses of Parliament, the clerks take minutes of all the proceedings, orders, and judgments of their respective houses as they occur, and make short entries of them in their minutes. \* \* \* From these, and from the papers on file, it is the duty of the clerks afterwards to prepare the journals; in which entries are made at greater length, and with the forms more distinctly pointed out. \* \* \* All persons may have access to the journals of the two houses, in the same manner as to the record of courts." *Montgomery Beer Bottling Works v. Gaston*, 28 South. 497, 503, 126 Ala. 425, 51 L. R. A. 396, 85 Am. St. Rep. 42 (quoting Cushing).

"Journals are not records, but remembrances for forms of proceedings to the record. They are not of necessity, nor have they always been. The journal is of good use for the observation of the generality and materiality of proceedings and deliberations as to the three readings of any bill, the intercourse between the two houses, and the like; but when the act is passed the journal is expired." *Martin v. Commonwealth*, 107 Pa. 185, 190 (quoting *King v. Arundel*, *Hobart*, 110).

## JOURNEY.

See "On a Journey."

The term "journey," as used in a statute forbidding the carrying of weapons except on a journey, should be construed in its popular sense, and includes a going from home by a highway to a definite point far enough distant to carry a person beyond the circle of his neighbors and to detain him throughout the day, and not within the routine of his daily business. *Davis v. State*, 45 Ark. 359, 361. It is impossible to lay down any unbending rule or determinate distance which will characterize the act as a journey or the actor as a traveler. Much must depend on the circumstances of each particular case. A "journey" is literally the travel of a day; but one who is merely on the move for a day is not necessarily a traveler, and a journey in the common acceptation might be begun and ended in a shorter time. *Davis v. State*, 45 Ark. 359, 361.

A "journey," within the meaning of the statute prohibiting the carrying of concealed

weapons, which makes an exception in favor of a person setting out on a journey, means traveling to a distance from home and out of the ordinary line of the person's duties, habits, or pleasure. It does not apply to the act of returning to his home after night by a person residing in the country contiguous to a city or town in which he has a place of business to which he is in the habit of returning daily. *Eslava v. State*, 49 Ala. 355-357. Thus whether a mail carrier, who daily carries mail a distance of 30 miles, is on a journey, within the meaning of the statute prohibiting the carrying of a pistol, except when on a journey, is for the jury. *Hathcote v. State* (Ark.) 17 S. W. 721.

"Journey," as used in Acts 1870, c. 13, § 3, prohibiting the carrying of pistols except by persons on a journey out of their state or county, implies something more than a travel of a few miles in the neighborhood of the party, though in an adjoining county. Mr. Webster says "a journey is the travel of a day." The word "journey" suggests the idea of a somewhat prolonged traveling for a specific object, leading a person to pass directly from one point to another. The word "journey" does not embrace a mere ramble in one's own neighborhood across the lines of contiguous counties. *Smith v. State*, 50 Tenn. (8 Heisk.) 511.

"Setting out on a journey" means something more than the mere passing from place to place. The traveling must be, as is the setting out on a journey, such as is without the ordinary habits, business, or duty of the person, to a distance from his home and beyond the circle of his acquaintances. The original signification of travel was a day's travel. It is now applied to travel by land from place to place, without the restriction of time. The terms "traveling" and "setting out on a journey" do not include the return of a person in a wagon from the county seat of one county to his home in another; the two points being about 20 miles apart. *Gholson v. State*, 53 Ala. 519, 521, 25 Am. Rep. 652.

## JOURNEYMAN.

A "journeyman" is a servant by the day, within the meaning of statutes against the enticing away of servants, and it makes no difference whether the work is done by the day or by the piece. *Hart v. Aldridge*, 1 Cowp. 54, 56.

The term "journeyman," as used in Code, §§ 34, 96, providing that all journey-men shall be exempt from the processes and liabilities of garnishment on their daily, weekly, or monthly wages, should be construed to include a shipping and receiving clerk, who also performed any other duties required of him by the firm for whom he

worked, who paid him at a certain rate per month and could discharge him at any time. "Journeyman" is defined in Zell's Encyclopedia to be a day laborer, a hired workman. If such clerk was not a day laborer, he was certainly a hired workman. *Butler v. Clark*, 46 Ga. 466, 468.

The word "journeyman," as used in the chapter relating to the supervision of plumbing, shall mean a person who himself does any work in plumbing which is by law, ordinance, by-law, rule, or regulation subject to inspection. *Rev. Laws Mass. 1902, p. 896, c. 103, § 1.*

#### Conductor of train.

A conductor of a passenger or freight train, who is not employed for the purpose of doing manual labor, but whose duty is to have general control and superintendence of the train, its running, and management, and supervision of the passengers and baggage, is not "a journeyman, mechanic, or a day laborer," within Code, § 3554, exempting from garnishment the wages of a journeyman, mechanic, or day laborer. *Miller v. Dugas*, 77 Ga. 886, 888, 4 Am. St. Rep. 90.

#### Superintendent of factory.

Code, § 3554, which exempts from liability and the process of garnishment the wages of "journeymen, mechanics, and day laborers," does not include a boss or director of an entire department of an extensive factory, who employs and discharges the hands that work under him, but does no manual labor, merely directing the work of the operatives under him, though the words have been construed to include the overseer of a plantation, who not only directed the operations of the hands employed, but labored with him, and also clerks employed in stores. *Kyle v. Montgomery*, 73 Ga. 337, 343.

#### Materialman.

The term "mechanics," "undertakers," or "journeymen," in a statute giving a lien to a mechanic, undertaker, or journeyman who builds or repairs a house, does not include a person who merely furnishes the owner with lumber to be used in such building. *Stevens v. Wells*, 36 Tenn. (4 Sneed) 387, 389.

#### JR.

See "Junior."

#### JUDAISM.

Judaism is the religion of those believers in the Old Testament who still expect and look for a promised Messiah. *Hale v. Everett*, 53 N. H. 9, 54.

#### JUDG.

"Judg.," as used at the close of a plea in abatement of a writ, praying "judg. of said writ," cannot be accepted for the word "judgment." It may stand for other words as well as for "judgment." *Cassidy v. Holbrook*, 18 Atl. 290, 81 Me. 589.

#### JUDGE.

See "Final Judge."

"To judge is to compare facts or ideas, so as to form an opinion." *Kramer v. Weinert*, 1 South. 26, 28, 81 Ala. 414.

The statement by a witness that "I judge" certain things are so is not a statement of knowledge, but merely of a guess. *Wyman v. Herard*, 59 Pac. 1009, 1022, 9 Okl. 85.

It is a general and sound principle that whenever the law vests any person with power to do an act, and constitutes him a judge of the evidence on which the act may be done, and at the same time contemplates that the act is to be carried into effect through the instrumentality of agents, the person thus clothed with power is invested with discretion, and is quoad hoc a judge. His mandate to his legal agents, on his declaring the event to have happened, will be a protection to those agents; and it is not their duty or business to investigate the facts thus referred to their superior and rejudge his determination. So, the President of the United States being empowered by law to call out the militia upon the happening of certain events and contingencies, he alone is made the judge of the happening of such events, and his order calling out the militia is a protection to them, without reference to the fact of the correctness of his judgment. *Vanderheyden v. Young* (N. Y.) 11 Johns. 150, 158.

#### JUDGE (In Law).

See "Chief Judge"; "Circuit Judge"; "De Facto Judge"; "Presiding Judge—Presiding Justice"; "United States Judge." Any judge, see "Any." As judicial officer, see "Judicial Officer."

A judge is a public officer, who by virtue of his office is clothed with judicial authority. *United States v. Clark* (U. S.) 25 Fed. Cas. 441, 442; *Todd v. United States*, 15 Sup. Ct. 889, 891, 158 U. S. 278, 39 L. Ed. 982.

Bouvier defines "judge" as "a public officer appointed to decide litigated questions according to law. An officer so named in his commission, and who presides in some court." *Foot v. Stiles*, 57 N. Y. 399, 406.

"A judge is a public officer lawfully appointed to decide litigated questions accord-



ing to law. He must not only be impartial, but he must pay a blind obedience to the law. Whether good or bad, he is bound to declare what the law is, and not to make it. He is not an arbitrator, but an interpreter of the law. It is his duty to be patient in the investigation of the case, learned in considering it, and firm in his judgment. He ought, according to Cicero, never to lose sight of the fact that he is a man, and that he cannot exceed the power given him by his commission; that not only power, but public confidence, has been given him; that he ought always seriously to attend, not to his wishes, but the requisitions of law, justice, and gentleness. In *re Lawyers' Tax Cases*, 55 Tenn. (8 Heisk.) 565, 650.

"A judge, technically speaking, may not be a representative of the state in prosecuting parties charged with crime; but he is nevertheless an officer of the state, charged with the high and responsible duty of seeing that the law is faithfully administered." *Cox v. State*, 8 Tex. App. 254, 282, 34 Am. Rep. 746.

The term "judge," as used in Code Civ. Proc. § 547, prohibiting a judge from acting in such capacity when subject to certain disqualifications, construed to mean a judge of a court. *First Nat. Bank v. Roberts*, 23 Pac. 718, 722, 9 Mont. 323.

The term "judge" includes every judicial officer authorized, alone or with others, to hold or preside over a court of record. *Laws N. Y. 1892, c. 677, § 6*.

The word "judge" includes a justice, surrogate, recorder, justice of the peace, or other judicial officer, authorized or required to act, or prohibited from acting, in or with respect to the matter or thing referred to in the provision wherein that word is used. Code Civ. Proc. N. Y. 1899, § 3343, subd. 3.

The word "judge," as employed in the Code, means always the competent judge. It is also used to signify the court, whether it be composed of the judge alone, or of the judge and jury. Civ. Code La. 1900, art. 3556, subd. 17.

"Judge," as used in the bankruptcy act, shall mean a judge of a court of bankruptcy, not including the referee. U. S. Comp. St. 1901, p. 3419.

The words "circuit justice" and "justice of a circuit," when used in the title relating to the judiciary, shall be understood to designate the justice of the Supreme Court who is allotted to any circuit; but the word "judge," when applied generally to any circuit, shall be understood to include such justice. U. S. Comp. St. 1901, p. 486.

#### **Administrative officer.**

The word "judge," in Const. art. 5, § 1, which provides that no judge or justice of

the peace shall be capable of holding his office after he reaches the age of 70 years, "does not comprehend mere administrative officers of the government, such as commissioners, committees, auditors, selectmen, and the like, who were never called 'judges,' and who do not constitute a court vested with judicial power." *Betts v. Town of New Hartford*, 25 Conn. 180, 186.

2 Rev. St. 463, § 2, provides that no judge of any court can sit as such in any cause in which he is a party or in which he is interested, etc. Held, that the word "judge," as therein used, cannot be extended to administrative officers, such as a commissioner of highways, though their acts may require deliberation and sound judgment. *Foot v. Stiles*, 57 N. Y. 399, 405.

#### **City recorder.**

The term "judge," as used in Const. art. 2, § 8, providing that no member of Congress or person holding or exercising any office of trust or profit under the United States shall hold or exercise the office of judge, etc., does not include the recorder of the city of Philadelphia, though he possesses some powers and performs some duties of a judicial nature, and in the strict legal sense of the word he is a judge, being a justice of the peace, and a constituent and principal member of a court of record empowered to hear certain criminal offenses. *Respublica v. Dallas (Pa.)* 3 Yeates, 300, 314.

#### **County judge.**

Rev. St. § 2640, provides that an order for the service of summons by publication may be made by the court or a judge thereof. Section 2815 provides that where these proceedings authorize an order or proceeding to be made or taken by the presiding judge or by the circuit judge, using such words of designation, no county judge or court commissioner can act, and, except as so provided or otherwise expressly directed in particular instances, a county judge or court commissioner may exercise within his county the powers, and shall be subject to the restrictions thereon, of the circuit judge at chambers. It was held that under such section 2815 the term "judge," as used in section 2640, must be construed to include a county judge or court commissioner. *Pfister v. Smith*, 69 N. W. 984, 985, 95 Wis. 51.

Rev. St. § 2831, authorizing a judge in his discretion, etc., to allow any proceedings in an action after its commencement, except, etc., to be taken after the time limited by the statute has expired, includes a court commissioner, as well as a circuit judge, as Rev. St. § 2815, as amended by Laws 1879, c. 194, § 2, subd. 24, provides that a county judge or court commissioner may exercise within the county the powers of a circuit judge at chambers, according to the existing

practice and the statutes, in all actions or proceedings in courts of record, except as herein prohibited or otherwise directed, *Woodruff v. Town of Depere*, 18 N. W. 761, 762, 60 Wis. 128.

#### Court.

The words "judge" and "court" are interchangeable. *Guild v. Meyer*, 48 Atl. 202, 59 N. J. Eq. 390.

The judge of a court, while presiding over the court, is by common courtesy called the court, and the words "the court" and "the judge (or judges)" are frequently used as synonymous. Where the record shows that a motion for new trial was made before a judge, it sufficiently shows that it was presented to the court. *Levey v. Bigelow*, 34 N. E. 128, 180, 6 Ind. App. 677. When used with reference to orders made by the court or judge, they were intended to be understood as synonymous. *Michigan Cent. R. Co. v. Northern Indiana R. Co.*, 3 Ind. 239, 245.

In Rev. St. 1881, § 1222, providing that a receiver may be appointed by the court or the judge thereof in vacation in certain specified cases, "judge" is synonymous with "court" in legal parlance; for the judge of a court is the court, and there can be no court without a judge. In this legal sense the words "judge thereof in vacation" should be taken and understood to mean the "court in vacation"; in other words, the phrase "the court or judge thereof in vacation" may be made to read "the court when in lawful session," or "the court in vacation," or thus, "the court in term" or "the judge in vacation." *Pressley v. Lamb*, 4 N. E. 682, 690, 105 Ind. 171.

The word "judge," in Act 1888, § 13, providing that any Chinese person, convicted before a commissioner of the United States court, may within 10 days from such conviction appeal to the "judge of the District Court for the district," is equivalent to the word "court." As used in Act 1891, § 6, providing that the Circuit Court of Appeals shall exercise appellate jurisdiction of final decisions in the District Court for the district, "judge" and "court" are not, strictly speaking, convertible terms; but they are so in popular sense, and such is the sense in which they were used in these statutes. *United States v. Gee Lee*, 50 Fed. 271, 273, 1 C. C. A. 516.

In a bill of exceptions it was stated that the judge disregarded accused's objections to the separation of the jurors, and it was contended that the judge alone had not authority to determine such question; it being a matter for the court. Held, that where it appeared that the exception stated that the judge disregarded said objection, and in the exercise of his discretion permitted the jury to sepa-

rate at its adjournment until they were finally charged by the court, and at each adjournment the judge gave the usual admonitions to the jury, it is clear that the word "judge," as used, meant "court," and consequently the exception was not insufficient. *State v. Smith*, 78 N. W. 224, 225, 107 Iowa, 480.

The court of probate, and not the individual who for the time should be occupying the office of judge thereof, is meant by a will appointing five executors and trustees, and providing that if, on account of vacancies, there should at any time be only two, "the judge of probate of this district" should appoint a third, regard being had in making such appointment to the wishes of the existing trustees, and further providing that testator did not desire "the judge of probate," in fixing the bonds of his executors and trustees, to be governed by the law with regard to the amount of personal property. *Appeal of Allen*, 38 Atl. 701, 702, 69 Conn. 702.

In the territorial act consolidating the village of Guthrie, providing that the district judge of Logan county is empowered to appoint a commissioner, etc., the use of the words "district judge" does not mean to distinguish between the judge and the court. There being but one judge of that court, the words are seemingly used interchangeably with "district court," and to mean the same as the latter expression. *Guthrie Nat. Bank v. City of Guthrie*, 19 Sup. Ct. 513, 516, 173 U. S. 528, 43 L. Ed. 796.

"Judge," in Gen. Laws 1876, c. 44, where in it is declared that jurisdiction over assignments for the benefit of creditors is vested solely in the judges of the district courts of the state, means that the jurisdiction is vested in the court itself, to be exercised by the judge as an authorized officer, by and through whom its judicial functions are to be administered, and does not intend to make any distinction between the judge and the court. *Clark v. Santon*, 24 Minn. 232, 241.

"The terms, 'circuit judge,' and 'judge of the circuit court' are convertible. They mean precisely the same thing, and if there is no circuit court there can be no circuit judge or judge of the circuit court." Hence an act abolishing the circuit court abolished by implication the office of circuit judge. *Crozier v. Lyons*, 34 N. W. 186, 188, 72 Iowa, 401.

A judge is not a court; so that a preliminary proceeding before a United States commissioner is not a proceeding in any court of the United States, within the meaning of Rev. St. § 5406, imposing a penalty for conspiring to deter a witness from attending or testifying in such a proceeding. *Todd v. United States*, 15 Sup. Ct. 889, 891, 158 U. S. 278, 39 L. Ed. 982.

**Court commissioner.**

Const. art. 6, § 21, prohibiting the judges of the Court of Appeals from holding any other office, does not include a Commissioner of Appeals. *Settle v. Van Evrea*, 49 N. Y. 280, 284.

Under Rev. St. § 4096, authorizing the taking of depositions before a judge at chambers, it is held that the words "judge at chambers" are indicative of the officers before whom the examination may be had, and not of the judicial powers which the officer taking the deposition must exercise in taking the same, and consequently under any statute providing that, except as otherwise expressly directed in particular instances, a county judge or court commissioner may exercise within his county the powers of a circuit judge at chambers, etc., it is held that a county court commissioner may act in the capacity of a judge at chambers in the taking of depositions. *Whereatt v. Ellis*, 27 N. W. 630, 633, 65 Wis. 639.

A preliminary proceeding before a United States commissioner is not a proceeding in any court of the United States. *Todd v. United States*, 15 Sup. Ct. 889, 891, 158 U. S. 278, 39 L. Ed. 982.

Act 1892, § 6, provides that Chinese laborers without certificates may be taken before a United States judge. It is held that the act is satisfied by a proceeding before a justice, judge, or commissioner. *Fong Mey Yuk v. United States* (U. S.) 113 Fed. 898, 51 C. C. A. 528. The words "United States judge" and "judge in court" refer to the tribunal authorized to deal with the subject, whether composed of a justice, judge, or commissioner, as a United States commissioner is a quasi judicial officer and in these hearings he acts judicially. *Chin Bak Kan v. United States*, 22 Sup. Ct. 891, 894, 166 U. S. 193, 46 L. Ed. 1121.

Rev. St. § 2831, authorizing a judge to allow certain proceedings, includes a court commissioner. *Woodruff v. Town of Depere*, 18 N. W. 761, 762, 60 Wis. 128.

The word "judge," in Rev. St. § 2640, relating to the making of an order of publication by a court or judge thereof, includes a court commissioner, under section 2815. *Pfister v. Smith*, 69 N. W. 984, 985, 95 Wis. 51.

**Judge of probate.**

A judge of probate is not a "judge" within the constitutional provision prohibiting the election of judges within 30 days of a general election. It refers only to those high judicial officers whose election had previously been provided for in the same article of the Constitution; those officers known in legal parlance, as well as common parlance,

as judges. *State v. French* (Wis.) 2 Pin. 181, 184.

**Justice of the peace.**

"Judge," in Const. art. 6, § 12, providing that no person shall hold the office of justice or "judge" of any court longer than until and including the last day of December next after he shall be 70 years of age, does not include a justice of the peace. *People v. Mann*, 97 N. Y. 530, 531, 49 Am. Rep. 556.

In Rev. St. div. 5, p. 466, § 8, providing that no "judge of any court" shall have a voice in the decision of any cause in which he is counsel, attorney, or solicitor, or in the subject-matter of which he is interested, the word "judge" means any person who is a judge, and hence applies to a justice of the peace. *Carrington v. Andrews* (N. Y.) 12 Abb. Prac. 348, 351.

**Justice of Supreme Court.**

Code, § 362, providing that no order to stay proceedings for a longer time than 10 days shall be granted by a judge out of court, except on previous notice to the adverse party, should be construed to include a justice of the Supreme Court, though the expression "judge or justice" is also used in the same chapter. "Judge" and "justice" are used synonymously in the Code. *Lowe v. Cheney* (N. Y.) 1 Code Rep. 29.

**Substitute judge.**

The words "judge thereof," in Code Civ. Proc. § 172, which provides that an injunction may be granted by the court in which the action is brought, or by the judge thereof, does not include a district judge who is holding court for another judge in the district of the latter, during an adjournment of the trial of a cause from Saturday until Monday, and hence such judge cannot issue an injunction in chambers during such time. *Wallace v. Helena Electric Ry. Co.*, 25 Pac. 278, 10 Mont. 24.

**JUDGE OF A COURT OF RECORD.**

A judge authorized by law to hold a court which is a court of record is a "judge of a court of record," although the court over which he ordinarily presides is not a court of record. *People v. Kelly*, 80 N. Y. Super. Ct. (7 Rob.) 592, 602.

The term "judge of a court of record," in the statutory provision providing that on a certain showing any inebriate or habitual or common drunkard shall be brought before the judge of a court of record for trial, means any judge of any court of record in the state, even at chambers. *State v. Ryan*, 30 N. W. 823, 827, 70 Wis. 676.

**JUDGE PRO TEM.**

A judge pro tem is only a substitute, and never a duplicate. *Haverly Invincible Min. Co. v. Howcutt*, 15 Coke, 746; *Cox v. State*, 2 Pac. 155, 156, 30 Kan. 202; *Williams v. Struss*, 44 Pac. 273, 275, 4 Okl. 160 (citing *In re Millington*, 24 Kan. 214).

**JUDGMENT.**

A "judgment" is the result of a mental process acting on prior events. The term "judgment," and not "feeling," characterizes a statement made by testator that his will had been made by reason of continuous influence exercised by his wife; and such declaration is therefore inadmissible in a will contest case. *Appeal of Vivian*, 50 Atl. 797, 798, 74 Conn. 257.

The term "judgment," as used in an instruction that it was the duty of a master to use ordinary and reasonable care and judgment in providing suitable and safe machinery for the use of his servants, was synonymous with "prudence," and, used in such sense, expressed the proper rule of law. *Garneau Cracker Co. v. Palmer*, 28 Neb. 307, 308, 44 N. W. 463, 465.

An instruction directing the jurors, in considering a certain case, to use their own judgment, means a decision resulting from the mental process of reasoning, or that faculty of the mind by which a person is enabled, by a comparison of ideas or an examination of facts, to arrive at a just conclusion in reaching for the truth. *Timmis v. Wade*, 31 N. E. 827, 829, 5 Ind. App. 139.

Following a bequest to a wife, a request to care for a testator's mother and sister "as in her judgment will be best" means that the wife should make a suitable provision with regard to the circumstances. *Colton v. Colton*, 8 Sup. Ct. 1164, 1171, 127 U. S. 300, 32 L. Ed. 138.

As used in a will authorizing executors to sell either at public or private sale as much of testator's real estate as should be required to complete a payment of his debts "for such price as in their judgment shall be right," such phrase does not limit the exercise of the power to the executors named, but permits it to be exercised by any one who may succeed to the office. The words "for such price as in their judgment shall be right" are incidentally connected with the power, as an injunction to good faith and the avoidance of the sacrifice of the property. They command the exercise of an ordinary business judgment in fixing the fair price of property, and such demand imposed no duty additional to that to which the law would hold the executors in its absence. They simply direct a conscientious discharge of the duties which the law requires. *Jorale-*

*mon's Adm'r v. Van Riper*, 14 Atl. 479, 480, 44 N. J. Eq. 299.

A voluntary assignment for the benefit of creditors, authorizing the assignee to sell and dispose "upon such terms and conditions as in his judgment may seem best," only authorizes the exercise of a judicial discretion by the trustee, and does not authorize him to sell on credit. "It must be held to apply to the mode of sale, as to whether it shall be public or private, by the quantity or by the single article, and the various other details of such transaction." *Cribben v. Ellis*, 34 N. W. 154, 159, 69 Wis. 337.

**JUDGMENT (In Law).**

See "Action on Judgment"; "After Judgment"; "Conclusive Judgment"; "Conditional Judgment"; "Consent Judgment"; "Contract Judgment"; "Criminal Judgments"; "Domestic Judgment"; "Dormant Judgment"; "Final Decree or Judgment"; "Foreign Judgment"; "Interlocutory Decree or Judgment"; "Irregular Judgment"; "Justice's Judgments"; "Money Judgment"; "Offer to Confess Judgment"; "Personal Judgment"; "Valid Judgment"; "Void Judgment"; "Writ of False Judgment."

All judgments, see "All."

Any judgment, see "Any."

On appeal as final hearing, see "Final Hearing or Trial."

Lord Coke pronounces a judgment to be the "very voice of the law and right." *Charles Greene's Son v. Salas* (U. S.) 31 Fed. 106, 108; *Pollock v. C. Hennicke Co.* (Ark.) 46 S. W. 185, 186.

A "judgment" is the decision of the court upon the case before it. *In re Negus* (N. Y.) 10 Wend. 35, 44; *McKercher v. Green* (Colo.) 58 Pac. 406, 407.

A judgment is the decision of a controversy, given by a court of justice, between parties who do not agree. *Ward v. Kenner* (Tenn.) 37 S. W. 707, 709 (citing *Union Bank v. Marin*, 3 La. Ann. 35).

A judgment is a fiat of a court settling the rights of the parties, and, however unjust, erroneous, or illegal the settlement may be, the parties can only claim under it that which by its terms the judgment awards. *Schulhoefer v. City of New Orleans*, 4 South. 494, 495, 40 La. Ann. 512 (citing *Succession of Anderson*, 33 La. Ann. 581).

A judgment is the action of court ascertaining some act to be done or forborne by a party. *Sullivan v. Thomas*, 3 S. C. (3 Rich.) 531, 546.

A judgment is a settled adjudication of an existing debt. *Ward v. Kenner* (Tenn.)

37 S. W. 707, 709 (citing *Nichols v. Dissler*, 81 N. J. Law [2 Vroom] 473, 86 Am. Dec. 219).

A judgment is an adjudication of the rights of the parties in respect to the claim involved. *Leslie v. Saratoga Brewing Co.*, 33 Misc. Rep. 118, 123, 67 N. Y. Supp. 222.

1 Black, Judgm. § 12, classifies judgments as of four kinds: (1) Judgments on the issue of law; (2) judgments upon a verdict; (3) judgments without a verdict; and (4) judgments against a verdict. *Falken v. Housatonic R. Co.*, 27 Atl. 1117, 1118, 63 Conn. 258.

That only is judgment which is pronounced between the parties to an action upon the matters submitted to the court for decision. To judgments thus rendered the federal law ascribes in every state the same conclusive force possessed in the state where they are rendered. *Bullock v. Bullock*, 52 N. J. Eq. (7 Dick.) 561, 30 Atl. 676, 679, 27 L. R. A. 213, 46 Am. St. Rep. 528.

Every definitive sentence or decision by which the merits of the cause are determined, although it be not technically a judgment, and although proceedings are not capable of being technically enrolled, so as to constitute what is technically called a "record," is a judgment, within the meaning of the law. *Epwright v. Kauffman*, 1 S. W. 736, 737, 90 Mo. 25.

A judgment is a determination by the court of the matters in issue in the particular case, as to whether a liability does or does not exist. *St. Joe & Mineral Farm Min. Co. v. First Nat. Bank*, 52 Pac. 678, 679, 24 Colo. 537.

A judgment is the determination of the law as the result of proceedings instituted in a court of justice. Where the district court by indorsement upon the papers "adjudges the respondent corporation to be probably guilty," and thereupon certifies the case to the Supreme Court upon the question of the constitutionality of the act under which the complaint was made, when the case is remanded to the district court, that tribunal will either discharge the defendant or bind it over, as the decision of this court upon the constitutional question may make proper; and there was a sufficient judgment in the district court to give this court jurisdiction over the constitutional question. *State v. Brown & Sharpe Mfg. Co.*, 25 Atl. 246, 247, 18 R. I. 16, 17 L. R. A. 856.

#### As conclusion of facts or law.

A judgment is a decision of the court upon questions of law or fact. *Martin v. Pifer*, 96 Ind. 245, 248. Or a compound question of both law and fact. *State ex rel. Crow v. Fleming (Mo.)* 44 S. W. 758, 759.

A judgment may be a conclusion of law upon facts found by the court or a conclusion of law upon facts found by the jury. *Siddall v. Jansen*, 32 N. E. 384, 386, 143 Ill. 537.

A judgment is the conclusions of law drawn from the facts found by the judicial investigation. *Froman v. Patterson*, 24 Pac. 692, 694, 10 Mont. 107. Or admitted by the parties. *Thompson v. People (N. Y.)* 23 Wend. 537, 537; *Tipton v. Tipton's Admr.*, 30 N. E. 823, 827, 49 Ohio St. 364; *Gould v. Hayes*, 40 Atl. 930, 932, 71 Conn. 86. Or upon their default in the course of a suit. *Davison v. Brown*, 67 N. W. 42, 43, 93 Wis. 85; *Siddall v. Jansen*, 32 N. E. 384, 386, 143 Ill. 537; *Thomas v. Pendleton*, 46 N. W. 180, 181, 1 S. D. 150, 38 Am. St. Rep. 726; *Teel v. Yost*, 5 N. Y. Supp. 5, 7 N. Y. Super. Ct. 456.

A judgment is the determination of the law as the result of proceedings in a court of justice. Appeal of *Mahoning County Bank*, 32 Pa. (8 Casey) 153, 160.

A judgment is the conclusion of law in a particular case announced by the court. *Little Pittsburg Con. Min. Co. v. Little Chief Con. Min. Co.*, 17 Pac. 760, 762, 11 Colo. 223, 7 Am. St. Rep. 228.

In Code Proc. § 368, subd. 1, relating to appeals from inferior courts, providing that the circuit courts shall have power to affirm or reverse judgments in the inferior courts for errors in law or fact, the word "judgment" is not used in its strict technical sense, as the final determination of the rights of the parties in the action, but in the more popular sense, as indicating the decision or conclusion at which it has arrived upon a given question, and thus will apply to an erroneous decision as to facts. *Redfearn v. Douglass*, 15 S. E. 244, 245, 35 S. C. 569.

Where a regularly constituted court of justice clothed with authority to hear and determine a question of fact, or a mixed question of law or fact, upon evidence, written or oral, produced before such court, renders a decision affecting the material rights or interests of one or more persons or bodies corporate, such proceeding by the court is judicial, and the decision by the court is a judgment. *Martin v. Simpkins*, 38 Pac. 1092, 1094, 20 Colo. 438.

A judgment is defined to be the conclusion of the law upon the facts. *Orvis v. Elliott*, 65 Mo. App. 96. From this definition the facts to sustain the judgment must be found by the tribunal rendering the judgment. *State ex rel. School Dist. No. 1 v. Denny*, 72 S. W. 467, 469, 94 Mo. App. 559.

#### As confessed judgment.

"Judgment," as used in Rev. Code, c. 51, § 2, declaring void all contracts, judg-

ments, conveyances, etc., for money lost at play, means only judgments confessed or allowed by consent, and does not include judgments recovered in invitum. *Teague v. Perry*, 64 N. C. 89, 42.

#### As decision on matter in record.

"Judgment is the sentence of the law pronounced by the court on the matter contained in the record." *Lockwood v. Saffold*, 1 Ga. (1 Kelly) 72, 74; *Ward v. Kenner* (Tenn.) 87 S. W. 707, 709; *Ætna Ins. Co. v. Swift*, 12 Minn. 437 (Gil. 826, 830); *Jordan v. Humphrey*, 21 N. W. 713, 82 Minn. 522; *Martin v. Simpkins* (Colo.) 38 Pac. 1092, 1094; *Davidson v. Smith* (U. S.) 7 Fed. Cas. 38, 39; *McTavish v. Great Northern Ry. Co.* (N. D.) 79 N. W. 443, 445; *Lance v. Bonnell*, 105 Pa. 46, 48; *Campbell v. Kent* (Pa.) 3 Pen. & W. 72, 77; *Halbert v. Alford* (Tex.) 16 S. W. 814, 815; *Weiner v. Lee Shing*, 7 Pac. 111, 113, 12 Or. 276.

Among numerous definitions of the term "judgment," this one is deemed sufficiently accurate, to wit: "The decision or sentence of the law, pronounced by a court or other competent tribunal on the matter contained in the record." 1 *Freem. Judgm.* (4th Ed.) § 2; *State ex inf. Crow v. Fleming*, 44 S. W. 758, 759, 147 Mo. 1; *Eppright v. Kauffman*, 1 S. W. 736, 737, 90 Mo. 25; *Succession of Anderson*, 33 La. Ann. 581, 583; *Schulhofer v. City of New Orleans*, 4 South. 494, 495, 40 La. Ann. 512; *Pollock v. C. Hennicke Co.*, 46 S. W. 185, 186, 64 Ark. 180; *Charles Green's Son v. Salas* (U. S.) 81 Fed. 106, 108.

#### As decision on whole matter.

A determination specifying the whole relief to be granted on all questions involved in the action, and nothing else than that, is a judgment. *Ford v. Turner*, 12 N. Y. Super. Ct. (5 Duer) 684, 686.

A judgment is the decision or sentence of a court on the main question in a proceeding, or on one of the questions, if there are several. *Ward v. Kenner* (Tenn.) 87 S. W. 707, 709 (citing *Rap. & L. Law Dict.*).

A judgment may be upon the main question, or on all of the questions, if there are several. This implies that there may be a judgment for plaintiff upon an issue of facts found in his favor and a judgment for defendant in the same proceeding upon an issue of fact found in his favor. *Tipton v. Tipton's Adm'r*, 30 N. E. 826, 827, 49 Ohio St. 364.

An adjudication may consist of many judgments, one of which judgments may be determined for the plaintiff or defendant on the claim of either as the entirety; or, when the claim consists of several parts or items, such judgment may be for either of them on

any specific part or item of such aggregate claim, and against him on the other part thereof; or a judgment may in any of these ways determine on the claims of co-parties on the same side against each other. *Lake v. Bender*, 4 Pac. 711, 718, 18 Nev. 861.

#### As final determination.

A judgment is the final determination of the rights of the parties. *Consolidated Mining & Prospecting Co. v. Huff*, 63 Pac. 442, 443, 62 Kan. 405; *Parker v. Bond*, 1 Pac. 209, 213, 5 Mont. 1; *Shattuck v. McArthur* (U. S.) 25 Fed. 133, 134; *Valentine v. Central Nat. Bank* (N. Y.) 10 Abb. N. C. 188, 191; *Spencer v. Thistle*, 13 Neb. 227, 229, 13 N. W. 214; *In re Foye*, 57 Pac. 825, 826, 21 Wash. 250; *Rev. Codes N. D.* 1899, § 6097.

A judgment is the final determination of the rights of the parties in an action. *Rev. St. Mo.* 1899, § 766; *Ann. Codes & St. Or.* 1901, § 179; *Rev. St. Wis.* 1898, § 2882; *Rev. Codes N. D.* 1899, § 5412; *Code Civ. Proc. S. D.* 1903, § 236; *Rev. St. Wyo.* 1899, § 3751; *Clark's Code N. C.* 1900, § 384; *Code Civ. Proc. S. C.* 1902, § 266; *Ind. T. Ann. St.* 1899, § 3368; *Ballinger's Ann. Codes & St. Wash.* 1897, § 5080; *Bates' Ann. St. Ohio* 1904, § 5310; *Rev. St. Okl.* 1903, § 4583; *Cobbe's Ann. St. Neb.* 1903, § 1413; *Garland v. McKittrick*, 9 N. W. 160, 52 Wis. 261; *Ex parte Ware Furniture Co.*, 49 S. C. 20, 28, 27 S. E. 9, 11; *Genobles v. West*, 23 S. C. 154, 160; *Archer v. Long* (S. C.) 24 S. E. 83, 84; *Produce Bank of New York v. Morton*, 42 N. Y. Super. Ct. (10 Jones & S.) 472, 476; *People v. County Judge of Rensselaer* (N. Y.) 13 How. Prac. 398, 400; *Pearson v. Lovejoy* (N. Y.) 53 Barb. 407, 408; *Voisin v. Commercial Mut. Ins. Co.* (N. Y.) 25 N. E. 325, 326; *Swarthout v. Curtis*, 4 N. Y. (4 Comst.) 415, 416; *Ford v. Turner*, 12 N. Y. Super. Ct. (5 Duer) 684, 686; *Prentiss v. Bowden*, 35 N. Y. Supp. 653, 654, 14 Misc. Rep. 185; *Ford v. David* (N. Y.) 13 How. Prac. 193, 195, 196; *Bank of Geneva v. Hotchkiss* (N. Y.) 1 Code Rep. 153; *Little v. Atchison, T. & S. F. Ry. Co.*, 53 S. W. 331, 332, 2 Ind. T. 551; *Russell v. St. Louis & S. Ry. Co.*, 55 S. W. 454, 154 Mo. 428; *State ex rel. St. Louis, K. & N. W. R. Co. v. Klein*, 41 S. W. 895, 897, 140 Mo. 502; *Gawtry v. Adams*, 10 Mo. App. 29, 32, 34; *Cook v. Jennings* (S. C.) 18 S. E. 640, 643; *Spokane & I. Lumber Co. v. Stanley* (Wash.) 66 Pac. 92, 93; *Bode v. New England Investment Co.*, 45 N. W. 197, 199, 1 N. D. 121; *School Dist. v. Caldwell*, 19 N. W. 634, 635, 16 Neb. 68 (citing *Civ. Code*, § 428); *Locke v. Hubbard* (S. D.) 69 N. W. 588, 589; *Harbin v. State* (Iowa) 43 N. W. 210, 211, 78 Iowa, 263; *Zeigler v. Vance*, 3 Iowa (3 Clarke) 528, 530; *Lake v. Lake*, 4 Pac. 711, 718, 18 Nev. 861; *Bird v. Young*, 46 N. E. 819, 821, 56 Ohio St. 210; *Hull v. Burson*, 56 N. E. 18, 19, 61

Ohio St. 283; *Stebbins v. Niles*, 21 Miss. (13 Smedes & M.) 307, 310; *Broder v. Superior Court of Mono County*, 37 Pac. 143, 103 Cal. 121; *Edwards v. Hellings*, 33 Pac. 799, 99 Cal. 214; *Houston v. Clark*, 13 Pac. 739, 740, 36 Kan. 412; *Butt v. Herndon*, 13 Pac. 580, 581, 36 Kan. 370; *Board of Com'rs of Custer County v. Moon* (Okla.) 57 Pac. 161, 162.

A judgment is the final determination of the rights of the parties in an action or proceeding. Code Civ. Proc. Cal. 1903, § 577; Rev. St. Utah 1898, § 8183; Code Civ. Proc. Idaho 1901, § 8495; Comp. Laws Nev. 1900, § 3242; In re *Smith's Estate*, 33 Pac. 744, 745, 98 Cal. 636; Id., 55 Pac. 249, 122 Cal. 462; In re *Rose's Estate*, 22 Pac. 86, 87, 80 Cal. 166; *Feeney v. Hinckley*, 66 Pac. 580, 134 Cal. 467, 86 Am. St. Rep. 290; *Crim v. Kessing*, 26 Pac. 1074, 1076, 89 Cal. 478, 23 Am. St. Rep. 491; In re *McFarland's Estate*, 26 Pac. 185, 188, 10 Mont. 445; In re *Gibbs*, 6 Pac. 525, 527, 4 Utah, 97; *Hansen v. Anderson*, 61 Pac. 219, 220, 21 Utah, 286; *Grey v. Cederholm*, 3 Pac. 12, 13, 2 Idaho (Hasb.) 34; *Wells v. Torrance*, 51 Pac. 626, 627, 119 Cal. 437; *St. Joe & Mineral Farm Consol. Min. Co. v. First Nat. Bank*, 52 Pac. 678, 679, 24 Colo. 537.

A "judgment" is an adjudication of the rights of the parties in respect to the claim involved. In re *Lyman*, 14 N. Y. Supp. 193, 60 Hun, 82 (citing *McNulty v. Hurd*, 72 N. Y. 518); *Leslie v. Saratoga Brewing Co.*, 67 N. Y. Supp. 222, 226, 33 Misc. Rep. 118; *Ward v. Kenner* (Tenn.) 37 S. W. 707, 709.

A judgment is the final determination of the issue submitted. In re *Beck*, 64 Pac. 971, 972, 63 Kan. 57.

A judgment is a final conclusion by a court of competent jurisdiction of a question of law or fact at issue between the parties thereto and properly submitted for adjudication. *Oklahoma City v. McMaster*, 73 Pac. 1012, 1016, 12 Okl. 570.

Among various definitions of a judgment, not differing in legal effect from each other, we have the one that it is "the final consideration and determination of a court of competent jurisdiction upon the matters submitted to it." *Bell v. Otts*, 101 Ala. 186, 188, 13 South. 43, 46 Am. St. Rep. 117 (citing 1 *Freem. Judgm.* § 2).

A judgment is the final and definitive sentence or decision of the court by which the merits of a cause are settled or determined. *Coffey v. Gamble*, 91 N. W. 813, 814, 117 Iowa, 545.

A judgment is the final and solemn adjudication and determination of the rights of the parties in and to the subject-matter litigated in a court of justice. *Duntermann v. Storey*, 58 N. W. 949, 951, 40 Neb. 447.

The word "judgment" usually means either the final determination, or the record

expressing the final determination, of a court as to the rights of the parties litigant in a common-law action. *Sparrow v. Strong*, 2 Nev. 362, 367.

The word "judgment," as used in the civil procedure act, means all final orders, decrees, and determinations in an action; also all orders upon which executions may be issued. *Horner's Rev. St. Ind.* 1901, § 1285.

A judgment is that final determination from which an appeal may be taken, and which is evidenced by the formal entry by the clerk of the court. *Fuentes v. Mayorga* (N. Y.) 7 Daly, 103, 104.

Chief Justice Marshall, in *Ex parte Watkins*, 28 U. S. (3 Pet.) 193, 204, 205, 7 L. Ed. 650, says: "A judgment in its nature concludes the subject on which it is rendered, and pronounces the law of the case." *Holmes v. Oregon & C. R. Co.* (U. S.) 9 Fed. 229, 233; *Manley v. Park*, 64 Pac. 28, 31, 62 Kan. 553.

The use of the term "judgment" would imply a final judgment. *Hull v. Burson*, 56 N. E. 18, 19, 61 Ohio St. 283.

The words "before judgment," as used in Code, § 295, providing that an order of arrest may issue with the summons, or at any time thereafter before judgment, means final judgment, which is a judgment on the matters put in issue by the pleadings, about which there was earnest contention. *Preiss v. Cohen*, 23 S. E. 162, 163, 117 N. C. 54.

The term "judgment," in Rev. St. § 7356, as amended in 1883, providing that in criminal cases in the Supreme Court only errors of law occurring on the trial or appearing in the pleadings or judgment can be reviewed, has relation to the final judgment and the orders with respect to the pleadings. *Wagner v. State*, 42 Ohio St. 537, 541.

The word "judgment," in a notice that defendants have appealed from the decision and judgment of the district court, necessarily referred to the final judgment of the district court, where that was the only one rendered in the case, and was therefore sufficiently specific. *Geyer v. Douglass*, 52 N. W. 111, 112, 85 Iowa, 93.

A condition in a contractor's bond, binding parties to the payment of any and all judgments which might be recovered against the property, imports that the judgment so rendered must be final, as distinguished from the interlocutory judgment. A judgment which is the complete determination of the rights of parties to the suit with respect to its subject-matter, leaving no further question or direction for after determination, except such as may be necessary to carry it into effect, is a final judgment. It is true that the words "final judgment" are often used to designate a judgment which is irreversible on appeal, or one from which no

appeal will lie; but there is nothing in this bond to justify such an extreme construction. The word "final" is not used, and there is not, therefore, any possible suggestion that it meant a judgment final in the sense which was beyond the reach of reversal. *Heagney v. Hopkins*, 52 N. Y. Supp. 207, 211, 23 Misc. Rep. 608.

The power of the court to charge a garnishee, where the debt is assigned "at the time of the rendition of the judgment against the garnishee," means at the time of final judgment in the action authorized by the statute against such garnishee to subject the debt assigned to the liability of the defendant in the suit at law, and not at the time of the examination of the garnishee, according to the summons served on him to compel him to answer as to his indebtedness to the defendant in the action. *Secor v. Witter*, 39 Ohio St. 218, 232.

#### Same—Interlocutory judgments.

A judgment is either interlocutory or the final determination of the rights of the parties in the action. Code Civ. Proc. N. Y. 1899, § 1200.

The distinction between judgments and interlocutory judgments consists in the final determination of the rights of the parties in an action in the one case, and such determination of these rights of the parties in an action as not complete or final, needing some other adjudication by the court, is an interlocutory judgment. *Cook v. Jennings*, 18 S. E. 640, 643, 40 S. C. 204.

The term "judgment" does not include an order allowing some and rejecting other items of an administrator's account, and reserving others for further consideration. In *re Rose's Estate*, 22 Pac. 86, 87, 80 Cal. 166.

The term "judgment," in Code Civ. Proc. § 551, authorizing the court to grant an order of arrest in an action wherein the judgment demanded would require the performance of an act, the neglect or refusal of which would be punishable by the court as contempt, and there might be danger that the judgment or order requiring the performance of the act would be ineffectual, includes either an interlocutory or final determination of the rights of the parties. *Ensign v. Nelson*, 1 N. Y. Supp. 685, 686, 49 Hun, 215.

#### As sentence of the law.

A judgment, though pronounced by the judges, is not their determination and sentence, but the sentence and determination of the law, which depends, not upon the arbitrary opinion of the judges, but upon the settled and invariable principles of justice. *Baker v. State*, 3 Ark. (3 Pike) 491, 492. The judgment, in short, is the remedy prescribed by law for the redress of injuries,

and the suit or action is the vehicle or means of administering it. In *re Sedgely Ave.*, 88 Pa. 509, 513; *Zeigler v. Vance*, 3 Iowa (3 Clarke) 528, 530.

A judgment is the conclusion that naturally and regularly follows from the premises of law and fact, and depends, therefore, not on the arbitrary caprice of the judge, but on the infallible principles of justice. *State v. Harbourn*, 45 Atl. 432, 433, 72 Conn. 607; *Pollock v. C. Hennicke Co.*, 46 S. W. 185, 186, 64 Ark. 180; In *re Sedgely Ave.*, 88 Pa. 509, 513.

A judgment is the sentence of the law upon a given state of facts. *Ross v. Battle*, 45 S. E. 252, 254, 117 Ga. 877.

A judgment is defined to be the sentence of the law, pronounced by the court upon the matter appearing from the previous proceedings in the suit. It is the conclusion that naturally follows from the premises of law and fact. *Branch v. Branch*, 5 Fla. 447, 450.

A judgment or decree is the fiat or sentence of law determining the matter in controversy. *Blundon v. Crosier*, 49 Atl. 1, 2, 93 Md. 355.

A judgment is the sentence of the law pronounced by a court or a judge thereof upon a matter in issue in any cause before it. In *re Moseley* (U. S.) 17 Fed. Cas. 886, 888.

A judgment, generally speaking, is the determination or sentence of the law, speaking through the court, and it does not exist as a legal entity until pronounced, expressed, or made known in some appropriate way. *Goldreyer v. Cronan*, 55 Atl. 594, 596, 76 Conn. 113.

A judgment is a decision or sentence of the law, given by a court of justice or other competent tribunal as the result of proceedings instituted therein for the redress of an injury. In *re Sedgely Ave.*, 88 Pa. 509, 513 (citing Bouv. Law Dict. tit. "Judgment"); *Stearns v. Aguirre*, 7 Cal. 443, 449; *State ex rel. St. Louis, K. & N. W. Ry. Co. v. Klein*, 41 S. W. 895, 897, 140 Mo. 502; *Teel v. Yost*, 5 N. Y. Supp. 5, 7, 56 N. Y. Super. Ct. (24 Jones & S.) 456. Thus, where it does not appear from the record of a court that there was any judgment in favor of the plaintiff and against the defendants for any sum of money that would justify the presumption that any question was adjudicated between the parties, the essential element of the judgment is lacking. *Thomas v. Pendleton*, 46 N. W. 180, 181, 1 S. D. 150, 36 Am. St. Rep. 726.

A "judgment" is the determination or sentence of the law pronounced by a competent judge or court as the result of an action or proceeding instituted in such court, affirm-



ing that upon the matter submitted for its decision a legal duty or liability does or does not exist. *Gunter v. Earnest*, 68 Ark. 180, 184, 56 S. W. 876, 877 (citing 1 Black, Judgm. p. 2, § 1).

#### Costs as part of.

The statute of 1866 provides that whenever any judgment rendered by a justice of the peace, otherwise than upon the verdict of a jury, shall exceed \$5, an appeal shall be allowed. Held, that the word "judgment" did not embrace the costs, as well as the debt or damages, but that an appeal was allowed only in cases where the damages alone amount to more than \$5. *Curtis v. Gill*, 34 Conn. 49, 53.

The word "judgment," as used in Rev. St. 1895, art. 1436, providing that if the party against whom a judgment is rendered appealed, and on appeal the judgment shall be against him, but for a less sum, he shall recover the costs of the court above, does not include costs. *Ball v. Chase* (Tex.) 49 S. W. 934.

#### Entry.

A judgment must be entered in the judgment docket. *Bode v. New England Inv. Co.*, 45 N. W. 197, 199, 6 Dak. 499.

A judgment is said by an ancient authority to be the decision or sentence of the law on facts found or admitted by the parties, or upon their default in the course of a suit; but a bare decision of a court is not a judgment. There must be a formal order entered upon it. Hence a judgment may be accurately defined as the decision or sentence of the law, pronounced by a court and entered upon its dockets, minutes, or records. The judgment of a court can only be shown by its records. Where there is no record, there is no judgment. *Plant v. Gunn* (U. S.) 19 Fed. Cas. 800, 803.

A judgment is that final determination from which an appeal may be taken, and which is evidenced by the formal entry by the clerk of the court. *Fuentes v. Mayorga* (N. Y.) 7 Daly, 103, 104.

The entry which the statute requires the judge to make upon his journal and the record of the proceedings do not constitute a judgment, and it is not essential to the validity of the proceedings that the order for such entry be made by the court. It is sufficient if it be made by the judge. *Bird v. Young*, 46 N. E. 819, 821, 56 Ohio St. 210.

An entry by the clerk at the end of the trial of the amount for which plaintiff was entitled to recover in a foreclosure suit does not constitute a judgment. *Crim v. Kes-sing*, 26 Pac. 1074, 1076, 89 Cal. 478, 23 Am. St. Rep. 491.

A judgment is the act of the court, while its entry in the record is the act of the clerk. The one is judicial; the other, ministerial. The one is the determining act; the other, the evidence of it. A judgment of a court of record can be proven only by the record, yet it derives its force, not from its entry on the record, but from its rendition by the court. *State ex rel. Green v. Henderson*, 64 S. W. 138, 141, 164 Mo. 347, 86 Am. St. Rep. 618.

A judgment is the sentence of the law pronounced by the court; but the court can only be held in term time as may be prescribed by law, and for the purpose of entering judgment has no existence in vacation. Consequently a judgment cannot be entered in vacation, unless in pursuance of a positive statute, whose provisions must be complied with. *Bonnell v. Weaver* (U. S.) 3 Fed. Cas. 851, 852.

While a written instrument purporting to be the judgment in a cause remains in the possession of the judge who is to pronounce it, it is of no effect, and like a deed not delivered. The moment, however, it is filed by the clerk of the court, it becomes the judgment of the court, and fixes the rights of the parties. *Archer v. Long*, 24 S. E. 83, 84, 46 S. C. 292 (citing *Genobles v. West*, 23 S. C. 160).

#### Form.

While the language used by courts in pronouncing judgments is in many instances identical, yet there is no legally prescribed verbal formula which must be used for that purpose. *Little Pittsburg Con. Min. Co. v. Little Chief Con. Min. Co.*, 17 Pac. 760, 762, 11 Colo. 223, 7 Am. St. Rep. 226.

The language employed to express the determination of the law is: "It is considered—consideratum est per curiam—that the plaintiff do recover his damages," or "his debt," or "his possession," and the like. *In re Sedgeley Ave.*, 88 Pa. 509, 513.

A judgment, though pronounced by the judges, is not their determination and sentence, but the sentence and determination of the law, which depends, not upon the arbitrary opinion of the judges, but upon the settled and invariable principles of justice, and is the remedy prescribed by law for the redress of injuries. Therefore the style of a judgment is, not "that it is ordered or resolved by the judges," for then the judgment might be their own, but "it is considered"—"consideratum est per curiam"—which implies that the judgment is not their own, but the act of the law, pronounced and declared by the court upon determination and inquiry. Accordingly, where a judgment was entered below, "Ordered by the court that the said defendant," etc., there

was no judgment, and no appeal would lie. *Baker v. State*, 3 Ark. (3 Pike) 491, 492.

A judgment is the conclusions of law drawn from the facts found by the judicial investigation. Such conclusions are generally stated in an imperative form. *Froman v. Patterson*, 24 Pac. 692, 694, 10 Mont. 107.

A judgment should be the simple sentence of the law upon the material ultimate facts admitted by the pleading or found by the court. *Rankin v. Newman*, 40 Pac. 1024, 1026, 107 Cal. 602 (citing *Gregory v. Nelson*, 41 Cal. 278, 282).

"The judgment or decree is a fiat or sentence of the law," says the court in *State v. Ramsburg*, 43 Md. 325, 333, "determining the matter in controversy in concise technical terms, which must be interpreted in their own proper sense. It would, we think, be of dangerous tendency to make the force and effect of the most solemn official acts depend upon the various interpretations which ingenuity might suggest to the most carefully considered language introducing them." *Martin v. Evans*, 86 Atl. 258, 260, 85 Md. 8, 86 L. R. A. 218, 60 Am. St. Rep. 292.

The entry of "Damages \$310," is not a judgment. It is nowhere stated that it is adjudged, ordered, decreed, or considered that plaintiff shall have the recovery of the defendants, or that defendants shall have the recovery of plaintiff, in the sum of \$310, or any other sum. There is no word or words used which indicate an adjudication by the judge for or against either party. *Grey v. Cederholm*, 3 Pac. 12, 13, 2 Idaho (Hasb.) 34.

The entry in a docket: "And now a single bill, under the hand and seal of the defendant, containing a clause authorizing the entry of a judgment on a note, waiving stay of execution, is produced hereto, to have judgment thereon. Wherefore judgment"—does not constitute a judgment. *Teel v. Yost*, 5 N. Y. Supp. 5, 7, 56 N. Y. Super. Ct. (24 Jones & S.) 456.

In *Freem. Judgm.* § 38, it is said a judgment is not what is entered, but what is ordered and adjudged. *Houston v. Clark*, 13 Pac. 739, 740, 36 Kan. 412. But where a husband and wife settled a suit for separate maintenance by a contract by which he was to pay her an annuity for life, and the judgment entered was that the suit had been settled and dismissed, the contract did not become a part of the judgment; it not appearing to have been considered or ordered by the court. *Newberry v. Newberry*, 87 N. W. 658, 660, 114 Iowa, 704.

A judgment may be formulated in writing by the judge or declared by him orally. *Allen v. Voje*, 89 N. W. 924, 926, 114 Wis. 1.

Act Feb. 24, 1806, provided that the prothonotary of any court of record might in

certain circumstances enter judgment on a bond in which judgment was confessed, or containing a warrant for any attorney to confess a judgment, which judgment should have the same force and effect as though confessed by an attorney or given in open court in term time. Held that, where the prothonotary entered the judgment bond on the docket in the form of an action, such entry containing the names of the parties, the amount due, and the date and the time of the writing, and showing the seal of the defendant, a judgment has been duly entered on the judgment bond. *Helvete v. Rapp* (Pa.) 7 Serg. & R. 306, 308.

A judgment must be signed by the judge of the court. *Bode v. New England Inv. Co.*, 45 N. W. 197, 199, 6 Dak. 499.

#### Power to enforce.

It is an essential part of every judgment passed by a court exercising judicial power that it should have authority to enforce it or to give effect to it. It is no judgment, in the legal sense of the term, without such power. It will be merely an opinion, which would remain a dead letter. *District of Columbia v. Eslin*, 22 Sup. Ct. 17, 18, 182 U. S. 62, 46 L. Ed. 85.

#### Two parties implied.

The word "judgment," when used in an action in personam implies two parties—one the plaintiff in whose favor, and the other the defendant against whom, the judgment may be pronounced. At law the judgment is *yea* or *nay* for one party and against the other. *Taylor v. Tennessee Lumber Co.*, 63 S. W. 1130, 107 Tenn. 41.

#### Award.

An award, when made, is more in the nature of a contract than of a judgment. It is but the consummation of the contract of submission; its appropriate and legitimate result. Hence it is held that the fact that a judgment rendered on Sunday is void does not render an award made on Sunday illegal. *Blood v. Bates*, 81 Vt. 147, 149.

An award of arbitrators in the common pleas is to be considered as a judgment of that court from the time of its entry upon the docket, and as such subject to a writ of error. The statute expressly provides that from the time of the entry of the award in the docket it shall take rank as a judgment, and that execution may issue thereon, provided that, when judgment has been rendered for any sum or sums of money, the like stay of execution shall be had and under like regulations as in the case of other judgments. When the Legislature expressly and repeatedly says that the award is a judgment, the court should do so. *Ebersoll v. Krug* (Pa.) 3 Binn. 523, 529.

A "judgment," by the common law, is a final decision entered of record on a parchment roll called a "judgment roll," under the signature of a judge of the court. Our Legislature wisely abolished the parchment roll, by substituting in its place a book, so that under our statute a judgment is a final decision entered of record in the book of judgments, under the signature of a judge. An award cannot be in the nature of a judgment, unless it be a part of the record in the book of judgments, under like signature, such as the award of oyer, a venire, writ of inquiry, execution, etc., which are all of record. Neither is a rule of court a judgment. *Evans v. Adams*, 15 N. J. Law (3 J. S. Green) 373, 380.

**As an agreement.**

See "Agreement."

**Adjudication in probate.**

An adjudication on the contest of a will, made in pursuance of a complaint whereby the legatees agreed to take certain amount in satisfaction of their legacies, and which directs that the administrator with the will annexed, to be thereafter appointed, should pay such legacies, is not a judgment, within Code, § 570, providing that all judgments shall bear interest until paid. The defendants became entitled to the amount payable rather by the terms of the will than by those of the order. *Moore v. Pullen*, 21 S. E. 195, 196, 116 N. C. 284.

**Allowance of claim in probate.**

An allowance by a probate court of a claim against an estate is a judgment. *Funk v. Seehorn*, 74 S. W. 445, 447, 99 Mo. App. 587.

The allowance by the county court of a claim filed therein against an estate did not constitute a judgment, within the meaning of Rev. St. § 2740, limiting actions on judgments of courts not of record to 10 years. *Smith v. Shawhan*, 37 Iowa, 533, 535.

While it may be true that the allowance or disallowance of a claim against an estate by the board of commissioners is not a "judgment" in the ordinary sense of that word, yet it does not necessarily follow for that reason that, when a board of commissioners has acted upon a claim, it has jurisdiction to act upon a claim for the same thing at a subsequent session, and rescind or set aside the former action of the board. *Myers v. Gibson*, 53 N. E. 646, 648, 152 Ind. 500.

**Appointment of receiver.**

The term "judgment," in Bankr. Act U. S. § 67, cl. "f," providing that all judgments, etc., obtained at any time within four months prior to the filing of a petition in bankruptcy, shall be deemed null and void in

case the judgment debtor is adjudged a bankrupt, includes a judgment appointing a receiver, and therefore the property held by the receiver must be turned over for administration under the bankruptcy proceedings. *Mauran v. Crown Carpet Lining Co.*, 50 Atl. 331, 333, 23 R. I. 324.

The Supreme Court of Rhode Island, in the case of *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 324, 50 Atl. 331, ruled that the word "judgment" in section 67f of the bankrupt act is sufficiently broad to apply to the judgment of the state court in appointing the receiver of an insolvent corporation, obtained within three months of an adjudication as an involuntary bankrupt. *Wilson v. Parr*, 42 S. E. 5, 7, 115 Ga. 629.

**As a chose in action.**

See "Chose in Action."

**Claim distinguished.**

There is a distinction between judgments against the testator or intestate and other claims against his estate. A judgment is an adjudication of the rights of the parties in respect to the claim involved. It imports absolute verity. It cannot be disputed any more than a judgment against the administrators. In that sense it is final and conclusive. The statute recognizes a distinction by giving priority to judgments over each other according to date of recovery, and over other debts. A judgment against a deceased, even if disputed or rejected by executors or administrators, need not be sued over in order to authorize a decree for its payment by the surrogate. *McNulty v. Hurd*, 72 N. Y. 518, 521.

**As a contract.**

See "Contract."

**As a conveyance.**

See "Conveyance."

**As a debt of record.**

A judgment is a debt of record, and in many respects is distinguished from a contract. *Davidson v. Smith* (U. S.) 7 Fed. Cas. 38, 40. See, also, *Attrill v. Huntington*, 16 Atl. 651, 654, 70 Md. 191, 2 L. R. A. 779, 14 Am. St. Rep. 344; *Burnes v. Simpson*, 9 Kan. 658, 664.

A judgment of another state is a debt of record, not examinable upon its merits; but it does not carry with it into another state the efficacy of a judgment upon property or upon persons to be enforced by execution. *Bennett v. Bennett*, 49 Atl. 501, 502, 63 N. J. Eq. 306.

A judgment is a security of record, showing the debt due from one person to another. It is as much a mere security as a treasury note or a bond of the United

States. Hence a suit on a judgment is simply a suit on an ordinary right of property. *Provident Savings Life Assur. Soc. v. Ford*, 5 Sup. Ct. 1104, 1107, 114 U. S. 635, 29 L. Ed. 261.

#### Decision in contested election.

The decision entered in a contested election case by a circuit court is not a "judgment," in the sense in which that term is used in the law, giving the right to prosecute a writ of error. *Moore v. Mayfield*, 47 Ill. 167, 169.

#### Decision in criminal proceeding.

A judgment is the decision of the court in a civil or criminal proceeding. *Sprott v. Reid* (Iowa) 3 G. Greene, 489, 494, 56 Am. Dec. 549.

The term "judgment," when used in speaking of the judgment rendered against defendant in criminal proceedings, means the proceeding of declaring the defendant's punishment. *Bugbee v. Boyce*, 35 Atl. 330, 331, 68 Vt. 811.

In *Commonwealth v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699, it is said that the ordinary legal meaning of "conviction," when used to designate a particular stage of a criminal prosecution triable by jury, is the conviction of the accused in open court or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt, while "judgment" or "sentence" is the appropriate term to denote the action of the court before which the trial is had, declaring the consequence to the convict of the fact thus ascertained. *People v. Adams*, 55 N. W. 461, 95 Mich. 541; *State v. Henson*, 50 Atl. 468, 470, 66 N. J. Law, 601; *State v. Moise*, 18 South. 943, 948, 48 La. Ann. 109, 35 L. R. A. 701. See, also, *Munkley v. Hoyt*, 60 N. E. 413, 179 Mass. 108; *State v. Barnes*, 4 South. 560, 561, 24 Fla. 153.

#### Decision on rule to show cause.

The word "judgment," in Act June 14, 1826, § 15, providing that a writ of error may be sued out by any person aggrieved "by the judgment of any court of common pleas on any writ of quo warranto," does not authorize a writ of error on the part of a person aggrieved by the action of the court in passing on a rule to show cause why a quo warranto should not issue. *Commonwealth v. Davis*, 109 Pa. 128, 129.

#### Decree.

There is no difference between judgments at law and decrees in equity. *Cook v. Jennings*, 18 S. E. 640, 643, 40 S. C. 204. See, also, *McGarrahan v. Maxwell*, 28 Cal. 75, 85.

The term "judgment" and "decree," while applicable, strictly speaking, the for-

mer to suits at law and the latter to suits in chancery, are usually employed as convertible terms. *Lamson v. Hutchings* (U. S.) 118 Fed. 321, 323, 55 C. C. A. 245.

Under a Code purporting to abolish the distinction between law and equity, "judgment" is an apt word in proceedings of an equitable nature, as well as in those which are strictly legal. *Gray v. Eurich*, 96 N. W. 343, 2 Neb. (Unof.) 194.

"Judgment," in Code, § 1833, providing that, on reading the pleadings and proofs and hearing the testimony offered, the court shall render such judgment as is consistent with the rules heretofore observed in chancery cases, should be construed to apply to proceedings in equity, and to include a decree. *Kramer v. Redman*, 9 Iowa, 114, 118.

"Judgment" is a general term, and may be applied to decrees. Being a more general term, it includes decrees as well. Therefore, when the Legislature used the term "final judgment" in a statute relating to the determination of conflicting claims, it must be taken in the broadest sense of the term. *Forsythe v. Richardson*, 1 Idaho, 459, 462.

By the terms of Code, § 3557, the word "judgment" embraces a decree for money. *Hockman v. Hockman*, 25 S. E. 534, 93 Va. 455, 57 Am. St. Rep. 816.

Within the provision of Code 1874, § 1010, that the attorney in an action, suit, or proceeding may be changed at any time before judgment or decree or final determination, the words "action, suit, or proceeding" are referred to distributively in the section. Each has its peculiar meaning, and the words "judgment, decree, and determination" apply equally to each. Thus "judgment" is the final result of "action," "decree" of "suit," and "determination" of "proceeding." *Shirley v. Birch*, 18 Pac. 344, 345, 16 Or. 1.

A judgment is the decision or sentence of the law, pronounced by a court or other competent tribunal, upon the matter contained in the record. According to the common-law rule, by "final judgment" is to be understood, not a final determination of the rights of the parties, but merely of the particular suit or controversy pending between them before the court. A decision has been defined to be a judgment given by a competent tribunal. This word also includes in legal parlance both orders and judgments, as well as the report or account of the opinions or judicial determinations of courts. A decree is the judgment or sentence of a court of equity. It is either interlocutory or final. It embraces, therefore, orders as well as decrees in equity or admiralty. Hence a bond conditioned merely for the performance of the decree or judgment is sufficient, under a statute pro-

viding that the appeal bond shall be conditioned that the appellant perform the decision, order, decree, or judgment of the district court; the word "judgment" and the word "decree" both being broad enough to include "decision" and "order." *Halbert v. Alford* (Tex.) 16 S. W. 814, 815.

The Code defines a judgment as the final determination of the rights of the parties in the action or proceeding, and is decisive as to what is a judgment thereunder; and it makes no difference whether it is what would be formerly called a "judgment" or "decree." *St. Joe & Mineral Farm Min. Co. v. First Nat. Bank*, 52 Pac. 678, 679, 24 Colo. 537.

The word "judgment," as used in 23 Stat. 94 (Ind. T. Ann. St. 1899, p. 9), providing that execution upon judgment obtained in any other than Indian courts shall not be for the sale or conveyance of title to improvements made upon lands owned by the Indian nation, except in cases where judgments are provided for, is used in its comprehensive sense, embracing not only judgments at law, but also decrees and orders in the nature of judgments. *Crowell v. Young* (Ind. T.) 69 S. W. 829, 831.

The word "judgment" is usually applied to a determination of the rights of the parties in an action at law, and the word "decree" to a similar determination in equity; but the words are interchangeable in this Code, each embracing both classes of determination, unless limited expressly or by the context. *Shannon's Code Tenn.* 1896, § 4698.

The word "judgment" includes decrees and also orders in chancery for the payment of money, as well as bonds or recognizances having the force of judgments. *Code W. Va.* 1899, p. 133, c. 13, § 17.

A decree for land or specific personal property, and a decree or order requiring the payment of money, shall have the effect of a judgment for such land, property, or money, and be embraced by the word "judgment," where used in any chapter under the statutes relating to judgment liens and executions. *Code Va.* 1887, § 3557.

#### **As estate in land.**

See "Estate."

#### **Findings of court.**

The findings of a court amount to nothing more than an order for judgment, and are not in themselves the judgment of the court. *Andrews v. Welch*, 2 N. W. 98, 99, 47 Wis. 132.

The findings upon which a judgment is based are not *res judicata*, so as to bind the parties, unless a judgment is rendered. *Butt v. Herndon*, 13 Pac. 580, 581, 36 Kan. 370.

#### **Fine.**

See "Fine."

#### **As an incumbrance.**

See "Incumbrance (On Title)."

#### **Judgment in special proceeding.**

The approval of the report of proceedings dissolving one municipality and annexing the same to another, under the act of 1893, is a judgment. *Martin v. Simpkins*, 38 Pac. 1092, 1094, 20 Colo. 438.

Act April 1, 1874, provides that appeals and writs of error and certiorari, to be effective, must be taken within two years after "any judgment in any real, personal, or mixed action." Held, that both words, "judgment" and "action," were to be used in their comprehensive, rather than in their strictly technical, sense, embracing decrees and orders in the nature of judgments, and including proceedings to vacate and relocate a township road. *In re Road in Salem Tp.*, 103 Pa. 250, 253, 254, 40 Leg. Int. 375.

The term "judgment," as used in *Code Civ. Proc.* § 376, declaring that a judgment for a sum of money is presumed to have been paid after the lapse of 20 years, does not include an order of a county court, made in proceedings to sell lands of an habitual drunkard, which confirms a referee's report finding that a drunkard is indebted to the person in a certain sum. *Sheldon v. Mirick*, 39 N. E. 647, 648, 144 N. Y. 498.

#### **Same—Condemnation proceeding.**

A judgment is the final determination of the rights of the parties in an action, and even under this strict definition the term will include a judicial determination of the rights of the parties in legal proceedings for the condemnation of private lands under the right of eminent domain. *Donnelly v. City of Brooklyn*, 7 N. Y. Supp. 49.

In *Code*, § 3376, authorizing an appeal from a judgment in condemnation proceedings, the word "judgment" is not used in the same sense as in the statute authorizing an appeal from judgments, as the former statute relates to special proceedings. "It is true that a judgment is defined to be a determination of the rights of the parties in action in *Code Civ. Proc.* § 1200; and subdivision 20, § 3343, provides that, in construing the Code, the word "judgment" refers to a civil action. But section 3343 also provides that this rule of construction is to be observed only when a contrary intent is not expressly declared in the provision to be construed, or is not plainly apparent from the context thereof. It is "plainly apparent" that the word "judgment" in this section of the condemnation law was not intended to refer to a judgment in a civil action, from the fact that the Code has in

express language provided for just such a determination in a special proceeding for the enforcement of that judgment and for an appeal therefrom. *Erie R. Co. v. Steward*, 69 N. Y. Supp. 57, 60, 59 App. App. 187.

An assessment of property made by commissioners for the widening of a street cannot be considered a "judgment," within the meaning of the statute of limitations, although the assessment was confirmed by an order of the Supreme Court. In such proceeding the court does not act by virtue of its general powers as a court of record, but in the execution of a special and limited jurisdiction conferred by the statute. It certainly was not a "judgment" in the popular or in the legal sense of that term. No process of the court could be awarded for its enforcement. It was rather a statutory method of creating a lien upon property than a judgment, and should be considered as in effect a mortgage, as well in regard to the time of commencing an action upon it as in other respects. *City of New York v. Colgate*, 12 N. Y. (2 Kern.) 140, 158.

An action against the city of Brooklyn for damages awarded by the assessors and confirmed by the court on property condemned for the widening of a street is based on a judgment, within the meaning of that term as used in the statute of limitations. *Donnelley v. City of Brooklyn*, 24 N. E. 17, 18, 121 N. Y. 9, affirming 7 N. Y. Supp. 49.

A judgment in a special proceeding, as on the assessment of damages in condemnation proceedings, is not a judgment from which an appeal is authorized to be taken under a statute authorizing an appeal from a final judgment in a civil action. *McNamara v. Minnesota Cent Ry. Co.*, 12 Minn. 388, 393 (Gil. 269, 278).

Where it was provided that, immediately upon an award of damages for the opening of a street, the street should forthwith be opened; that the city should pay to the respective owners of the property damaged the damages so assessed for the opening; that the assessment of such damages should be final, no option being left with the city, either as to taking the land or paying the damages assessed; and that at the same time the jury should assess such sum against the property benefited as should seem just, which should become a lien on the property—the confirmation of such award was a final judgment for the payment of the money to the property owners. In *re Sedgeley Ave.*, 88 Pa. 509, 513.

#### Judgment by default.

A judgment by default, modified by an order allowing the defendant to answer and thus litigate plaintiff's claim, and directing the judgment to stand as security for the al-

leged indebtedness, is not "the final determination of the rights of the parties," as "judgment" is defined to be in section 245 of the Code, and hence is no legal obstacle to a valid order of arrest under section 33 of the Code, providing that the order may be made at any time after the summons and "before judgment." *Mott v. Union Bank*, 38 N. Y. 18, 19.

A judgment by default has been held to be covered by an indemnity against judgments. *Lee v. Clark* (N. Y.) 1 Hill, 56. And in *Conner v. Reeves*, 103 N. Y. 527, 9 N. E. 439, which was an action on an indemnity bond given to a sheriff on the seizure of property, indemnifying him against all suits, actions, or judgments, it was held that a judgment rendered against him by consent in good faith was prima facie evidence against the surety in his action on the bond. *Dunn v. National Surety Co.*, 80 N. Y. Supp. 744, 746, 80 App. Div. 605.

#### As judgment lien.

Construed in connection with the other parts of the bankruptcy act of 1898, the word "judgments," in section 67f, providing that all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, within four months prior to the filing of petition in bankruptcy, shall be void, if he is adjudged a bankrupt, means "judgment liens," so that the equitable lien arising from a creditors' bill to set aside a fraudulent conveyance, having its date from the filing of the bill, and not from the date of the decree in the suit, is not avoided by the bankruptcy proceedings, where the bill is filed more than four months prior to the petition in bankruptcy, though the decree is rendered within such four months. *Doyle v. Heath*, 47 Atl. 213, 214, 22 R. I. 213.

#### Justice court judgment.

In a statute relating to appeals, and requiring proof of service of notice with the notice to be filed with the clerk where the judgment or decree is entered, the terms "judgments" and "decrees" import of themselves judgments and decrees of a court of record. Judgments in a general sense would doubtless include all judgments given in a court of justice, but when the words "judgments" and "decrees" are used they can hardly be supposed to include a justice's court judgment. *Odell v. Gotfrey*, 11 Pac. 190, 192, 13 Or. 466.

#### As liability or obligation.

See "Liability"; "Obligation."

#### As a lien.

See "Lien."

**Ministerial or legislative act distinguished.**

The order authorized by Rev. St. 1889, § 977, to be entered by the county court, on petition of the inhabitants, declaring a city or town to be incorporated, is a judgment, and not merely a ministerial or legislative act. *State ex inf. Crow v. Fleming*, 44 S. W. 758, 759, 147 Mo. 1.

Our Legislature is clothed with the simple power to enact laws and do some other things expressly authorized by the Constitution. Beyond this the Legislature has no power at all. To grant a divorce is not to enact a law. An expression of the will of the lawmaking power that the marriage relation is dissolved is no law. It is a decree, an order, a judgment, and not a law. A law is a rule, something permanent, uniform, and universal. A divorce begins with the parties and ends with the parties. It is a single act, and begins and expires with the performance of a single function. *Bingham v. Miller*, 17 Ohio, 445, 448, 49 Am. Dec. 471.

**Opinion and reasons.**

The reasons announced by the court to sustain its judgment, strictly speaking, form no part of the judgment itself. The reasons or findings upon which a judgment is based are not *res judicata*, so as to bind the parties, unless a judgment is rendered. *Butt v. Herndon*, 13 Pac. 580, 581, 36 Kan. 370.

In the case of *Durant v. Essex Co.*, 74 U. S. (7 Wall.) 107, 19 L. Ed. 154, it was said the reason for the signing of a decree "is no part of the judgment itself." The decree, and not the opinion, is the instrument through which the court acts. The opinion of the judge is the expression of the reasons by which he reaches his conclusions, and these may be sustained or contradictory, clear or confused. Where an opinion, after stating that the judge has examined the case on the merits, and that he would dismiss the bill without regard to technicalities, continues: "But it seems to me to be clear that this proceeding could not be sustained at any rate, as at best it would be simply a conversion of plaintiff's property, for which she had an ample remedy at law"—such language cannot qualify the decree dismissing the bill, without showing the cause of the dismissal, so as to make it a dismissal for want of jurisdiction. *Martin v. Evans*, 36 Atl. 258, 260, 85 Md. 8, 36 L. R. A. 218, 60 Am. St. Rep. 292.

**Order.**

A determination of the liability of the purchaser of property for the purchase price made by order in the principal case constitutes a judgment. *Leslie v. Saratoga Brewing Co.*, 67 N. Y. Supp. 222, 226, 33 Misc. Rep. 118.

The word "judgment," as used in 28 Stat. 94 (Ind. T. Ann. St. 1899, p. 9), providing that execution upon judgment obtained in any other than Indian courts shall not be for the sale or conveyance of title to improvements made upon lands owned by the Indian Nation, except in cases where judgments are provided for, is used in its comprehensive sense, embracing not only judgments at law, but also orders in the nature of judgments decreeing the sale of Indian improvements so situated. *Crowell v. Young* (Ind. T.) 69 S. W. 829, 831.

An "order" can in no sense be considered a "judgment." *People v. Logan*, 1 Nev. 110, 114.

A "judgment" is a final determination of the rights of the parties to an action, while every direction of a court made or entered in writing, but not included in the judgment, is denominated an "order." *Sellers v. Union Lumbering Co.*, 36 Wis. 398, 400.

Under the New York Code the word "order" means a written direction of a court or judge, other than a "judgment" and not included in it, so that where the notice of motion asked to strike out the answer on the ground of the frivolousness thereof, or for such other or further order as should be deemed proper, judgment on account of the frivolousness of the answer could not be given. *Darrow v. Miller* (N. Y.) 5 How. Prac. 247, 248.

The distinguishing characteristic of a judgment is that it is final, while that of an order, where it relates to proceedings in an action, is that it is interlocutory. *Notting v. Western R. Corp.* (N. Y.) 10 How. Prac. 97, 99.

Code, § 245, provides that a judgment is a final determination of the rights of the parties in the action. Section 400 enacts that every direction of the court or judge, made or entered in writing and not included in the judgment, is an order. By sections 252, 255, a trial is a judicial examination of issues, whether they be of law or fact. Held, that a "judgment" is the decision of a trial, while an "order" is a decision of a motion. *Bentley v. Jones* (N. Y.) 4 How. Prac. 335.

The terms "judgment," "decree," "decision," and "order" are more or less cognate as applied in legal proceedings, and closely allied in meaning, especially under our system of practice, where we do not distinguish between forms of actions at law or suits in chancery. We generally, almost invariably, both bench and bar, express or refer to the judicial determination of the controversy by the word "judgment." The term "order" is not infrequently used in a more restricted sense than the word "judgment." It may be defined to be a command, direction, or de-

cision of the court or judge on some intermediate point or issue in the case, but without finally disposing of the main issue or issues in the cause. Then it is a mere interlocutor; but the term is sometimes given a more extensive signification, even in legal controversies, and is occasionally used as a synonym of "judgment" or "decree." A "judgment" is a final determination of a cause given by any competent tribunal. Judgments, like decrees, are either final or interlocutory, and in the latter sense also include orders. Hence a bond conditioned merely for the performance of the decree or judgment is sufficient, under a statute providing that the appeal bond shall be conditioned that the appellant perform the decision, order, decree, or judgment of the district court. The word "judgment" and the word "decree" both being broad enough to include "decision" and "order." Halbert v. Alford (Tex.) 16 S. W. 814, 815.

The order from which an appeal is allowed, when "it involves the merits of the action or some part thereof, or affects a substantial right," must be something different from a decision during the actual progress of the trial, disposing of some claim made by either party affecting the relief to be granted, and something other than a conclusion of law included in the decision on which the judgment in part is to be entered. But by the definition of an "order," as given by the Legislature and written in the Code, no direction of a court or judge, made and entered in writing and included in a judgment, is an "order." So, when an action is tried before the court without a jury, and a decision is made disposing of the case, except that a reference is directed to take an account, and an order is entered in conformity to the decision, an appeal from such order will be dismissed. The decision can only be reviewed on an appeal from the judgment. Until the account has been taken and all questions arising upon it have been disposed of at special term, the order entered on the final decision does not become a "judgment" within the meaning of that word as defined by the Code. Lawrence v. Farmers' Loan & Trust Co. (N. Y.) 15 How. Prac. 57, 60, 61.

A "judgment" is the final determining of the rights of the parties in an action or proceeding. Every direction of a court or judge made or entered in writing and not included in the judgment is denominated an "order." The Supreme Court, in Loring v. Illsley, 1 Cal. 27, in discussing the distinction between an "order" and a "final judgment," said: "The former is a decision made during the progress of the cause, either prior to or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the proceedings, and necessary to be determined and carried into execution and effect. The

term 'final judgment' means the ultimate or last judgment which puts an end to the proceedings." In re Smith's Estate, 33 Pac. 744, 745, 98 Cal. 636.

Under a notice that plaintiff would move for an order that the answer to the complaint be stricken out on the ground of the frivolousness thereof, with costs, or for such other or further order as the justice shall deem proper to grant, the plaintiff is not entitled to a "judgment." Under the Code, defenses may be stricken out on motion, and, if the answer be frivolous, the plaintiff may move for judgment. In the notice of motion for an "order," had the word "judgment" or "relief" been used in its stead, the objection might possibly have been disregarded, but in the Code the word "order" is made to exclude the idea of the "judgment." It means a written direction of a court or judge other than a judgment, and not contained in it. Under the Code the words "rule" and "order" in no case mean a "judgment." Darrow v. Miller (N. Y.) 3 Code Rep. 241, 243.

The distinction between an "order" and a "judgment" is clearly made in the Code. An order is the decision of a motion, a judgment is the decision of a trial, and a trial is the judicial examination of issues, whether they be of law or of fact. Bentley v. Jones (N. Y.) 3 Code Rep. 37, 38.

#### **Order charging separate estate of married woman.**

While the use of the word "decree" is very often convenient and proper as indicating the specific character of the judgment rendered, there can be no authority for saying that a final determination charging the separate estate of a married woman with the payment of her promissory note, and directing the sale of the realty charged, is not a "judgment" within the meaning of the statute concerning appeals. Gawtry v. Adams, 10 Mo. App. 29, 32, 34.

#### **Order confirming sale.**

An approval by the court of a sale by a receiver of a national bank under order of court has the force and effect of a judgment. Schaberg v. McDonald, 83 N. W. 737, 739, 60 Neb. 493.

An order refusing to confirm a sale of property is not a judgment, under the provision of the statute requiring findings of fact when judgment upon the decision is to follow. In re Gibbs, 6 Pac. 525, 527, 4 Utah, 97.

#### **Order dismissing action.**

The dismissal of an action is, in the contemplation of the Code, a judgment, and when the dismissal is at cost of plaintiff it is a final determination with reference to



the costs as well as to the action itself. *Houston v. Clark*, 18 Pac. 739, 740, 36 Kan. 412.

Where A. received from B. a sum of money which he agreed to return to B. in case judgment should be rendered in favor of B. in an action being prosecuted by A. against him, a dismissal of such suit by A., and the assignment of the cause of action therein sued on by him to a third party, was equivalent to a judgment for B. within the meaning of the contract, and entitled B. to demand and have back the sum of money given to A. *Sawyer v. Christian*, 40 Mo. App. 295, 301.

#### **Order dismissing appeal.**

An order of the county court dismissing an appeal from a judgment of a justice is a "judgment." *Pearson v. Lovejoy* (N. Y.) 53 Barb. 407, 408.

#### **Order for execution or sentence.**

The term "judgment" is sometimes applied to the final determination of the issues of a case, or to the final ascertainment of the guilt of the accused at nisi prius. It is also used in a larger sense, involving the order for an execution or sentence. It is held to be used in the former sense in Gen. St. c. 115, § 7, allowing exceptions to a judgment of the court in matters of law. *Commonwealth v. Inhabitants of Gloucester*, 110 Mass. 491, 494.

#### **Order for judgment.**

A "judgment" is the final consideration and determination of the court of competent jurisdiction upon the matters submitted to it, and its only evidence by a record, or that which is by law substituted in its stead. An order for a judgment is not the judgment, nor does the entry of such order partake of the nature and quality of a judgment record. *Whitwell v. Emory*, 3 Mich. 84, 88, 59 Am. Dec. 220.

A true judgment must be distinguished from a mere order or direction or permission to the clerk to enter a judgment. A document of the latter kind has not the force or characteristics of a judgment, and will not support an action. An order for judgment duly entered in the judgment books does not constitute a judgment, unless the wording be such that it expresses the final judgment of the court upon the matters contained in the record, and it at once ends the case and contemplates no further judicial action. *McTavish v. Great Northern Ry. Co.*, 79 N. W. 443, 445, 8 N. D. 333.

Under Comp. Laws, § 5102, providing that a judgment shall be entered in the judgment book, a judgment so entered is the original judgment, and a form of judgment signed by the judge is only an order

for judgment and not the judgment of the court. *Locke v. Hubbard*, 69 N. W. 588, 589, 9 S. D. 364.

#### **Order in supplementary proceedings.**

An order made in a justice's court, under pleadings supplementary to execution, is not a judgment. *Wells v. Torrance*, 51 Pac. 626, 627, 119 Cal. 437.

#### **Order of maintenance in bastardy proceedings.**

Under the Ohio statutes relating to bastardy proceedings, and providing that "if the jury shall find the defendant guilty he shall be judged the putative father of said child, and shall stand charged with the maintenance thereof, in such sum or sums as the court shall order and direct, with the payment of costs of prosecution, and the court shall require the reputed father to give security to perform the aforesaid order," etc., such an order of maintenance is a judgment, which may be properly enforced by execution, and it is not necessary that resort be first had to the bond. *Darby's Lessee v. Carson*, 9 Ohio (9 Ham.) 149, 150.

The order of filiation made by a justice in a bastardy proceeding, determining that the defendant is the father of the bastard child, and requiring him to give bond, etc., is a judgment, and as such is subject to the supervisory powers of the superior court. *Cloud v. State* (Del.) 2 Har. 361, 362.

#### **Order staying proceedings.**

The word "judgment," as used in section 84 of the original Code, as amended in 1849, conferring upon the court of common pleas the power to review the "judgments of the Marine Court of the City of New York," was used in its usual sense, and did not include an order of the general term of the Marine Court granting a perpetual stay of proceedings. *Bamberg v. Stern*, 76 N. Y. 555, 557.

#### **Promissory note distinguished.**

In an action in which it was sought to levy an execution on a promissory note, it was contended that a decision holding that an execution could not be levied on a judgment was binding, but the court held that the distinction between a judgment and a promissory note was plain. The judgment is a matter of record. It is the record evidence of the debt due by the judgment debtor. It is not capable of being taken out of the book where it is recorded, and personally delivered. The sheriff cannot seize the judgment, take possession of it, and sell it, but a promissory note negotiable in form, which passes in the commercial world by indorsement and delivery and is subject to sale, is quite different. *Hoxie v. Bryant*, 63 Pac. 153, 155, 131 Cal. 85.

**Ruling on demurrer.**

The decision of a demurrer is a judgment, and not an appealable order. *Cummings v. Heard*, 2 Minn. 34, 35 (Gil. 25).

Code, § 245, provides that a judgment is a final determination of the rights of the parties in the action. Section 400 enacts that every direction of the court or judge, made or entered in writing, and not included in the judgment, is an order. By sections 252 and 255 a trial is a judicial examination of issues, whether they be of law or fact. Held, that a decision of a demurrer to a reply was a judgment. *Bentley v. Jones* (N. Y.) 4 How. Prac. 335.

A decision made at special term overruling a demurrer is an "order," and not a "judgment," and a decision by the general term affirming it is also an "order," as defined by the Code. A "judgment" is the final determination of the rights of the parties in the action. The decision on the demurrer is interlocutory; it determines the plaintiff's right to recover something or to have something, and that the defendants were proper parties, but nothing as to the precise nature or extent of the relief to be granted. Such an order is not a final order from which an appeal will lie. *Ford v. David* (N. Y.) 13 How. Prac. 193, 195, 196.

The adjudication of a demurrer is the trial of an issue of law, and the decision thereon is a "judgment," and not an "order." *Bentley v. Jones* (N. Y.) 3 Code Rep. 37 38.

A decision on demurrer to a complaint, which determines merely that the plaintiffs have a right to recover something or to have some relief, and that the defendants are proper parties, but nothing as to the precise nature or extent of the relief to be granted, is an order and not a judgment (Code, § 349, subd. 2), and a decision of the general term which merely affirms such order is itself an order, within the meaning of Code, § 400. *Ford v. Turner*, 12 N. Y. Super. Ct. (5 Duer) 684, 686.

The distinguishing characteristic of a judgment is that it is final, while that of an order, where it relates to proceedings in an action, is that it is interlocutory. The decision upon an issue of law either sustaining or overruling a demurrer is final in its character, since, unless reversed on appeal, judgment must be entered in conformity to the decision; but it is very much a matter of course, when a demurrer is allowed, to permit the party whose pleading is found defective to amend, or, when the demurrer is overruled and it appears to have been interposed in good faith, to allow the party to plead over upon payment of costs. That part of the decision which allows further pleading in the action cannot, of course, be regarded

as final in its character; the most that can be said of such a decision is that it is a conditional judgment. It is analogous to the old rule for judgment interlocutory; it is therefore no very great misnomer to call such a decision an "order." *Nolton v. Western R. Corp.* (N. Y.) 10 How. Prac. 97, 99.

Under Code, § 245, providing that a judgment is the final determination of the rights of the party in the action, the decision of the special term sustaining a demurrer, and ordering judgment for defendant unless the plaintiff shall amend within a specified time, is not a "judgment," but is an "order." *Phipps v. Van Cott* (N. Y.) 4 Abb. Prac. 90, 92.

**Refusal of committee's report.**

The term "judgment," within the meaning of Gen. St. § 1129, providing that a party can appeal only from the judgment of the court, does not include the court's action, in an action of book debt, in sustaining the defendant's remonstrance and declining to accept the committee's report.—*Cothran v. Atwood*, 29 Atl. 13, 63 Conn. 576.

**Re-restitution in forcible entry and detainer.**

In an action for forcible entry or detainer, the justice is authorized by the statute to fine and imprison upon his own view and conviction of the force, but possession cannot be changed without the intervention of a jury, and if the justice awards possession on his own view he does an unauthorized act, which should be set aside by the Supreme Court on certiorari, and re-restitution ordered. The question of re-restitution does not depend, necessarily, either on the legality or illegality of the conviction. The conviction may be good, and yet the mode of obtaining possession irregular. So, also, in such an action the conviction may be bad, and yet re-restitution, under the circumstances of the case, be denied. The question of re-restitution need not meddle with the question on the conviction. The one must appear by record, and the other may appear by affidavit. When the courts award re-restitution, they do not determine the right of possession. They merely decide on the irregularity of taking possession under the statute in the given instance, and they leave the party to go on immediately and pursue the possession in a more regular way. The court may even permit the party to renew the question of restitution by new affidavits. The decision, therefore, does not touch or prejudice the right of possession, nor is it definitive in the case. It is not a *res judicata* which could be pleaded in bar of a fresh application. Therefore it is not a "judgment" in any technical sense of the term. *Clason v. Shotwell* (N. Y.) 12 Johns. 31, 43, 51.

**As security.**

See "Security."

**Separate decisions of different judges.**

The term "judgment," when used in speaking of a judgment of a court composed of more than one judge, means what is ordered and adjudged by the court, not merely what is entered. The term cannot be applied to separate decisions filed by the separate judges. *Butts v. Armor*, 30 Atl. 357, 361, 164 Pa. 73, 26 L. R. A. 213.

**As specialty.**

See "Specialty."

**Taxes distinguished.**

Judgments are the judicial sentences of courts, rendered in cases within their jurisdiction and coming legally before them, and are conclusive in all cases where no appeal or writ of error lies, and cannot be inquired into or controverted. Taxes, on the other hand, are those proportional and reasonable assessments or duties which may, by reason of the Constitution, be imposed from time to time by the general court upon the inhabitants of the commonwealth for the necessary defense and support of the government, and for the protection and the preservation of the rights and to promote the interest of the people. They do not partake of the nature of judgments. They are acts of the government, binding upon the inhabitants, to the making or enforcing of which their personal consent individually is not required. Therefore taxes are not the subject of set-off under Rev. St. c. 96, § 2, providing that no demand shall be a set-off unless it is founded upon a judgment. *Peirce v. City of Boston*, 44 Mass. (3 Metc.) 520, 521.

**Verdict distinguished.**

Under the statute providing that a motion to discharge an order of arrest may be made before "judgment," a motion made after verdict and before the judgment is entered is made in time. A "verdict" is not a "judgment"; a verdict may be had and yet no judgment be entered upon it. The judgment is that final determination from which an appeal may be taken, and which is evidenced by the formal entry by the clerk of the court. *Fuentes v. Mayorga* (N. Y.) 7 Daly 103, 104.

**As written instrument.**

See "Written Instrument."

**JUDGMENT AGAINST A CORPORATION.**

A "judgment against a corporation" is in effect a judgment against the stockholders in their corporate capacity, as they are represented by the corporation as to their action. *Childs v. Cleaves*, 50 Atl. 714, 716, 95 Me. 498.

**JUDGMENT BOOK.**

A judgment book is a book in which the clerk of a court of record is required to keep and enter all judgments directed by the court. *In re Weber*, 59 N. W. 523, 524, 4 N. D. 119, 28 L. R. A. 621.

**JUDGMENT BY CONFESSION.**

See, also, "By Confession"; "Confession of Judgment."

Judgment by default distinguished, see "Judgment by Default."

A "judgment by confession" is a judgment which results from the voluntary agreement of the parties. *Third Nat. Bank v. Divine Grocery Co.*, 37 S. W. 390, 391, 97 Tenn. 603, 34 L. R. A. 445.

The words "confessed judgment," as used in an entry and judgment of a justice of the peace as follows: "Defendant appeared in court and confessed judgment for the amount sued for and costs of suit. Judgment is therefore herein entered, etc."—refer necessarily to those statutory provisions which require the action of the defendant to be evidenced by a written document, viz., Code Civ. Proc. § 465, providing "that a judgment by confession may be entered without action \* \* \* in the manner prescribed by this chapter," and section 465, providing "that a statement in writing shall be made and signed by the defendant and verified by his oath to the following effect," etc. *Hunter v. Eddy*, 11 Mont. 251, 264, 28 Pac. 296, 300.

**JUDGMENT BY DEFAULT.**

A judgment by default is obtained where one party neglects to take certain steps in the action within a proper time. If judgment by default is taken against the defendant in an action for damages, it is an interlocutory one, because the amount of the damages has to be assessed, after which the final judgment is entered. And where a statute provides that an application to set aside a judgment by default must be made within 60 days after default or judgment, the time commences to run from the entry of the default, and not from the date of the final judgment. *Burrows v. Mickler*, 22 Fla. 577, 579.

A judgment by default only admits, for the purpose of the action, the legality of the demand or claim in suit; it does not make the allegations of the declaration or complaint evidence in an action upon a different claim. So a judgment by default in an action for fraud is not evidence of the truth of the allegations. *In re Van Buren* (U. S.) 2 Fed. 643, 648.

**As judgment for want of appearance.**

A "judgment by default" is a judgment for want of an appearance, or, if the defend-

ant appears and does not plead, or appears and pleads and withdraws the plea, the judgment to follow is properly *nil dicit*. *Simmons v. Titcher*, 14 South. 786, 787, 102 Ala. 317.

A "default judgment" is a judgment issued for want of an appearance. It is distinguished from other judgments by the recital, "The defendant being called, came not, but made default." An appearance in a civil suit at law is purely voluntary; no process can issue to compel it, nor can the plaintiff in any event enter it for the defendant. A defendant may decline to make it, incurring no other consequence than an admission of the plaintiff's cause of action as averred in the complaint, and a judgment against him on such admission. The judgment can never be entered if there is an appearance, unless the defendant has filed an affirmative plea and does not subsequently appear to sustain it. If there is an appearance and a failure to plead, a judgment *nil dicit*, but not a judgment for default, must be rendered. *Grigg v. Gilmer*, 54 Ala. 425, 430; *Washington County v. Porter*, 29 South. 185, 186, 128 Ala. 278.

Judgments where there has been no appearance by defendant, even though he was not legally summoned, are "judgments by default," within Code, § 3451, providing that a court in which there is judgment by default may on motion reverse it for any error for which an appellate court might reverse it. *Goolsby v. St. John (Va.)* 25 Grat. 146, 158; *Brown v. Chapman*, 17 S. E. 855, 856, 90 Va. 174.

Code, § 2296, declaring that judgment by default rendered by a justice of the peace may be set aside by him at any time within six days thereafter upon satisfactory excuse, means a judgment for want of an appearance, in contradistinction as well to a judgment for want of a plea, as for a judgment on the consideration of the court or on the verdict of a jury. *Rhodes v. De Bow*, 5 Iowa (5 Clarke) 260, 265.

A judgment by default is a judgment rendered in consequence of the nonappearance of a defendant. *Wilbur v. Maynard*, 6 Colo. 483, 485.

A "judgment by default" within Wag. St. p. 831, § 17, authorizing a justice of the peace, on application of defendant, to set aside a judgment by default in certain cases, is a judgment rendered in a cause in which defendant has neither appeared at the return day of the summons nor at the day set for trial. *Borgwald v. Fleming*, 69 Mo. 212, 214.

#### As judgment for failure to plead.

Black, in his work on "Judgments," vol. 1, § 15, says that a judgment by default is a judgment entered in consequence of a non-

appearance of a defendant. Where the defendant omits to plead within the time required, the judgment taken against him for that cause is more properly called "*nil dicit*," but the term "default" is usually extended to cover this case also. In *Lennon v. Rawitzer*, 57 Conn. 583, 585, 19 Atl. 334, *Loomis, J.*, delivering the opinion of the court, defines "default" as a common-law judgment which was entered when the defendant neglected or refused to appear, or when he acknowledged the action to be just and withdrew his appearance—a definition which clearly does not embrace judgments upon demurrer, whether such judgments be regarded as final or interlocutory. The term in Acts 1899, c. 157, prescribing that in an action of tort, where defendant suffers a default and there is a hearing in damages, said hearing shall be to the jury, is confined to defaults proper, and does not include a default in failing to answer after a demurrer has been overruled. *Falken v. Housatonic R. Co.*, 27 Atl. 1117, 1118, 1119, 63 Conn. 258.

The essential to a judgment by default is the failure to answer, and where this appears in a judgment it is sufficient, *prima facie*, to authorize the action of the court, and its proper action in taking a default will be presumed. *Hardy v. Miller*, 9 N. W. 475, 477, 11 Neb. 395.

A "judgment by default," as used in Civ. Code, § 54, providing that a judgment by default may be entered on failure to answer an amended complaint as in other cases, is the same as a "judgment *nil dicit*," though, as defined by *Bouvier*, "judgment by default is a judgment rendered in consequence of the nonappearance of the defendant," while judgment by *nil dicit* is rendered against a defendant for want of a plea. *Wilbur v. Maynard*, 6 Colo. 483, 486.

*Burrill (Law Dict.)* says: "When a defendant in an action at law omits to plead within the time allowed him for that purpose, or fails to appear on the trial, he is said to make default, and a judgment entered in the former case is technically called a 'judgment by default.'" Judgments by "default," according to the common-law practice, are either by *non sum informatus*, where, instead of entering a plea, defendant's attorney says he is not informed of any answer to be given to the action; or *nil dicit*, where it is rendered against the defendants for want of a plea. A default may be made after an appearance as well as before. Page v. Sutton, 29 Ark. 304, 306.

A judgment entered upon the verdict of a jury, rendered on an inquest in an action of ejectment in which an answer has been interposed, is not a "judgment by default," within 2 Rev. St. 309, § 38, providing that where a judgment is rendered by default a new trial can be granted only where the court

is satisfied that justice will be promoted. A "judgment by default," referred to in the statute, is a judgment entered on failure to answer. *Sacia v. O'Connor*, 47 N. Y. Super. Ct. (15 Jones & S.) 53, 54.

#### **Judgment by confession distinguished.**

A "judgment taken by default" is a judgment resulting either from the fact that a defendant has no defense to make, or does not appear to make it. The expressions "judgment by confession" and "judgment taken by default" are not synonymous, as the former is one which results from the voluntary agreement of the parties. *Third Nat. Bank v. Divine Grocery Co.*, 37 S. W. 390, 391, 97 Tenn. 603, 34 L. R. A. 445.

The entry on the docket of the words "Judgt. by default," in a proceeding where a judgment by default is unauthorized, is entirely insufficient to show a valid judgment. For in such a proceeding the words "Judgt. by default," unaccompanied by some further entry, have no such definite legal meaning as would make the same the final judgment provided by the statute in such cases. *Stacks v. Simmons (Tex.)* 58 S. W. 958, 961.

#### **JUDGMENT BY OPERATION OF LAW.**

A judgment confirmed under section 1552 of the Code, which provides that "where one judge is disqualified from serving, and the court is equally divided, the judgment of the district court shall stand affirmed," is not a judgment by operation of law more than any other judgment, and is subject to rehearing in the same manner. *Zeigler v. Vance*, 3 Iowa (3 Clarke) 528, 530.

#### **JUDGMENT CONFESSED BY WARRANT OF ATTORNEY.**

A "judgment confessed by warrant of attorney" means a money judgment entered by virtue of a warrant of attorney in the usual form. *Appeal of Swartz*, 13 Atl. 69, 119 Pa. 208.

#### **JUDGMENT CREDITOR.**

As purchaser, see "Purchaser."

As representative, see "Representative."

"Judgment creditors" are creditors who have reduced their debt through judgment. *King v. Fraser*, 23 S. C. 543, 548.

"Judgment creditor," within Rev. St. c. 46, § 52, authorizing proceedings in equity to subject property fraudulently conveyed to the payment of debts, means a judgment creditor who has first exhausted all legal remedy. *Baxter v. Moses*, 1 Atl. 350, 77 Me. 465, 52 Am. Rep. 783.

The term "judgment creditor" signifies the person who is entitled to collect, or otherwise

enforce, in his own right, a judgment for a sum of money, or directing the payment of a sum of money. *Code Civ. Proc. N. Y. 1899*, § 3343, subd. 13.

#### **JUDGMENT CREDITOR'S ACTION.**

A "judgment creditor's action" is an action brought as prescribed in article 1, tit. 4, c. 15, of this act (civil procedure act), or any other action brought by a judgment creditor to aid the collection of a judgment for a sum of money, or directing the payment of a sum of money. *Code Civ. Proc. N. Y. 1899*, § 3343, subd. 14.

#### **JUDGMENT DEBTOR.**

The term "judgment debtor," as used in the statute providing for the summoning of heirs, devisees, legatees, and personal representatives, in a certain time after the death of a judgment debtor, to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands, means one against whom the judgment is conclusive or final. *Foster v. Wood (N. Y.)* 1 Abb. Prac. (N. S.) 150, 153.

"Judgment debtor," in Code, § 215, subd. 4, providing that after a judgment in any court of record a notice by an attorney claiming a lien on the money due his client in the hands of the adverse party against whom the judgment is rendered, may be given and the lien made effective against the "judgment debtor" by entering the same in the judgment docket beside the entry of judgment, should be construed as merely descriptive of the person against whom the lien may be enforced. *Winslow v. Central Iowa R. Co.*, 32 N. W. 330, 332, 71 Iowa, 197.

#### **JUDGMENT DOCKET.**

In *Metz v. State Bank of Brownsville*, 7 Neb. 165, the court, in speaking of the nature of a "judgment docket," observes: "It is said that the docket is an index to the judgment, invented by the courts for their own ease and for the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large." *Hutchinson v. Gorham*, 61 Pac. 431, 433, 37 Or. 347.

#### **JUDGMENT FOR FRAUD.**

*Bankr. Act July 1, 1898*, c. 541, § 17, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], provides that a discharge in bankruptcy shall not release a bankrupt from a judgment in an action for fraud. Defendant, after a judgment against him in an action for conversion of goods, was discharged in bankruptcy. Held, that the discharge was a defense to an action on the judgment, the judgment not being one for fraud. The phrase "judgments for fraud" means that the fraud is the grav-

amen of the action in which the judgment is rendered, and that proof of the fraud is essential to the right of recovery. It does not include a judgment in which the right of recovery is based upon an act which is not essentially fraudulent, though in that action fraud may be incidentally shown. *Burnham v. Pidcock*, 68 N. Y. Supp. 1007, 1009, 58 App. Div. 278.

A complaint alleged that defendant was employed as plaintiff's agent for a commission; that he received money from plaintiff in that capacity, and rendered accounts at stated intervals, which he represented to be correct, and which were settled in reliance upon such statements; that such accounts were in fact false and fictitious, and by means thereof defendant, "intending to beat and defraud plaintiffs, obtained from them, and fraudulently converted to his own use, upwards of \$11,000." The relief prayed was that defendant render an account and pay over the amount found due. Held, that the action was not one "to procure a judgment \* \* \* on the ground of fraud," the gravamen of the action being a breach of contract, and the fraud being only a necessary fact to open the closed accounts and to prevent them from being a conclusive defense; and that therefore the action did not come within the provisions of the Code of Civil Procedure limiting the time for the commencement of "an action to procure a judgment other than for a sum of money on the ground of fraud." *Carv. v. Thompson*, 87 N. Y. 160, 164.

#### JUDGMENT IN PERSONAM.

"A 'judgment in personam' is, in form as well as in substance, between the parties claiming the right, and that it is so inter partes appears by the record itself." *Hine v. Hussey*, 45 Ala. 496, 501, 515.

#### JUDGMENT IN REM.

A "judgment in rem" is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. *Woodruff v. Taylor*, 20 Vt. 65, 73. Or, in other words, it is a solemn declaration, proceeding from an accredited quarter, concerning the status of the thing adjudicated upon, which very declaration operates accordingly upon the status of the thing adjudicated upon, and ipso facto renders it such as it is thereby declared to be. *Martin v. King*, 72 Ala. 354, 360. Such an adjudication concludes all persons from saying that the thing adjudicated upon was not such as declared by the adjudication. *Lord v. Chadbourne*, 42 Me. 429, 443, 66 Am. Dec. 290. *Taylor, Ev.*, quoted in *State v. McMurphy*, 58 Pac. 961, 962, 61 Kan. 87, but with the following remarks by way of limitation: "This definition would seem,

however, to include convictions on criminal prosecutions, inquisitions in lunacy, inquisitions post mortem, and several other species of judicial determinations which, if they are 'judgments in rem' at all, are at least not governed by the same rules of evidence as are generally applicable to adjudications of that nature. In general, a judgment in rem furnishes conclusive proof of the facts adjudicated, as well against strangers as against parties; but this rule does not extend either to criminal convictions, which are subject to the same rules of evidence as ordinary judgments, inter partes or to inquisitions in lunacy, inquisitions post mortem, or other inquisitions which, though regarded as judgments in rem so far as to be admissible in evidence of the facts determined against all mankind, are not considered as conclusive evidence." "It is a solemn declaration upon the status of the thing, and ipso facto renders it what it declares it to be." *Hine v. Hussey*, 45 Ala. 496, 501, 515.

A judgment in rem "is an adjudication against some person or thing upon the status of some subject-matter which, whenever and wherever binding upon any person, is equally binding upon all persons." *Cross v. Armstrong*, 10 N. E. 160, 164, 44 Ohio St. 618.

A grant of probate or of administration is in the nature of a judgment or decree in rem, and actually invests the executor or administrator with the character which it declares belongs to him, and so it is conclusive as against all the world. *Morin v. St. Paul, M. & M. Ry. Co.*, 22 N. W. 251, 253, 33 Minn. 176.

The adjudication that a creditor is entitled to participate in the benefits of the assignment is a judgment in rem. *Epwright v. Kauffman*, 1 S. W. 736, 737, 90 Mo. 25.

The judgment entered in the probate court upon the probate of a will is a judgment in rem. *In re Storey's Will*, 20 Ill. App. (20 Bradw.) 183, 190.

A judgment against a nonresident defendant, rendered on service of summons by publication, while in form in personam, is in fact in rem, as it can be enforced only against the property of the defendant which is within the jurisdiction. *Stone v. Myers*, 9 Minn. 303, 310 (Gil. 287, 293), 86 Am. Dec. 104.

#### Judgment in personam distinguished.

A "judgment in rem" differs from a "judgment in personam" in this, that the latter is, in form as well as substance, between the parties claiming the right, and that it is so inter partes appears by the record itself, and it is binding only upon the parties appearing to be such by the record, and those claiming by them. But a judgment in rem is founded upon a proceeding instituted, not

against the person as such, but against or upon the thing or subject-matter itself, whose state or condition is to be determined; and the judgment is a solemn declaration upon the status of the thing, and it ipso facto renders it what it declares it to be. The probate of a will is an instance of a proceeding in rem in this state. Hall, J. There is another class of cases besides proceedings purely in rem, which may be considered to some extent proceedings in rem, though in form they are proceedings inter partes. The object of a proceeding purely in rem is to ascertain the right of every possible claimant, and it is instituted on an allegation that the title of the former owner, whoever he may be, has become divested; and notice, actual or constructive, is given to the whole world to appear and make claim to it. But the limited proceedings in rem before mentioned are not based on any allegation that the right of property is to be determined between any other persons than the parties to the suit; no notice is sought to be given to any other persons; and the judgment, being only as to the status of the property as between the parties of record, is, as to all other persons, a mere nullity. *Woodruff v. Taylor*, 20 Vt. 65, 73.

#### JUDGMENT LIEN.

A judgment lien is a creature of the statute, and its duration is fixed. No authority for making a judgment a lien on land can be found in the common law. *Taylor v. McGrew*, 64 N. E. 651, 29 Ind. App. 324.

A judgment lien is not an estate or interest in the land, but only confers a right to levy on the land to the exclusion of other adverse interests subsequent to the judgment. *Ashton v. Slater*, 19 Minn. 347, 351 (Gil. 300, 303); *Brier v. Traders' Nat. Bank*, 64 Pac. 831, 836, 24 Wash. 695; *Burwell v. Tullis*, 12 Minn. 572, 577 (Gil. 486, 497) (citing *Massingill v. Downs*, 48 U. S. [7 How.] 760, 767, 12 L. Ed. 903).

A judgment lien binding the present and future real estate of the debtor, is a creation of statute law, and has no other existence. *Brier v. Traders' Nat. Bank*, 64 Pac. 831, 836, 24 Wash. 695.

A judgment lien is not a vested right. It is a lien purely statutory, and is a general, and not a specific, lien upon any specific real estate. Its loss does not necessarily impair the validity of the judgment as a personal security. *McFadden v. Blocker*, 48 S. W. 1043, 1049, 2 Ind. T. 260, 58 L. R. A. 878.

A judgment lien is strictly a legal lien, general in its character, resting upon statute. In *Shirk v. Thomas*, 121 Ind. 147, 22 N. E. 976, the history and character of judgment liens were thoroughly and exhaustively considered, and as the result the following

conclusion was reached: "In strictness, neither a judgment nor an attachment is a lien upon land; both are simply charges against the land, existing by virtue of statutes. 'Lien upon a judgment,' said an eminent English judge, 'is a vague and inaccurate expression.' In *Boyd v. Anderson*, 102 Ind. 217, 1 N. E. 724, this court said: 'It is settled law in this state that judgment creditors are in no sense purchasers; that their judgments are general liens upon whatever interest the judgment defendants may hold in the land.'" *Johnson v. Hess*, 25 N. E. 445, 449, 126 Ind. 298, 9 L. R. A. 471.

#### JUDGMENT NIHIL DICIT.

See "Nihil Dicit."

#### JUDGMENT NISI.

A judgment nisi "is nothing more than a rule to show cause why judgment should not be rendered." *Young v. McPherson*, 3 N. J. Law (2 Penning.) 895, 897.

A recognizance duly entered into is a debt of record, and the object of a scire facias is to notify the cognizor to show cause why the cognizee should not have execution. It is in the nature of a conditional judgment, and a recorded default makes it absolute, subject only to such matters of legal voidance as may be shown by plea, or such matters of relief as may induce the court to remit or mitigate the forfeiture. On the other hand, a judgment nisi is one that is to be valid unless something else should be done within a given time to defeat it. When a witness is duly summoned to appear at court, and fails to do so, a judgment nisi may be entered for the penalty imposed by law for such failure, and upon being served with a scire facias he may show cause at a future day why the judgment nisi should not be made absolute. Therefore the entry of a judgment nisi upon a forfeited recognizance is irregular. *United States v. Winstead* (U. S.) 12 Fed. 50, 51.

#### JUDGMENT NON OBSTANTE VEREDICTO.

See "Non Obstante Veredicto."

#### JUDGMENT NOTE.

As security, see "Security."

#### JUDGMENT NUNC PRO TUNC.

See "Nunc Pro Tunc."

#### JUDGMENT OF AFFIRMANCE.

See "Affirmance."

#### JUDGMENT OF AMERCEMENT.

See "Amercement."

**JUDGMENT OF HIS PEERS.**

The phrase "judgment of his peers" is a term or expression borrowed from ancient English statutes, which means a trial by the country, which is a trial by jury. *Fetter v. Wilt*, 48 Pa. (10 Wright) 457, 460; *Wright v. Wright's Lessee*, 2 Md. 429, 452, 56 Am. Dec. 723.

The phrase "judgment of his peers" means, at common law, a trial by a jury of twelve men. *State v. Simons*, 60 Pac. 1052, 61 Kan. 752.

Mullen, P. J. (dissenting from a definition of the word "jury," as occurring in the constitutional provision concerning the right of trial by a jury, as meaning anything else than the common-law jury of twelve men): "The phrase, 'the judgment of his peers,' means a trial by a jury of twelve men according to the course of common law." *Knight v. Campbell* (N. Y.) 62 Barb. 16, 34 (citing 2 Kent's Comm. 13, note b; *Oliver v. Pray*, 4 Ohio [4 Ham.] 175, 177, 19 Am. Dec. 595; *Norval v. Rice*, 2 Wis. 22; *Jones v. Lake*, 2 Wis. 210, 212).

The phrase "by judgment of his peers," as used in the Magna Charta and the various constitutions, providing that no one shall be deprived of life, liberty, or property but by the judgment of his peers or the law of the land, means "a trial by jury and the courts according to the accustomed course of legal proceedings." *Newland v. Marsh*, 19 Ill. (9 Peck) 376, 382; *State v. Beswick*, 13 R. I. 211, 217, 43 Am. Rep. 26; *State v. Saunders*, 25 Atl. 588, 595, 66 N. H. 39, 18 L. R. A. 646.

**JUDGMENT OF NONSUIT.**

See "Nonsuit."

**JUDGMENT OF REVIVAL BY AGREEMENT.**

A "judgment of revival by agreement" of the parties is something more than a continuance of the original judgment; it is a confession of judgment by the party defendant. It not only continues the former lien, but may also create a new one on lands not before bound thereby. *Lyons v. Burns* (Pa.) 20 Phila. 412, 413.

**JUDGMENT ON THE MERITS.**

See "Merits."

**JUDGMENT ON THE PLEADINGS.**

See "Motion for Judgment on Pleadings."

**JUDGMENT OTHER THAN FOR SUM OF MONEY.**

The provision of the Code of Civil Procedure limiting the time for the commence-

ment of "an action to procure a judgment, other than for a sum of money, on the ground of fraud," includes all cases formerly cognizable by the Court of Chancery in which any remedy was sought aside from or in addition to a mere money judgment, and therefore would include a case where an accounting was sought for in addition to and as a means of obtaining a judgment for money. *Carr v. Thompson*, 87 N. Y. 160, 164.

**JUDGMENT ROLL.**

A "judgment roll," as defined in Code Civ. Proc. § 670, consists of the papers enumerated by statute, and does not depend upon the fact that the clerk has fastened these papers together, nor do any other papers which the clerk may have joined with those which the statute declares shall constitute the judgment roll become a part of such roll by reason of having been so joined. *Colton Land & Water Co. v. Swartz*, 33 Pac. 877, 879, 99 Cal. 278.

The "judgment roll" is made up of the summons and proof of service, the pleadings, bill of exceptions, all orders relating to change of parties, together with the copy of the entry of judgment, and all other journal entries or orders in any way involving the merits and necessarily affecting the judgment. *Tatum v. Massie*, 44 Pac. 494, 495, 29 Or. 140.

Strictly speaking, there is no "judgment roll" in proceedings in probate, but whenever proceedings are so akin to a civil action as to necessitate the papers which are declared by a statute to constitute the judgment roll in a civil action, they may be held to constitute the judgment roll for the purpose of appeal. *In re Kelsey*, 43 Pac. 106, 108, 12 Utah, 393.

An order sustaining a demurrer to a cross-complaint, and a bill of exceptions, constitute a part of the judgment roll, and are therefore properly a part of the transcript on an appeal taken from the judgment alone. *Packard v. Bird*, 40 Cal. 378, 383.

**JUDICATURE.**

"Judicature" is defined to be a court, or rather a power which distributes justice." *State, to Use of Gentry, v. Fry*, 4 Mo. 120, 191.

"Judicature" is used to designate with clearness that department of government which it was intended should interpret and administer the law. *State v. Whitford*, 11 N. W. 424, 426, 54 Wis. 150.

**JUDICIAL.**

See "Quasi Judicial."

"Judicial" includes deciding upon a question of fact, viz., whether the act has been



committed, and upon a question of law, viz., whether the injury was material. It is "judicial" to hear, adjudge, and condemn. *State v. Hawkins*, 5 N. E. 228, 44 Ohio St. 98.

#### **Acts of courts.**

"Judicial," as defined by the Century Dictionary, means: "Of or belonging to a court of justice; of or pertaining to a judge; pertaining to the administration of justice; proper to a court of law; consisting of or resulting from legal inquiry or judgment, as judicial power or proceedings; a judicial decision, writ, sale, or punishment; determinative; giving judgment." *Board of Com'rs of Yellowstone County v. Northern Pac. R. Co.*, 25 Pac. 1058, 1060, 10 Mont. 414.

As defined by Webster, the word "judicial" means: "Pertaining or appropriate to a court of justice or to a judge thereof, as judicial power, a judicial mind; practiced or employed in the administration of justice, as judicial proceedings; proceeding from a court of justice, as a judicial determination; ordered by the court, as a judicial sale." *Board of Com'rs of Yellowstone County v. Northern Pac. Ry. Co.*, 25 Pac. 1058, 1060, 10 Mont. 414; *Home Ins. Co. v. Flint*, 13 Minn. 244, 246 (Gil. 228); *In re Cooper*, 22 N. Y. 67, 82; *Matter of Graduates* (N. Y.) 11 Abb. Prac. 315, 316. *In Striker v. Kelly* (N. Y.) 2 Denlo, 323, it is said that where any power is conferred upon a court of justice, to be exercised by it as a court in the nature and with the formalities used in its ordinary proceedings, the action of such court is to be regarded as judicial, irrespective of the original nature of the power. *State v. Noble*, 21 N. E. 244, 248, 118 Ind. 350, 4 L. R. A. 101, 10 Am. St. Rep. 143.

"Judicial" is defined by Bouvier as belonging to or emanating from a judge as such; the authority vested in judges. Whatever emanates from a judge as such, or proceeds from a court of justice, is therefore "judicial." *In re Graduates* (N. Y.) 11 Abb. Prac. 315, 316; *In re Cooper*, 22 N. Y. 67, 82; *Merchants' Nat. Bank v. Jaffray*, 54 N. W. 258, 259, 36 Neb. 218, 19 L. R. A. 316; *Home Ins. Co. v. Flint*, 13 Minn. 244, 246 (Gil. 228, 230).

#### **Ministerial distinguished.**

The word "judicial" is used in two senses: The first to designate such bodies or officers "as have the power of adjudication upon the rights of persons and property. In the other class of cases it is used to express an act of the mind or judgment upon a proposed course of official action as to an object of corporate power, for the consequences of which the official will not be liable, though his act was not well judged; as differing from a ministerial or physical act of an official, for which, if negligently done, he or his superior will be held to answer." *In re Zborowski*, 68 N. Y. 88, 97.

#### **JUDICIAL ACT.**

A "judicial act" is the performance of "a duty which has been confided to judicial officers to be exercised in a judicial way." *Supervisors of Onondaga v. Briggs* (N. Y.) 2 Denio, 26, 32.

A "judicial act" is an act done by a member of the judicial department of government in construing the law or applying it to a particular state of facts presented for the determination of the rights of the parties thereunder. *Smith v. Strother*, 8 Pac. 852-854, 68 Cal. 194.

A "judicial act" is an act done in furtherance of justice, or a judicial proceeding by a person having the right to exercise judicial authority. *Ross v. Fuller*, 12 Vt. 265, 270, 36 Am. Dec. 342.

An act is not "judicial" because the person performing it may have to satisfy himself that a state of facts exists under which it is his right and duty to perform the act. *State v. Hathaway*, 21 S. W. 1081, 1084, 115 Mo. 36.

A "judicial act" is one that determines what the law is, and what the rights of the parties are, with reference to transactions that have been had; one that undertakes to determine questions of right or obligation. *Union Pac. R. Co. v. United States*, 99 U. S. 700, 761, 25 L. Ed. 496.

Duties performed by a district judge do not become judicial acts merely because they are performed by a judicial officer. Hence it is held that the action of a judicial officer in regard to matters which are exclusively executive or administrative in their nature, even when the act of Legislature requiring such duty to be performed is in violation of the constitutional provision, cannot be reviewed by certiorari. *Esmeralda County v. Third District Court*, 5 Pac. 64, 65, 18 Nev. 438.

#### **As act done by court.**

A "judicial act" pertains to a court of justice. *Board of Com'rs of Yellowstone County v. Northern Pac. R. Co.*, 25 Pac. 1058, 10 Mont. 414.

If the law confers the power to render a judgment or decree, then the court has jurisdiction. What shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it. *State of Rhode Island v. State of Massachusetts*, 37 U. S. (12 Pet.) 657, 718, 9 L. Ed. 1233.

The tribunal performing a judicial act is not necessarily a court, or surrounded with the machinery of such, nor will such machinery necessarily make its action judicial. A question whether a certain action is a judicial one, or whether it is ministerial or

legislative, depends in every given case upon the character of the action, and not upon the character of a person or tribunal engaged. In *re Saline County Subscription*, 45 Mo. 52, 53, 100 Am. Dec. 337.

A "judicial act" is defined to be "an act performed by a court touching the rights of parties or property brought before it by voluntary acts or by the prior action of ministerial officers; in short, by ministerial acts." *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 173, 79 Am. Dec. 468 (cited in *Pennington v. Streight*, 54 Ind. 376, 377); *Arkle v. Board of Com'rs*, 23 S. E. 804, 807, 41 W. Va. 471.

"Where any power is conferred upon a court of justice to be exercised by it, as a court, in the manner and with the formalities used in its ordinary proceedings, the action of such court is to be regarded as judicial, irrespective of the original nature of the power. The Legislature, by conferring any particular power upon a court, virtually declares that it considers it a power which may be most appropriately exercised under the modes and forms of a judicial proceeding." In *re Cooper*, 22 N. Y. 67, 84.

A "judicial act" is an adjudication upon the rights of parties, who in general appear or are brought before a tribunal by notice or process, and upon whose claims some decision or judgment is rendered. It implies impartial disinterestedness, a weighing of adverse claims, and is inconsistent with discretion on the one hand—for the tribunal must decide according to law and the rights of the parties—or with dictation on the other, for in the first instance it must exercise its own discretion under the law, and not act under a mandate from another power. In *re Saline County Subscription*, 45 Mo. 52, 53, 100 Am. Dec. 337.

#### **As act of judge.**

A "judicial act" pertains to a judge of a court of justice. *Board of Com'rs of Yellowstone County v. Northern Pac. R. Co.*, 25 Pac. 1058, 10 Mont. 414. Contra, see *Mills v. City of Brooklyn*, 32 N. Y. 489, 497.

The thing to be done does not derive its character from the individual who does it. If it be not, by reason of its attributes, judicial, it does not become judicial by being performed by a judicial officer. Hence it is that the nature of the act must be sought in its attributes and qualities, apart from the official title of the actor. *City of Baltimore v. Bonaparte*, 48 Atl. 735, 737, 93 Md. 156.

Where the law authorizes a person to hear and determine issues between parties, the granting or refusal of the relief demanded therein is a "judicial act"; but where a power vests in judgment or discretion, so that it is of a judicial nature or character, but does not involve the exercise of the func-

tions of a judge, or has been conferred upon an officer having no authority of a judicial character, the expression used is generally "quasi judicial." *School Dist. No. 2 v. Lambert*, 42 Pac. 221, 225, 28 Or. 209.

The qualities of the act, and not the character of the actor, must determine the nature of the act. As said in *Ex parte Candee*, 48 Ala. 399: "It by no means follows that a duty is judicial because it is to be performed by a judge. If in its performance he does not exercise the powers that appropriately appertain to his judicial office, it is ministerial, and not judicial, although its qualities require the exercise of his judgment." If its qualities make the act a judicial act, it continues to be judicial, no matter what official undertakes to perform it; otherwise the test would be found, not in the nature of the act done, but in the official character of the person assuming to do it, and there could then never be a question as to whether a designated act was an invasion by one governmental department of the province of another, because if the act became judicial by reason of being assigned to a judge for performance, you would have to go no further than to ascertain that it had been so assigned, and thereupon, no matter how obviously executive it might be, it would have to be treated as judicial. *Robey v. Prince George's County Com'rs*, 48 Atl. 48, 51, 92 Md. 150.

#### **As exercise of judicial power.**

Ordinarily the words "judicial act" include a judicial proceeding wherein an interested party is entitled to a trial or hearing, or, differently expressed, a judicial act is one involving the exercise of judicial power, by which is meant the power to hear and determine controversies between adverse parties, or questions in litigation. *People v. Murphy*, 72 N. Y. Supp. 475, 65 App. Div. 126; *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 173, 79 Am. Dec. 468; *Arkle v. Board of Com'rs*, 23 S. E. 804, 807, 41 W. Va. 471; *Merchants' Nat. Bank v. Jaffray*, 54 N. W. 258, 259, 36 Neb. 218, 19 L. R. A. 316; *Board of Com'rs v. Northern Pac. R. Co.*, 25 Pac. 1058, 1060, 10 Mont. 414.

#### **Discretion involved.**

Official action, the result of judgment or discretion, is a judicial act. *Grider v. Tally*, 77 Ala. 422, 424, 54 Am. Rep. 65; *Merlette v. State*, 14 South. 562, 563, 100 Ala. 42; *People v. Jerome*, 73 N. Y. Supp. 306, 307, 36 Misc. Rep. 256.

A judicial act is one done by a judicial officer which requires the exercise of his discretion and judgment. *Ex parte Kellogg*, 6 Vt. 509, 510.

A "judicial act" means an act requiring the exercise of some judicial discretion, and,

though the officer may not strictly be a judge, still if his powers are discretionary, to be executed or withheld according to his own view of what is necessary and proper, they are in their nature judicial. *Mills v. City of Brooklyn*, 32 N. Y. 489, 497.

It is inconsistent with discretion on the one hand—for the tribunal must decide according to law and the rights of the parties—or with dictation on the other. For it must exercise its own judgment under the law, and not from a mandate from another power. In *re Saline County Subscription*, 45 Mo. 52, 53, 100 Am. Dec. 337.

#### Legislative act distinguished.

That which distinguishes a "judicial" from a "legislative" act is that the one is the determination of what the existing law is in relation to some existing thing already done or happened, while the other is a pre-determination of what the law shall be for the regulation of all future cases falling under its provisions. *Mabry v. Baxter*, 58 Tenn. (11 Helsk.) 682, 690; *Yellowstone County Com'rs v. Northern Pac. R. Co.*, 25 Pac. 1058, 1060, 10 Mont. 414 (citing *Union Pac. R. Co. v. United States*, 99 U. S. 700, 25 L. Ed. 496). Rev. St. § 3461, requiring probate courts to direct the mode in which a telegraph or telephone company may use the streets and alleys of a city or village when the municipal authorities and the company are unable to agree, is a legislative, and not a judicial, act. *City of Zanesville v. Zanesville Telephone & Telegraph Co.*, 59 N. E. 109, 110, 63 Ohio St. 442. The legislative power extends only to the making of laws. To construe and apply the law is the peculiar province of judicial power. To do this, therefore—to compare the claims of the parties with the law of the land before established—is in its nature a judicial act. *Cooley, Const. Lim.* 110, 111. The act of an ecclesiastical body in adopting the report of a committee appointed to determine the validity of a constitutional amendment and to submit it to the vote of its members, the amendment being adopted by the adoption of the report, is a legislative, and not a judicial act. *Philomath College v. Wyatt*, 37 Pac. 1022, 1024, 27 Or. 390, 26 L. R. A. 68.

Whenever an act undertakes to determine a question of right or obligation or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one. *Board of Com'rs of Yellowstone County v. Northern Pac. R. Co.*, 25 Pac. 1058, 1060, 10 Mont. 414 (citing *In re Sinking Fund Cases*, 99 U. S. 700, 761, 25 L. Ed. 496); *Smith v. Strother*, 8 Pac. 852, 854, 68 Cal. 194; *Tanner v. Nelson*, 70 Pac. 984, 986, 25 Utah, 226.

#### Ministerial act distinguished.

"Judicial acts" are defined as those requiring the exercise of some judicial discre-

tion, as distinguished from "ministerial acts," which require none. *Reclamation Dist. No. 535 of Sacramento County v. Hamilton*, 44 Pac. 1074, 1076, 112 Cal. 603.

A purely ministerial duty is one to which nothing is left to discretion. Where the officer is clothed with discretionary powers and is required to act upon his own judgment, the act is a judicial one. *People v. Jerome*, 73 N. Y. Supp. 306, 307, 36 Misc. Rep. 256.

Acts 1861, p. 388, authorizing a vote by a county as to subscribing for railroad stock, and leaving the matter of subscribing to such stock to the county court, even in cases where the vote might be in favor thereof, vested in the county court an administrative and discretionary, rather than a judicial, function. The judges were bound, it is true, to act with good judgment—judiciously—but "exercising sound judgment" is by no means synonymous with "rendering judgment," and acting judiciously is not always acting judicially. In *re Saline County Subscription*, 45 Mo. 52, 53, 100 Am. Dec. 337.

A duty is ministerial when the law exacting its discharge prescribes the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action, the result of certain specific duties arising from fixed and designated facts, is a ministerial act. *Merlette v. State*, 14 South. 562, 563, 100 Ala. 42.

Where an act to be done by virtue of public authority requires the exercise of discretion and judgment, it is a "judicial act," and the persons to whom the authority is delegated must meet and confer together and be present when the act is performed, or at least a majority must meet and confer and be present after all have been notified to attend. Where the act to be done is merely ministerial, a majority must concur and unite in the performance of the act, but they may act separately. So where two public officers join in commencing an action to recover penalties for violation of the excise law, the question whether such action should be dismissed was judicial, and in determining such question they must act together, and a dismissal by one of them alone, without a conference or consultation with the other, was inoperative and unauthorized. *Perry v. Tynen* (N. Y.) 22 Barb. 137, 140.

An ordinance directing certain public improvements, passed by authority of the charter, giving the council "power to cause common sewers, vaults, and bridges to be made in any part of the city," is judicial in its nature, and extends immunity for private action for damage to those who perform the duties. The further prosecution of the work is of a ministerial character, and they are bound to see that it is done in a safe and skillful manner, and, if the work is not so

done, any person injured may recover from the city for such negligence. *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. (3 Comst.) 463, 467, 53 Am. Dec. 316.

The act of a county superintendent in drawing an order apportioning school funds is ministerial, and not judicial. *School Dist. No. 2 of Multnomah County v. Lambert*, 42 Pac. 221, 225, 28 Or. 209.

Acts done out of court in bringing parties into court are, as a general proposition, ministerial acts; those done by the court in session in adjudicating between parties, or upon the rights of one in court ex parte, are judicial acts; and hence a provision of a statute prescribing a mode of getting an action against a property holder for payment of an assessment for a street improvement by authorizing the issuing of a precept for the collection of the assessment, by the mayor and clerk does not impose upon ministerial officers the performance of a judicial act. *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 173, 79 Am. Dec. 468.

#### **Adoption of schoolbooks.**

The action of the board of education in adopting a series of readers for the public schools, in lieu of a series previously in use, is an exercise of legislative and not judicial power, and therefore cannot be reviewed on certiorari. *People v. Board of Education of Oakland*, 54 Cal. 375, 376.

Rev. St. §§ 1854, 1855, 1859, require the state superintendent, county superintendent, and principals of the State Normal School, or a majority of them, to decide what text-books shall be used in the district schools, and provide for the calling of a convention at which sealed proposals for furnishing such books shall be received, at which the convention shall adopt such text-books for the period of five years, and require that a contract shall be let to the successful bidder for the furnishing of such books. The acts required of the convention were not judicial, and hence a person injured by its determination was entitled to restrain the execution thereof. *Tanner v. Nelson*, 70 Pac. 984, 986, 25 Utah, 228.

#### **Allowance of accounts.**

Under a statute by which the supervisors of a county are given power "to examine, settle, and allow all accounts chargeable against the county," in determining the amount due to the marshal, whose pay is fixed by statute at a certain amount per diem, the supervisors must examine and decide as to the number of days of the services rendered by him. In the examination and decision of this question the board of supervisors act "judicially," and if they commit an error in their decision it forms no ground for a writ of mandamus. *People v. Livingstone County Sup'rs* (N. Y.) 26 Barb. 118, 120.

#### **Allowance of attachment.**

An order by a district or county judge allowing an attachment on a claim not due is a judicial act, within the statute prohibiting such acts on Sundays and legal holidays, since, when the application is made, the court or judge must determine that the action is one of those contemplated by the statute, and that the showing is sufficient to entitle the plaintiff to an attachment. *Merchants' Nat. Bank v. Jaffray*, 54 N. W. 258, 259, 36 Neb. 218, 19 L. R. A. 316.

#### **Appointment or removal of officer.**

The appointment by the county judge of certain persons as supervisors, in place of others removed by the district court, is not a judicial act, and hence such action of the county court cannot be reversed under a writ of certiorari. *People v. Bush*, 40 Cal. 344, 346.

The term "judicial," as applied to the actions of boards and officers authorized to prefer charges and remove officers, is not received in the sense ordinarily applied to courts of justice. The legislature may authorize boards of that character to perform judicial acts, though its judicial authority extends no farther than is necessary to an orderly and proper management of the affairs over which it has control. *Gilbert v. Board of Police & Fire Com'rs of Salt Lake City*, 40 Pac. 264, 265, 11 Utah, 378.

In *People v. Board of Police Com'rs*, 155 N. Y. 40, 43, 49 N. E. 257, in reviewing the action of the police board on the trial of a delinquent policeman, the court said: "The relator was not subject to removal except from some legal cause, to be ascertained and adjudged as matter of fact. This contemplates a judicial investigation. The proceeding was judicial in character. That such acts of a police commissioner or his deputy are judicial is recognized in the countless certiorari proceedings which have been brought from time to time to review the determination of police officials in passing upon such charges. If the acts were not judicial, the writs could not be invoked, since the rule is well established that the writ of certiorari will not lie except to review the judicial action of the inferior courts, or of public officers or bodies exercising judicial functions." *People v. Jerome*, 73 N. Y. Supp. 306, 307, 36 Misc. Rep. 256.

#### **Appointment to serve process.**

When a statute provides that if it is made to appear before a justice that a writ may fail of service for want of a proper officer, seasonably to be had, to serve the same, the justice is empowered to depute any person to serve the same, the appointment of such person requires the exercise of the justice's discretion and judgment, and such appointment is therefore a judicial act. *Ex*

parte Kellogg, 6 Vt. 509, 510; Ingraham v. Leland, 19 Vt. 304. And hence his power of appointment cannot validly be delegated to another. Kelly v. Paris, 10 Vt. 261, 263, 33 Am. Dec. 199; Ross v. Fuller, 12 Vt. 265, 270, 36 Am. Dec. 342. The determination of the magistrate is conclusive upon the matter. He must determine not only the fitness of the person, but the action and the fitness of the person with reference to the particular case. It might be suitable to appoint a special officer at one time, but not so at another. A person who was suitable to serve one process might be very unsuitable to serve another. The magistrate might as well leave the deputation blank as the writ. A person authorized to have the custody of, and, if one may be allowed so incongruous an association of ideas, to execute, a blank writ, is not thereby authorized to execute the writ when filled. So, where a justice signed a blank writ, and an authorization on the back to a certain person to serve it, and afterwards, and while the justice was out of town, the writ was filled in by another person, such authorization did not give authority to serve that writ. Kelly v. Paris, 10 Vt. 261, 263, 33 Am. Dec. 199.

#### **Certified and acknowledged act of officer.**

In Illinois it is held that an act of an officer, certified to and acknowledged, is a judicial act. In Tennessee it has been held that such act is in the nature of a judicial act. Kennedy v. Security Bldg. & Sav. Ass'n (Tenn.) 57 S. W. 388, 394.

#### **Confirmation of assessment.**

The charter of the city of Brooklyn provides that assessments for grading, leveling, graveling, and paving streets shall be submitted to the common council for confirmation, who are empowered to alter the same in such manner as in their opinion justice may require. This act of confirmation is an exercise of judicial authority, and the proceedings are therefore subject to review by the common-law writ of certiorari. People v. City of Brooklyn (N. Y.) 9 Barb. 535, 542.

#### **Confirmation of sale by Legislature.**

An act of the Legislature of Rhode Island confirming the sale of land situated in Rhode Island by an executrix in New Hampshire is not a judicial act, but is an exercise of legislation. Wilkinson v. Leland, 27 U. S. (2 Pet.) 627, 660, 7 L. Ed. 542.

#### **Decision as to jurisdiction.**

The court must decide whether it has jurisdiction or not, and the decision of that question is a judicial act, an exercise of jurisdiction, and costs are a proper and necessary incident of such a judgment. Hilliard v. Brown, 15 South. 605, 606, 103 Ala. 318 (citing King v. Poole [N. Y.] 36 Barb. 242;

Jordan v. Dennis, 48 Mass. [7 Mete.] 590; Hawes, Jur. § 19, and note; 1 Freem. Judgm. § 120).

#### **Granting of appeal.**

A "judicial act" includes the granting of an appeal by the justice of the peace, since the magistrate must determine whether the right of appeal exists, and whether it was taken in due time, and whether the security offered was in form and substance sufficient, and these acts are judicial in their nature. Jordan v. Hanson, 49 N. H. 199, 204, 6 Am. Rep. 508.

#### **Issuance of injunction.**

There is no color for saying that the act of issuing an injunction is a judicial act, which may be prohibited. State v. Bradley, 33 South. 339, 340, 134 Ala. 549.

#### **Issuance or refusal of license.**

The refusal of a police commissioner to issue a theatrical license is a discretionary and not a judicial act, and therefore is not subject to review by certiorari. People v. Murphy, 72 N. Y. Supp. 475, 65 App. Div. 126.

Acts of the Secretary of State in issuing and revoking licenses to foreign insurance companies, under the statute, are ministerial and not judicial, although he is required to ascertain the existence of the facts upon which his authority in each case is founded. State v. Doyle, 40 Wis. 175, 183, 22 Am. Rep. 692.

#### **Issuance of summons.**

The issuing of summons by a justice of the peace is a purely ministerial, and not a judicial, act. Well v. Geier, 21 N. W. 246, 247, 61 Wis. 414.

#### **Making of contract.**

Courts do not make contracts, and the making of a contract has none of the elements of judicial action. State v. Board of Com'rs of Washoe County, 45 Pac. 529, 23 Nev. 247.

#### **Making up record.**

A magistrate does not act judicially in making up and completing his record. In doing this, he performs himself what other courts do by the agency of a clerk. It is a mere ministerial act. In re Bourke, 13 Nev. 253, 256.

#### **Naturalization.**

It is a settled law that the naturalization of an alien as a citizen of the United States is a judicial act. Charles Greene's Son v. Salás (U. S.) 31 Fed. 106, 107.

#### **Rejection of bid.**

Certiorari does not lie to review the action of a board of supervisors in rejecting

a bid for county printing, since, if they are obliged to accept the lowest bid, their act is merely ministerial and not judicial. *Townsend v. Copeland*, 56 Cal. 612, 615.

The act of a state funding board in rejecting a bill as spurious or a counterfeit is a judicial act, and is conclusive upon the state unless reversed under direct proceedings of certiorari. *Longinette v. Shelton* (Tenn.) 52 S. W. 1078, 1084.

#### **Taking acknowledgment of deed.**

Taking the proof or acknowledgment of a deed is not a judicial act, and may be done by one who is so related to the parties as to be disqualified as a judge or juror. *Lynch v. Livingston*, 6 N. Y. (2 Seld.) 422, 429.

#### **Taxation.**

The power of taxation is legislative, and not judicial. Its exercise is not a judicial act in any ordinary sense, and it cannot be exercised otherwise than under the authority of the Legislature. In *re City of Chicago* (U. S.) 64 Fed. 897, 899.

An assessment by a county auditor of omitted property for the purpose of taxation is not a judicial act, he not being a judicial officer. *Vandercook v. Williams*, 8 N. E. 118, 106 Ind. 345.

The assessment of the value of land by assessors, who are required by statute to ascertain the names of all taxable inhabitants and all the taxable property in their respective towns, and to prepare an assessment roll in which, among other things, they shall put down the value of the land assessed, is a judicial act. But they must have jurisdiction of the matter or they are not protected, and, in determining whether they have jurisdiction or not in a particular case, they do not act judicially. Hence they were responsible for taxing a minister of the gospel over whom they had no jurisdiction. *Prosser v. Secor* (N. Y.) 5 Barb. 607, 611.

The ordinary, usual valuation of property for purposes of taxation is in no sense a judicial act, though requiring the exercise of judgment in its performance. *City of Baltimore v. Bonaparte*, 48 Atl. 735, 737, 93 Md. 156.

#### **Taxation of costs.**

The term "judicial act" includes the act of the justice of the peace in taxing costs. *Sibley v. Howard* (N. Y.) 3 Denio, 72, 73, 45 Am. Dec. 448.

Where a statute authorizes a justice of the peace to issue a warrant for costs in proceedings had before him for alleged encroachments on a highway, he is given implied authority to liquidate the amount of such costs, and his act in so doing is a judi-

cial act, for which he cannot be held liable in a civil suit. *Voorhees v. Martin* (N. Y.) 12 Barb. 508, 510.

The taxation of costs is not judicial action, in the proper sense of the term, but ministerial, and cannot, therefore, be reviewed on error, unless some motion or application has been made to the lower court to correct the taxation as made by its ministerial officer. *Abbott v. Mathews*, 26 Mich. 176, 178.

#### **Taxation of district attorney's account.**

The taxation of a district attorney's account by a Supreme Court commissioner after notice duly given to the chairman of the board of supervisors is a "judicial act," and not subject to collateral attack. *Supervisors of Onondaga v. Briggs* (N. Y.) 2 Denio, 26, 33.

### **JUDICIAL ACTION.**

A judicial action is an adjudication of the rights of parties who in general appear or are brought before the tribunal by notice or process, and on whose claims some decision is rendered. *Kerosene Lamp Heater Co. v. Monitor Oil Stove Co.*, 41 Ohio St. 287, 288, 293; In *re Saline County Subscription*, 45 Mo. 52, 53, 100 Am. Dec. 837; *State v. Washoe County Com'rs*, 45 Pac. 529, 23 Nev. 247.

### **JUDICIAL BUSINESS.**

Service of a statement for new trial is not judicial business, within the Code, providing that judicial business shall not be transacted on holidays. *Reclamation Dist. No. 535 v. Hamilton*, 44 Pac. 1074, 1076, 112 Cal. 603.

Code Civ. Proc. § 134, prohibits the transaction of "judicial business" on Sundays or holidays, and it may be that the expression is somewhat broader in meaning than the expression "judicial acts," used by Coke; but it can hardly be extended to the service of process or other ministerial acts, and certainly not to the publication of service. *Heisen v. Smith*, 71 Pac. 180, 181, 138 Cal. 216, 94 Am. St. Rep. 39.

The words "judicial business," in Comp. St. c. 39, § 38, enacting that no judicial business can be transacted on Sunday, except to give instructions to a jury then deliberating, to receive a verdict, or to exercise the powers of a magistrate in a criminal proceeding, means "such acts as are performed in the exercise of judicial power." *Merchants' Nat. Bank of Omaha v. Jaffray*, 54 N. W. 258, 259, 36 Neb. 218, 19 L. R. A. 316.

Within Comp. Laws, vol. 1, § 4, providing that no judicial business shall be performed by the court on Sunday, the execution of an appeal bond is not judicial busi-

ness, and the fact that such a bond was executed on Sunday did not render it invalid. *State v. California Min. Co.*, 13 Nev. 203, 214.

### JUDICIAL CAUSE.

"Judicial cause" is a term used by Mr. Wharton as equivalent to "proximate cause." It is defined, in case of an injury, as such negligence as by the usual course of events will result, unless independent disturbing moral agencies intervene, in the particular injury. *City Council of Montgomery v. Wright*, 72 Ala. 411, 422, 47 Am. Rep. 422 (citing Whart. Neg. §§ 303, 324).

### JUDICIAL CONFESSION.

A judicial confession is a preliminary examination taken in writing by a magistrate pursuant to the statutes, or the plea of guilty made in open court to an indictment. *White v. State*, 49 Ala. 344, 348.

Judicial confessions are those which are made before the magistrate or in court in due course of legal proceedings. *United States v. Williams* (U. S.) 28 Fed. Cas. 636, 643 (citing *Greenl. Ev.*); *Speer v. State*, 4 Tex. App. 474, 479; *State v. Lamb*, 28 Mo. 218, 230. And it is essential that they be made of the free will of the party, and with full and perfect knowledge of the nature and consequences of the confession. Of this kind are the preliminary examinations taken in writing by the magistrate pursuant to statutes, and the plea of guilty made in open court to an indictment. Either of these is sufficient to found a conviction, even if to be followed by a sentence of death; they being deliberately made, with the deepest solemnities, under the advice of counsel, and the protecting caution and oversight of the court." *United States v. Williams* (U. S.) 28 Fed. Cas. 636, 643.

A judicial confession is the declaration which the party or his special attorney in fact makes in a judicial proceeding. *Civ. Code La.* 1900, art. 2291.

### JUDICIAL DAY.

A judicial day is distinguished from a legal day in this: The former means a day in which the court is in session, and the legal day is one in which legal and judicial business can be transacted, as distinguished from dies non. *Heffner v. Heffner*, 20 South. 281, 282, 48 La. Ann. 1088.

### JUDICIAL DECISION.

Judicial decision is the application by a court of competent jurisdiction of the law to a state of facts proved or admitted to be true, and a declaration of the consequences

which follow. *Le Blanc v. Illinois Cent. R. Co.*, 19 South. 211, 212, 78 Miss. 463.

Where a lessee receiving a bonus to execute a lease agreed to return the same if his title to the premises should thereafter be held invalid by judicial decision, it was held that the decision of a court of competent jurisdiction that his title was invalid was sufficient to entitle the lessee to a return of the money, although the decisions of such court were subject to review in a higher court, and although a writ of error brought to reverse the decision was still pending. *Wadsworth v. Green*, 3 N. Y. Super. Ct. (1 Sandf.) 78.

### JUDICIAL DECREE.

An adjudication of bankruptcy in involuntary proceedings against the insured, and an assignment by the register pursuant to the bankrupt act, is a transfer and change of title by judicial decree, within the meaning of a policy of insurance declaring that it shall be void in case of a sale, transfer, or change in the title of the property, voluntary or by legal process or judicial decree. *Perry v. Lorillard Fire Ins. Co.*, 61 N. Y. 214, 218, 19 Am. Rep. 272.

A foreclosure of a mortgage by advertisement is not legal process or a judicial decree. The proceedings in this kind of a foreclosure are carried on wholly outside of court, and without the aid of its process or decree. *Loy v. Home Ins. Co.*, 24 Minn. 315, 319, 31 Am. Rep. 346.

### JUDICIAL DEPARTMENT.

See "Judiciary."

### JUDICIAL DEPOSIT.

The judicial deposit is that which is made in consequence of an order or judgment rendered by a judge in the cases provided by the laws regulating judicial proceedings. *Civ. Code La.* 1900, art. 2979.

### JUDICIAL DETERMINATION.

The decision of a town meeting not to pay the costs and expenses incurred by commissioners of highways in the prosecution of a suit conducted by them by direction of voters of the town is not a judicial determination, and, though the Legislature cannot reverse the judgment of a court, it may provide that such expenses may be paid, notwithstanding the decision of such town meeting. *Town of Guilford v. Chenango County Sup'rs*, 13 N. Y. (3 Kern.) 143, 148.

### JUDICIAL DICTUM.

See "Dictum."

**JUDICIAL DISCRETION.**

See, also, "Discretion."

Judicial discretion is the option which a judge may exercise between the doing and not doing of a thing, the doing of which cannot be demanded as an absolute right of the party asking it to be done. *Alden v. Hinton*, 6 D. C. 217, 223.

By "judicial discretion" we mean the exercise of final judgment by the court in the decision of such questions of fact as from the nature and the circumstances of the case come peculiarly within the province of the presiding judge to determine, without the intervention and to the exclusion of the functions of the jury. *Bundy v. Hyde*, 50 N. H. 116, 120; *Darling v. Town of Westmoreland*, 52 N. H. 401, 408, 13 Am. Rep. 55.

Judicial discretion is not an arbitrary discretion, but a discretion to be guided by the spirit, principles, and analogies of the law. *Halliburton v. Martin*, 86 S. W. 675, 678, 28 Tex. Civ. App. 127; *Coos Bay Nav. Co. v. Endicott*, 57 Pac. 61, 62, 34 Or. 573; *Powell v. Willamette R. Co.*, 12 Pac. 83, 84, 14 Or. 22.

Judicial discretion is that discretion which is not, and cannot be, governed by any fixed principles or rules. *Rowley v. Van Benthuyzen* (N. Y.) 16 Wend. 369, 378.

"Judicial discretion" is defined by Lord Coke to be, "*Discernere per legem quid sit justum*," etc.—to see what would be just according to the laws in the premises. It does not mean a wild self-willfulness, which may prompt to any and every act, but this judicial discretion is guided by the law. See what the law declares on a certain statement of facts, and then decide in accordance with the law, so as to do substantial equity and justice. *Faber v. Bruner*, 13 Mo. 541, 543.

"Judicial power," as contradistinguished from the power of the law, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise discretion, it is a mere legal discretion—a discretion to be exercised in discerning the course prescribed by law, and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the Legislature, or, in other words, to the will of the law. *Osborn v. United States Bank*, 22 U. S. (9 Wheat.) 738, 866, 6 L. Ed. 204.

However incapable of exact definition, judicial discretion is not absolutely without limitation, as is clearly recognized in other jurisdictions. Lord Mansfield, in *Rex v.*

*Wilkes*, 4 Burrows, 2539, says: "Discretion,' when applied to a court of justice, means sound discretion, guided by law. It must be governed by rule, not by humor. It must not be arbitrary, vague, or offensive, but regular." *Marsh v. Griffin*, 31 S. E. 840, 843, 123 N. C. 660.

"Judicial discretion," in its technical legal sense, is the name of a decision of certain questions of fact by the court, and does not mean that the judge has arbitrary power, but that the question is one of fact. *Colburn v. Town of Groton*, 28 Atl. 95, 96, 66 N. H. 151, 22 L. R. A. 763 (citing *Darling v. Town of Westmoreland*, 52 N. H. 401, 408, 13 Am. Rep. 55).

The judicial discretion which is or should be brought into play in all cases of pure equity means no more than that the judge will weigh and balance the equities, and decide in favor of that party on whose side he finds the preponderance. *West New York Silk Mill Co. v. Laubsch*, 30 Atl. 814, 53 N. J. Eq. 65.

"Judicial discretion" is a phrase of wide latitude, but it never means the arbitrary will of the judge. In the language of Chief Justice Marshall, it is a legal discretion, to be exercised in discerning the force prescribed by law. It is to be exercised not to give effect to the will of the judge, but to that of the law. *Tripp v. Cook* (N. Y.) 26 Wend. 143, 152.

**Granting or denying injunction.**

The issuance of an injunction to restrain a nuisance is a matter which rests in the sound discretion of the court, but that discretion is not an arbitrary one. The injunction can be demanded as a matter of right in a proper case, and, if the discretion of the court is improperly exercised in either granting or refusing an injunction, the error is one to be corrected upon appeal. *Campbell v. Seaman*, 63 N. Y. 568, 569, 20 Am. Rep. 567.

The discretion with which the *nisi prius* judge is clothed in granting or refusing injunctions is a legal, not an arbitrary, discretion, and, where the court refuses to dissolve an injunction which was illegally granted, such action may be reviewed and reversed. *Thorn v. Sweeney*, 12 Nev. 251, 260.

A motion to grant or dissolve an injunction is not a matter of discretion in the court. It depends upon well-established principles, and the chancellor, in awarding or dissolving an injunction, is no more at liberty to depart from approved precedents than is the judge who presides on the final decision in a court of law. *Rowley v. Van Benthuyzen* (N. Y.) 16 Wend. 369, 378.



**Granting specific performance.**

Within the rule that the granting of specific performance of a contract lies in the judicial discretion of a chancery court, "judicial discretion is not an arbitrary or capricious discretion, dependent on the whims or caprice of the chancellor, but a discretion reduced to rules and clearly defined, to call the powers of the chancery court into exercise. In such a case it is not always enough that the contract is legally binding. It must be fair, just, and reasonable in all its parts." *Moon's Adm'r v. Crowder*, 72 Ala. 79, 89.

**Setting aside dismissal.**

The authority of a court to set aside the dismissal of a case is said to be the power of the judge to rule and decide as his best judgment and sound discretion dictate. The term "judicial discretion" is usually employed as designating such power. Judicial discretion is not an arbitrary right to do whatever the individual judge's whim, caprice, or passion may suggest, for what is not reasonable, or not in accordance with common justice, no judge has a right to do. When a ruling or decision clearly and certainly passes the limits of reason, justice, and right, it is not a product of judicial discretion. Judicial discretion is not without elements or conditions, altogether these elements or conditions are not defined or established by fixed rules or principles of law. Thus it was held, where plaintiff's attorney was sick, and plaintiff unable to employ another at the time the case was called for trial, and it was dismissed, the refusal of the court to set aside the dismissal was an abuse of discretion. *Alexander v. Smith*, 49 S. W. 916, 20 Tex. Civ. App. 304.

**Setting aside motion for default.**

Within the rule that a motion to set aside a motion for default is addressed to the sound discretion of the trial court, it is said in *Thompson v. Connell*, 31 Or. 231, 48 Pac. 468, 65 Am. St. Rep. 818, that the discretion here spoken of is an impartial discretion, guided and controlled in its execution by fixed legal principles; a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to defeat, the ends of substantial justice. *Hanthorn v. Oliver*, 51 Pac. 440, 441, 32 Or. 57, 67 Am. St. Rep. 518.

**Review.**

The judicial discretion that is not subject to review on appeal is such an exercise of authority in the mode of proceeding for the enforcement of rights or the redress of wrongs as is reasonably designed to promote substantial justice. *Linn County v. Morris*, 67 Pac. 295, 297, 40 Or. 415.

**JUDICIAL DISTRICT.**

A judicial district is simply a political division provided for by the Constitution, but arranged by the Legislature, for the purpose of economizing in the number of judges; and, though two or more counties are both in the same judicial district, courts of these counties are separate and distinct. The only thing they have in common is that the same judge presides over both. *Ex parte Gardner*, 39 Pac. 570, 22 Nev. 280.

"Judicial districts are districts created for judicial purposes; for defining the jurisdiction of courts, and distributing judicial business." *Abb. Law Dict.* "By successive extensions of meaning, this word [District] has gradually lost its original and peculiar signification, and is now constantly used in ordinary language to denote any extent of territory for any purpose." *Burrill, Law Dict.* "The circuit or territory within which a person may be compelled to appear." *Rap. & L. Law Dict.*; *State v. Atherton*, 10 Pac. 901, 906, 19 Nev. 332.

Judicial district in Const. § 260, providing that the boundary of a "judicial district" shall not be changed unless at an election held for that purpose, means the districts in counties for holding court and other purposes though it has not in the Acts creating the district been so called. It is not inappropriate but on the contrary is quite expressive as descriptive of them, and is not applicable to anything else in the constitution to which it refers. *Lindsley v. Coahoma County Sup'rs*, 11 South. 336, 337, 69 Miss. 815.

An indictment charging that defendant, "within the judicial district of said court," unlawfully sold intoxicating liquors, meant that the sale was made in a part of the county of which the court had jurisdiction. *Commonwealth v. Hoar*, 121 Mass. 375, 377.

**JUDICIAL DUTY.**

A judicial duty is such a duty as legitimately pertains to an officer in the department designated by the Constitution as judicial. *State v. Hathaway*, 21 S. W. 1081, 1084, 115 Mo. 36. By this designation is meant the judiciary in the true sense of the term. *State v. Noble*, 21 N. E. 244, 250, 118 Ind. 350, 4 L. R. A. 101, 10 Am. St. Rep. 143.

The duty of the probate judge to approve a sheriff's official bond is in no proper sense a judicial duty. It by no means follows that a duty is judicial because it is to be performed by a judge. If in its performance he does not exercise the powers that appropriately appertain to his judicial office, it is ministerial, and not judicial, although its performance requires the exercise of his judgment. *Ex parte Candee*, 48 Ala. 386, 399.

A purely ministerial duty is one to which nothing is left to discretion. Where the officer is clothed with discretionary powers, and is required to act upon his own judgment, the act is a judicial one; and it is a rule of universal acceptance that persons exercising judicial functions, by whatever name they may be called, enjoy the protection of the judicial privilege. The exercise of judicial functions is not confined to judges. The act of every public official is either ministerial or judicial. In *East River Gas-light Co. v. Donnelly*, 25 Hun (N. Y.) 614, it was held that the duty confided to a board of aldermen of awarding a contract to the lowest responsible bidder giving adequate security was judicial; and the court said, per Gilbert, J.: "The duty was a judicial one. It involved the determination of questions of fact, and that determination could not be controlled or coerced." In *Barbyte v. Shepherd*, 35 N. Y. 238, the Court of Appeals held that the tax assessor, in determining what property is subject to taxation, performs a judicial duty. In passing upon the same question in *Williams v. Weaver*, 75 N. Y. 30, 31, the court said: "That class of public officials is charged with duties which require the exercise of judicial functions, and, when they are called upon thus to act, they are protected from the consequences which may flow from any error they may commit." *People v. Jerome*, 73 N. Y. Supp. 306, 307, 86 Misc. Rep. 256.

The duty imposed on the court of chancery to hear a petition for the apportionment between the counties interested in the expense of maintenance of a plankroad running into two or more counties, after the charter of the plankroad company has expired, is judicial. In *re Newark Plankroad & Bridges*, 53 Atl. 5, 7, 63 N. J. Eq. 710.

The words "judicial duties," in a bond given by a justice of the peace for the faithful performance of his duties, as required by Gen. St. 1894, § 957, providing that a justice of the peace shall execute a bond conditioned for the faithful discharge of his official duties, construed as meaning "official duties." *Larson v. Kelly*, 64 Minn. 51, 66 N. W. 130.

### JUDICIAL EVIDENCE.

Judicial evidence is the means sanctioned by law of ascertaining in a judicial proceeding the truth respecting a question of fact. Code Civ. Proc. Cal. 1903, § 1823; Ann. Codes & Sts. Or. 1901, § 677.

### JUDICIAL EXAMINATION.

The Code has not defined what is meant by the words "a judicial examination of the issues between the parties," given as the definition of a trial, otherwise than by the language, force, and effect of its provisions

for a final disposition of such issues. They probably include the action of both the court and jury in cases where a verdict is rendered, and only the action of the court or of referees when disposed of by the court without a jury, or by referees on a reference. They do not necessarily require that the court should hear pleadings read, and that evidence should be given, if the issues are those of fact, or an argument made, if they are issues of law. *Mora v. Great Western Ins. Co.*, 23 N. Y. Super. Ct. (10 Bosw.) 622, 623.

### JUDICIAL FUNCTION.

The exercise of a judicial function is the doing of something in the nature of the action of the court. Thus the making of an order by the board of county commissioners that a firm of attorneys be employed in a certain litigation in which the county was interested is not the exercise of judicial functions. *State v. Board of Com'rs of Washoe County*, 45 Pac. 529, 23 Nev. 247.

Where the law confers a right, and authorizes an application to a court of justice for the enforcement of such right, the proceeding upon such an application is the exercise of a judicial function, though the order or judgment authorized be of such a nature that it can only be performed or its execution enforced progressively during a future period. Thus an act conferring on a probate court authority to determine the use of the streets of a municipality by telegraph and telephone companies after disagreement between the municipal council and such company confers a judicial function on the court. *City of Zanesville v. Zanesville Telegraph & Telephone Co.*, 59 N. E. 781, 788, 64 Ohio St. 67, 52 L. R. A. 150, 83 Am. St. Rep. 725 (reversing, on rehearing, *City of Zanesville v. Zanesville Telegraph & Telephone Co.*, 59 N. E. 109, 63 Ohio St. 442).

The term "ministerial," and not "judicial," applies to the function of dividing personal property which is divisible by weight, measure, or number, into portions identical in quality and value, as corn and various other articles. There is no question of legal or equitable right, and there can be no dispute that a court of law or equity can settle. Equity could do no more than decree that each might take so many pounds, bushels, or yards, or so many of the articles in number, and enforce its decree by process—in other words, enforce the conceded right. *Pickering v. Moore*, 32 Atl. 828, 830, 67 N. H. 533, 31 L. R. A. 698, 68 Am. St. Rep. 695.

The county court exercises judicial functions when it makes its order or decision in allowing or rejecting claims which it is invested by statute with the special duty or authority to audit or allow. *Crossen v. Wasco County*, 10 Or. 111, 116.

Act of Feb. 15, 1889, provides for the appointment by the Supreme Court of five commissioners of the Supreme Court to relieve the court, and that they shall assist the court in the performance of its duties. It is held that such commissioners do not exercise judicial functions, by receiving from the secretary of the court briefs and transcripts assigned to them by the court, and reporting the result of their examination thereof, and of the authorities cited by counsel, with their opinions thereon, to the court; such reports and opinions never reaching the clerk of the court, nor being of any legal efficacy until approved by the court. *People v. Hayne*, 23 Pac. 1, 8, 83 Cal. 111, 7 L. R. A. 348, 17 Am. St. Rep. 211.

The functions of an election board of a town in receiving votes and announcing the result are not judicial. *People v. Austin*, 46 N. Y. Supp. 526, 527, 20 App. Div. 1.

### JUDICIAL MORTGAGE.

The judicial mortgage is that resulting from judgment (whether these be rendered on contested cases or by default, or whether they be final or provisional) in favor of the person obtaining them. Civ. Code La. 1900, art. 3321.

A final or definite judgment, when recorded in the office of mortgages, gives a judicial mortgage. *Chaffe v. Walker*, 1 South. 290, 292, 39 La. Ann. 35.

### JUDICIAL NOTICE.

"The matters of which judicial notice may be taken are those which must have happened according to the constant and invariable course of nature, or are of such general and public notoriety that every one may fairly be presumed to be acquainted with them. The expression of *Brown J.*, in *Hunter v. New York, O. & W. Ry. Co.*, 23 N. E. 9, 10, 116 N. Y. 615, 6 L. R. A. 246, is that notice may be taken of facts which are generally known, and, as the common knowledge of man ranges far and wide, so the doctrine embraces matters so curiously diverse as the rising of the sun; the status of the Isle of Cuba; the late Civil War; the contents of the Bible; the character of a camp meeting; the height of the human frame; the fable of the frozen snake; the characteristics and construction of the ice cream freezer; the general use of the diamond stack or the straight stack spark arrester; the habits of those who shave—in fine, 'all things, both great and small.' In resolving such questions the judges have recognized that the criterion is the maxim, 'What is known need not be proved,' and, beginning with *Starkle*, who, as *Thayer* notes, first took special notice of the subject, the text-writers, such as *Phillips*, *Greenleaf*, *Stephen*, *Rice*, and *Burr-*

*Jones*, are not in accord. Thus, *Swayne, J.*, in *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200, says: 'Facts of universal notoriety need not be proved.' *Comstock, J.*, in *Wynehamer v. People*, 13 N. Y. (3 Kern.) 378, says: 'We must be allowed to know what is known by all persons of common intelligence.' Town of *North Hempstead v. Gregory*, 65 N. Y. Supp. 867, 869, 53 App. Div. 350.

Judicial notice takes the place of proof, and is of equal force. As a means of establishing facts it is therefore superior to evidence. In its appropriate field, it displaces evidence, since, as it stands for proof, it fulfills the object which evidence is designed to fulfill, and makes evidence unnecessary. If, in regard to any subject of judicial notice, the court should permit documents to be referred to, or testimony introduced, it would not be in any proper sense the admission of evidence, but simply a resort to a convenient means of refreshing the memory, or making the trier aware of that of which everybody ought to be aware. *State v. Main*, 37 Atl. 80, 84, 69 Conn. 123, 36 L. R. A. 623, 61 Am. St. Rep. 30 (citing *Brown v. Piper*, 91 U. S. 37, 43, 23 L. Ed. 200; *Commonwealth v. Marzynski*, 149 Mass. 68, 21 N. E. 228; *State v. Morris*, 47 Conn. 179, 180).

### JUDICIAL OATH.

There is an essential difference between a judicial and a nonjudicial oath. A judicial oath is one taken before an officer in open court, and a nonjudicial oath is one taken before an officer ex parte or out of court. In case perjury is assigned as having been committed on a judicial oath it is sufficient that the person acting is one of a class of officers having prima facie authority, and does administer the oath with due formality and solemnity in the presence of the court, it having jurisdiction of the cause. In case of perjury assigned on a nonjudicial oath, it is insufficient to maintain a conviction if the person administering the oath was not legally authorized to administer that particular oath. Where one is sworn by a clerk in the presence of the court, he is sworn by the court; and where an oath is administered by an officer, though incompetent, in presence of the court, the oath is regarded as administered by the court. *State v. Dreifus*, 38 La. Ann. 877, 878, 882.

### JUDICIAL OFFICE.

Judicial offices are those which relate to the administration of justice. *Waldo v. Wallace*, 12 Ind. 569, 580; *State v. Womack*, 29 Pac. 939, 941, 4 Wash. 19. They are those which must be exercised by the persons appointed for that purpose, and not by deputies. *Fitzpatrick v. United States*, 7 Ct. Cl. 290, 293.

**JUDICIAL OFFICER.**

A judicial officer is a person authorized to act as a judge in a court of justice. *Ann. Codes & St. Or. 1901, § 931; Ballinger's Ann. Codes & St. Wash. 1897, § 4697.*

Every person authorized to act as a judge in a court of justice, including a commissioner of the county court, from the time of his election or appointment; every person summoned as a juror in any court of justice, or upon any inquest, or before any officer, from the time he is so summoned; and every referee, umpire, or arbitrator, from the time of his appointment—shall be held and deemed to be a "judicial officer," within the meaning of certain provisions of the Penal Code punishing bribing, offering to bribe, and receiving or agreeing to receive a bribe. *Ann. Codes & St. Or. 1901, § 1880.*

The term "judicial officers" includes judges and justices of all courts and all persons exercising judicial powers by virtue of their office. *Settle v. Van Evrea, 49 N. Y. 280, 284.*

There is a difference between judicial and ministerial officers. A ministerial office may be discharged by a deputy, but a judicial office cannot. The duties of the office must be discharged by the judge himself; for it may be possible he was elected on account of his known views and the decisions it was reasonable to suppose he would make. *People v. Wells, 2 Cal. 198, 203.*

The essential and characteristic distinction between a judicial and a ministerial officer is that the former is to give judgment, which requires perfect freedom of opinion, but the latter is to execute, which supposes obedience to some mandate prescribing what is to be done, and leaving nothing to opinion. *Reid v. Hood (S. C.) 2 Nott & McC. 168, 170, 10 Am. Dec. 582.*

**Attorney.**

The term executive and judicial officer "of the United States," in the United States Constitution, requiring all executive and judicial officers of the United States and of the several states to be bound by oath or affirmation to support the Constitution, has been construed by the Supreme Court of the United States to include attorneys at law, as is shown by the rule of the court requiring attorneys to take such an oath. Therefore, as the term "executive and judicial officers" is also the language of the Constitution, it is to be given the same meaning. *In re Wood (N. Y.) Hopk. Ch. 8, 7.*

**County auditor.**

A county auditor is not a judicial officer, so that an assessment by him of omitted property for the purpose of taxation is not

a judicial act. *Vandercook v. Williams, 8 N. E. 113, 114, 106 Ind. 345.*

**Justice of the peace.**

A justice of the peace is a judicial officer. *McGregor v. Balch, 14 Vt. 428, 434, 39 Am. Dec. 231; Vogel v. State, 8 N. E. 164, 165, 107 Ind. 374; In re Golding, 57 N. H. 146, 149, 24 Am. Rep. 66.*

A justice of the peace is a judicial officer, within Act Cong. May 18, 1792, exempting from military duty judicial and executive officers of the government of the United States. *Wise v. Withers, 7 U. S. (3 Cranch) 331, 336, 2 L. Ed. 457.*

**Mayor.**

Under a statute providing that, unless the council have directed the election of a municipal judge, the mayor shall hold a city court every day, Sundays excepted, and conferring upon him the same jurisdiction as a justice of the peace and certain additional powers, in the absence of the election of a municipal judge, the mayor is a judicial officer, within the meaning of the Constitution, providing that "no person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state other than a judicial office"; and he is ineligible, during the term for which he was elected, to election to the office of sheriff. *Waldo v. Wallace, 12 Ind. 569, 580.*

**Notary public.**

A notary public, when engaged in taking depositions to be used as evidence before some judicial tribunal, is a "judicial officer"; his duty being to assist the court under whose commission he acts in administering justice. *Stirneman v. Smith, 100 Fed. 600, 603, 40 C. C. A. 581.*

**Police judge.**

A police judge is undoubtedly a judicial officer, but he is a judicial officer of a municipality, and does not come within the provision of section 10, art. 22, of the Constitution, providing that judicial officers shall be elected at the time and in the manner that state officers are elected. *People v. Henry, 62 Cal. 557.*

**JUDICIAL OPINION.**

An affirmance or other judgment is a "judicial opinion," within the meaning of the provision that no justice of the Supreme Court who has given a judicial opinion in the cause in favor of or against an error complained of can sit on error in the Court of Errors and Appeals. In order to constitute such disqualification, it is not necessary that any formal opinion should have

been delivered below. *Gardner v. State*, 21 N. J. Law (1 Zab.) 557, 558.

The use of the words "judicial opinion," in speaking of a case as bearing no impress of the chancellor's judicial opinion of the merits of the case, is synonymous with what the chancellor has adjudged or decreed, and does not show that the case bears no impress of the chancellor's opinion on the merits. *Hagthorp v. Hook's Adm'rs* (Md.) 1 Gill & J. 270, 411.

### JUDICIAL POWER.

Judicial power is the power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the law. *Land Owners v. People*, 113 Ill. 296, 309; *People v. Chase*, 165 Ill. 527, 538, 46 N. E. 454, 458, 86 L. R. A. 105 (citing *Cooley*, Const. Lim.); *People v. Simon*, 176 Ill. 165, 169, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175; *Arms v. Ayer*, 61 N. E. 851, 855, 192 Ill. 601, 58 L. R. A. 277, 85 Am. St. Rep. 357.

By the judicial power of courts is generally understood the power to hear and determine controversies between adverse parties and questions in litigation. *State v. Le Clair*, 30 Atl. 7, 9, 86 Me. 522; *People v. Murphy*, 72 N. Y. Supp. 475, 65 App. Div. 126.

It is one of the striking and peculiar features of judicial power that it is displayed in the decision of controversies between contending parties, the settlement of their rights, and the redress of their wrongs. *Inhabitants of Durham v. Inhabitants of Lewiston*, 4 Me. (4 Greenl.) 140, 143.

It is the province of judicial power to decide private disputes between or concerning individuals. *Sanders v. Cabaniss*, 43 Ala. 173, 181.

"Judicial power can mean nothing more nor less than the power which administers justice to the people, according to the prescribed forms of law—according to their rights as fixed by the law." *State, to Use of Gentry, v. Fry*, 4 Mo. 120, 191.

Judicial power is authority vested in some court, officer, or person to hear and determine when the rights of persons or property or the propriety of doing an act is the subject-matter of adjudication. *Grider v. Tally*, 77 Ala. 422, 424, 54 Am. Rep. 65; *Merlette v. State*, 14 South. 562, 563, 100 Ala. 42.

"Judicial power" is abstract or relative. In the latter sense it superintends and controls the conduct of other tribunals by a prohibitory or mandatory interposition. *Lincoln-Lucky & Lee Min. Co. v. District Court in First Judicial District*, 38 Pac. 580,

582, 7 N. M. 486 (citing *United States v. Peters*, 3 U. S. [3 Dall.] 123, 1 L. Ed. 535).

The judicial power, which by the third article of the Constitution is vested in the Supreme Court and such inferior courts, etc., and which shall extend to all "cases in law and equity arising under the Constitution or laws of the United States," is a conclusive power. It embraces the whole judicial power as to such matters. *United States v. Smith*, 4 N. J. Law (1 Southard) 33, 38.

The grant of "judicial power" was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state of such a nature that it could not, on the settled principles of public and international law, be entitled by the judiciary of the other state at all. *State of Wisconsin v. Pelican Ins. Co.*, 8 Sup. Ct. 1370, 1374, 127 U. S. 265, 32 L. Ed. 239.

Judicial power, within the meaning of the Constitution, may be defined to be that power by which judicial tribunals construe the Constitution, the laws enacted by Congress, and the treaties made with foreign powers or with Indian tribes, and determines the rights of parties in conformity with such construction. *Gilbert v. Priest* (N. Y.) 65 Barb. 444, 448.

"Judicial power" is well defined in the *Century Dictionary*: "(a) The authority to determine rights of persons or property by arbitrating between adversaries in specific controversies at the instance of a party thereto. \* \* \* (c) A power conferred upon a public officer, involving the exercise of judgment and discretion in the determination of questions of right in specific cases affecting the interest of persons or property, as distinguished from ministerial power or authority to carry out the mandates of judicial power or of the law." In re *Walker*, 74 N. Y. Supp. 94, 96, 68 App. Div. 196.

"Judicial powers" is used to designate with clearness that department of government which it was intended should interpret and administer the law. *State v. Whitford*, 11 N. W. 424, 426, 54 Wis. 150; *State v. Le Clair*, 30 Atl. 7, 9, 86 Me. 522.

"Judicial power," in Const. art. 7, § 2, providing that the judicial power of this state, "as to matters of law and equity," shall be vested in a Supreme Court, circuit courts, courts of probate, and justice of the peace, is construed to vest such power as the courts under English and American systems of jurisprudence have always exercised in legal and equitable actions; that is, in actions at law the power of determining questions of law and not of fact, and in suits in equity the power of determining

questions of both law and fact. *Callanan v. Judd*, 23 Wis. 343, 349.

"Judicial powers," in Const. 1789, art. 3, § 1, providing that the judicial powers of this state shall be vested in a superior court and in such inferior courts as the Legislature shall from time to time ordain and establish, embraces all cases, criminal and civil, at common law and in equity. *Gilbert v. Thomas*, 3 Ga. 575, 579.

#### **As power to hear and determine.**

A judicial power is said to be a power to hear and determine; but this definition is too comprehensive. Every administrative and executive officer is required to hear and determine many facts upon which his action is based. Such action by administrative or executive officers is not judicial in the sense that it belongs exclusively to the courts. It may be so far judicial that such an officer so exercising judgment and discretion in the determination of controverted questions of fact may be protected in an erroneous determination of the matter before him, but not so far judicial that the subject-matter is cognizable by the courts only. *Cameron v. Parker*, 38 Pac. 14, 30, 2 Okl. 277.

"Judicial power," as used in the Constitution, is not capable of a precise definition. It is included in the power to hear and determine, but does not exhaust the power. That it embraces the hearing and determination of all suits and actions, whether public or private, there can be no doubt; but we think that it is equally clear that it does not necessarily include the power to hear and determine the matter that is not in the nature of a suit or action between parties. The power to hear and determine matters more or less directly affecting public and private rights is conferred upon and exercised by administrative and executive officers. The term "judicial powers" has never been taken with such latitude of construction in the usages and customs of our American commonwealths, and to so extend the jurisdiction of the courts would lead to the most embarrassing results, with little or no compensation whatever. *De Camp v. Archibald*, 35 N. E. 1056, 1058, 50 Ohio St. 618, 40 Am. St. Rep. 692; *Bellingham Bay Imp. Co. v. City of New Whatcom*, 54 Pac. 774, 775, 20 Wash. 53.

#### **As vested in courts or judges.**

"Judicial power" is the power to construe and interpret the Constitution and the laws, and make decrees determining controversies, and is vested in the courts. *State v. Denny*, 21 N. E. 252, 254, 118 Ind. 382, 4 L. R. A. 79; *State v. Hyde*, 22 N. E. 644, 648, 121 Ind. 20; *People v. Salsbury* (Mich.) 96 N. W. 936, 939.

Judicial power exists only in the courts. It cannot live elsewhere. *Edwards v. Dykeman*, 95 Ind. 509, 518.

All judicial power, by the Constitution of the states and nation, is vested in the courts; but the judicial power therein conferred upon and limited to the courts is that judicial power which can be exercised only by the courts. In other words, the courts have exclusive power to hear and determine those matters which affect the life or liberty or property of a citizen. All other rights, while they may be in a sense "judicial," are not so far within the jurisdiction of the courts that their exercise by another department is void. *Territory v. Cox*, 6 Dak. 501; *Cameron v. Parker*, 38 Pac. 14, 30, 2 Okl. 277.

Under the Constitution of state of Kansas, vesting all judicial power in courts, any seemingly judicial power which is not vested in some court is not judicial power within the meaning of the Constitution. *Wilson v. Price-Raid Auditing Commission*, 1 Pac. 587, 588, 31 Kan. 257.

The judicial power which by the Constitution of the United States is vested in the Supreme Court and in such inferior courts as Congress may from time to time establish, etc., means the power conferred upon the courts maintained and established by and under the Constitution in the strict and appropriate sense of that term; courts that compose one of the three great departments of the government by the fundamental law, the same as the legislative and executive. *Charge to Grand Jury, Fugitive Slave Law* (U. S.) 30 Fed. Cas. 1007, 1010.

"Judicial power" is defined by Bouvier to be "the authority vested in the judges." *Home Ins. Co. v. Flint*, 13 Minn. 244, 246 (Gil. 228); *Gilbert v. Board of Police & Fire Com'rs of Salt Lake City*, 40 Pac. 264, 265, 11 Utah, 378; *Bellingham Bay Imp. Co. v. City of New Whatcom*, 54 Pac. 774, 775, 20 Wash. 53; *State v. Noble*, 21 N. E. 244, 248, 118 Ind. 350, 4 L. R. A. 101, 10 Am. St. Rep. 143.

Judicial power is power belonging to or emanating from a judge as such. Webster's definition of the word "judicial" is "pertinent to courts of justice, as judicial power." *State v. Noble*, 21 N. E. 244, 248, 118 Ind. 350, 4 L. R. A. 101, 10 Am. St. Rep. 143.

Judicial power is whatever emanates from a judge as such, or proceeds from courts of justice. *Merchants' Nat. Bank v. Jaffray*, 54 N. W. 258, 259, 36 Neb. 218, 19 L. R. A. 316.

#### **Other powers distinguished.**

Executive power distinguished, see "Executive Power."

The terms "discretionary power" and "judicial power" are often used interchange-

ably; but there are many acts requiring the exercise of judgment which may fairly be considered of a judicial nature, and yet do not in any proper sense come within the judicial power, as applicable to the courts. *State v. Le Clair*, 30 Atl. 7, 9, 86 Me. 522.

In England the judicial was not known as a separate power, but was, both in theory and practice, a part of the executive. The King, at the common law, by his prerogative had the power, as chief magistrate of the nation, to erect tribunals of justice, to define their powers and duties, to create offices and appoint and remove officers, and to appoint judges and limit the tenure of their office. There could be no contest between the executive and judicial power, for the whole was executive. *United States v. Kendall* (U. S.) 26 Fed. Cas. 702, 753.

#### **Adjudging breach of contract or grant.**

The power to adjudge a breach of contract or grant, with conditions, and deprive of vested rights by forfeiture, is judicial in its character, and pertains to the courts, and not to the grantors of the rights claimed under the grant; and while a grantor might sue to forfeit for failure of compliance with the conditions of the grant, he could not himself sit in judgment and enter a judgment against the grantee. *City of Alexandria v. Morgan's Louisiana & T. R. & S. S. Co.*, 33 South. 65, 69, 109 La. 50.

#### **Admission of attorney.**

The admission of attorneys or their exclusion from the practice of law is not the exercise of a mere ministerial power, but has been held in numerous cases to be the exercise of a judicial power. *Ex parte Garland*, 71 U. S. (4 Wall.) 333, 378, 18 L. Ed. 366.

#### **Admission of physician.**

Rev. St. 1899, c. 110, art. 1, which vests the board of health with power to examine, not only into the literary and technical acquirements of an applicant for a certificate to practice medicine, but also into his moral character, does not confer on the board "judicial power," within the meaning of Const. art. 3, and article 6, § 1, providing that judicial power can be exercised only by the courts of the state. *State v. Hathaway*, 21 S. W. 1081, 1084, 115 Mo. 36 (citing *United States v. Ferreira*, 54 U. S. [13 How.] 40, 52, 14 L. Ed. 42; *Wilkins v. State*, 16 N. E. 192, 113 Ind. 514; *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468; *State ex rel. O'Malley v. Lesueur*, 15 S. W. 539, 103 Mo. 253).

#### **Allowance of attachment.**

An order by a district or county judge allowing an attachment on a claim not yet due is an exercise of judicial power. *Merchants' Nat. Bank v. Jaffray*, 54 N. W. 258, 259, 36 Neb. 218, 19 L. R. A. 316.

#### **Allowance of bail.**

"Judicial power," within the United States Constitution, vesting the "judicial power" in certain courts, cannot be construed to include the granting of bail and the determining of the amount in which the parties shall be bound; for, in the exercise of this jurisdiction, a magistrate is deemed to act, not judicially, but ministerially. At least he does not put forth judicial power within the meaning of the Constitution. *State ex rel. District Attorney v. Moulin*, 12 South. 142, 143, 45 La. Ann. 309 (citing 1 Bish. Cr. Proc. 257).

#### **Determination of validity of assessment.**

Nowhere is there any provision in the organic act which prohibits the Legislature from creating a ministerial power and requiring of it the performance of judicial acts as incidental to its ministerial capacity. Hence a law authorizing a city council to determine the regularity, validity, and correctness of an assessment, and providing for an appeal from its decision, is not unconstitutional as conferring judicial powers on the council. *Bellingham Bay Imp. Co. v. City of New Whatcom*, 54 Pac. 774, 775, 20 Wash. 53.

#### **Divorces.**

Divorces in this state from the earliest times have emanated from the General Assembly, and can now be viewed in no other light than as a regular exercise of legislative power. But where an act of the Legislature not only grants a divorce, but also requires the payment of alimony by the husband, such requirement is an exercise of judicial power, and the act to that extent is unconstitutional and void. *Crane v. Meginnis* (Md.) 1 Gill & J. 463, 473, 474, 19 Am. Dec. 237.

#### **Hearing of appeal.**

Judicial power has never been held to apply to those cases where judgment is exercised as incident to the execution of a ministerial power; nor has it ever been held the exercise of ministerial power by the courts, within the meaning of this article, where they have been compelled to exercise a ministerial act as an incident to the exercise of judicial power. So a statute authorizing an appeal from the orders of drainage commissioners confirming any special assessments to the county surveyor, the county treasurer, and sheriff as a board of appeals to meet for the purpose of hearing appeals in such cases, and giving a further appeal from such board to the county court, is not unconstitutional as conferring a judicial power on a nonjudicial body, although such board is required to exercise judgment on the matters coming before its members. *Landowners v. People*, 113 Ill. 296, 309.

**Issuing commission.**

The duty imposed by statute on the register of the chancery court of issuing a commission to take a deposition is ministerial. *Merlette v. State*, 14 South. 562, 563, 100 Ala. 42.

**Issuing or refusing license.**

A judicial officer, ordinarily exercising judicial functions, may be required by law to perform ministerial acts, and in the performance of such acts he is a ministerial officer, without regard to the general nature of his office; so that it is held that, under a statute requiring a county judge to issue a liquor license upon the presentation to him of a proper petition therefor, his act in issuing or refusing to issue the license is a ministerial one. *Grider v. Tally*, 77 Ala. 422, 424, 54 Am. Rep. 65.

**Punishment for contempt.**

A statute conferred on the prosecuting attorney power to determine whether there was probable cause to charge one, brought to his attention, with violation of a particular law, and to aid him in the determination gave him the power to compel the attendance of witnesses before him by subpoena and attachment, and to punish them for disobedience to his writs. Held, that by such statute the prosecuting attorney was given judicial powers. *In re Ziebold* (U. S.) 23 Fed. 791, 794.

The taking of depositions is a very ancient and necessary method of obtaining evidence to be used in the trial of a cause, and a power conferred on a notary by Rev. St. §§ 5252, 5254, in taking depositions, to commit a witness to jail for refusing to answer a question, is not a judicial power in the sense of the Constitution, conferring all judicial powers upon the courts of the state. *De Camp v. Archibald*, 35 N. E. 1056, 1058, 50 Ohio St. 618, 40 Am. St. Rep. 692.

**Quasi judicial acts.**

Besides the mass of judicial power belonging exclusively to courts as a department of government, there is a considerable portion of power in its nature judicial—quasi judicial—invested from time to time by legislative authority in individuals, separately or collectively, for a particular purpose and limited time; for example, a commission for settling land claims against the government. Therefore a fugitive slave law, conferring on commissioners the power to act under it, and which provides for a summary hearing and decision, was not in violation of the provision of the Constitution above referred to. *Charge to Grand Jury, Fugitive Slave Law* (U. S.) 30 Fed. Cas. 1007, 1010.

The power conferred upon a State Superintendent of determining questions as to the division of school districts on appeal from

the decision of a town board is only quasi-judicial. *State v. Whitford*, 11 N. W. 424, 426, 54 Wis. 150.

**Removal or appointment of officer.**

The power of courts to appoint persons to assist in the performances of their judicial duties, such as the appointment of Commissioners of the Supreme Court by the General Assembly, is the exercise of a judicial power, and cannot be exercised, except by the courts. *State v. Noble*, 21 N. E. 244, 248, 118 Ind. 350, 4 L. R. A. 101, 10 Am. St. Rep. 143.

Judicial power includes the authority to appoint all necessary subordinate officers and assistants essential to the conducting of judicial business. Examiners of title being subordinate officers and assistants of the courts, to aid them in the discharge of judicial duties imposed upon them by legislative act, it was competent and proper for the Legislature to provide for their appointment by the court. *State v. Westfall*, 89 N. W. 175, 178, 85 Minn. 437, 89 Am. St. Rep. 571.

Generally an appointment to an office is an executive function; but it is not every appointment to office which involves the exercise of executive functions, as, for instance, the appointments made by judicial officers in the discharge of their official duties, or the appointments made by the General Assembly of officers necessary to enable it to properly discharge its duties as an independent legislative body, and the like. *State v. Hyde*, 22 N. E. 644, 648, 121 Ind. 20.

The right of the Governor to hear and determine evidence against an officer, pass upon it, and remove him from office, is not a judicial power. *Cameron v. Parker*, 38 Pac. 14, 30, 2 Okl. 277.

The power conferred on a Governor to remove any member of a board of police commissioners is administrative, and not judicial, in its nature. *State v. Hawkins*, 5 N. E. 228, 44 Ohio St. 98.

**Shortening term of imprisonment.**

The power to shorten the term of service in a penitentiary of a reformed convict is not judicial power, but is purely a ministerial or administrative power. It is no more the exercise of judicial power than the power of the Governor to "grant reprieves, commutations, and pardons after convictions." *Miller v. State*, 49 N. E. 894, 899, 149 Ind. 607, 40 L. R. A. 109.

**Summary proceedings against tenant.**

A power to hear and decide proceedings for the summary dispossession of tenants is a "judicial power." *People v. Russell* (N. Y.) 19 Abb. Prac. 136, 138.



**Widening streets and highways.**

Under a statute empowering the selectmen of the town to widen any street whenever, in their opinion, the safety and convenience of the inhabitants of the town should require it, it was held that the power so vested in the selectmen was a "judicial power," so that certiorari would lie to review their action. *Parks v. City of Boston*, 25 Mass. (8 Pick.) 218, 225, 19 Am. Dec. 322.

**Vacating judgments.**

An act of the Legislature "to declare void certain judgments and to grant new trials in certain cases therein mentioned" is clearly an attempt to exercise a judicial, and not a legislative, power—a power that legitimately belongs to the courts and judges, and not to the Legislature. *Sanders v. Canabiss*, 43 Ala. 173, 186.

The Legislature cannot by a mere resolve set aside a judgment or decree of a judicial court and render it null and void. Such act is an exercise of judicial power, and not legislative power. *Lewis v. Webb*, 3 Me. (3 Greenl.) 326, 332 (followed in *Inhabitants of Durham v. Inhabitants of Lewis*, 4 Me. [4 Greenl.] 140, 143).

**JUDICIAL PROCEEDING.**

The expression "judicial proceeding," as used in the statement that perjury is an assertion upon oath duly administered in a judicial proceeding, means a proceeding which takes place in or under the authority of the court of justice, or which relates in some way to the administration of justice, or which legally ascertains any right or liability. *Hereford v. People*, 64 N. E. 810, 812, 187 Ill. 222.

The phrase "course of judicial proceeding," in the statute providing that false statements in affidavits made in the course of judicial proceedings shall not constitute the crime of false swearing, but shall constitute the crime of perjury, applies to a sworn complaint made before a magistrate for the purpose of instituting a criminal proceeding. *Langford v. State*, 9 Tex. App. 283, 285.

When a regularly constituted court of justice is clothed with authority to hear and determine a question of fact, or a mixed question of law and fact, upon evidence, written or oral, to be produced before such court, and thereupon to render a decision affecting the material rights or interests of one or more persons or bodies corporate, such proceedings by the court must be regarded as judicial. *Martin v. Simpkins*, 38 Pac. 1092, 1094, 20 Colo. 438.

The phrase "judicial proceeding," as used in a statement of the doctrine that words spoken or written in a judicial pro-

ceeding by any person having an interest therein, or a duty to perform as a witness or counsel, are not only conditionally, but absolutely, privileged, and that no action will lie therefor, however defamatory or malicious they may be, provided they are pertinent and material, includes every proceeding before a competent court or magistrate, in the due course of law or administration of justice, which is to result in any determination of the action by such court or magistrate. *Newfield v. Copperman* (N. Y.) 47 How. Prac. 87-89.

Judicial proceedings, within the meaning of the rule that statements, otherwise slander, which are made in judicial proceedings, are absolutely privileged, means proceeding in a court of justice established or recognized by law, wherein the rights of parties recognized and protected by law are involved and may be determined. Proceedings of a municipal investigating committee do not constitute judicial proceedings within the meaning of the rule. *Blakeslee v. Carroll*, 29 Atl. 473, 475, 64 Conn. 223, 25 L. R. A. 108.

The provision of the Constitution of the United States, requiring full faith and credit to be given to the judicial proceedings of every other state, applies to a judicial proceeding had in an insurrectionary state during the war. *Hendry v. Cline*, 29 Ark. 414, 416.

A bill is a judicial proceeding, and is within the provisions of the act of 1850 providing that misnomers in judicial proceedings on the civil side of the court shall be amended without unnecessary delay. *Watkins v. Smith*, 17 Ga. 68, 69.

The constitutional provision that full faith and credit shall be given in each state to the records and judicial proceedings of every other state should not be construed to embrace every judgment in fact. On the other hand, the words may rationally be satisfied by a limitation to such judgments only as are duly rendered by a court of competent jurisdiction against those who appear and defend, or who were legally notified to appear; and hence a judgment obtained in another state against a person who had no legal notice to appear, and who did not in fact appear, is of no validity and impeachable. *Aldrich v. Kinney*, 4 Conn. 380, 386, 10 Am. Dec. 151.

**Assignment for benefit of creditors.**

Where a note provided for an attorney's fee of 10 per cent., should "judicial proceedings" be used in collecting, the fee was held not to be collectible on acceptance and payment of the note by an assignee for the benefit of creditors; the assignment not being considered a judicial proceeding, and the assignee not being appointed by, nor under the

direction or control of, a court. *Briam v. Sullivan* (Tex.) 66 S. W. 572.

#### **Certiorari.**

A proceeding by a writ of certiorari in a technical sense is distinguished from a quasi judicial one, and apart from its ancillary use its main performance and commonest use is to supervise, control, review, and correct the proceedings of quasi judicial tribunals, or where such proceedings are different from the course of common law. *State v. South Penn. Oil Co.*, 24 S. E. 688, 692, 42 W. Va. 80.

#### **Dissolving and annexing municipalities.**

The proceeding required to be instituted, carried on, and consummated in the county court as the means of dissolving one municipality and annexing the same to another, under the act of 1893, is a judicial proceeding, and the approval of the report of the annexation proceedings is a judgment. *Martin v. Simpkins*, 38 Pac. 1092, 1094, 20 Colo. 438.

#### **Foreclosure.**

A foreclosure under the statute is an act of a party and not a judicial proceeding, and it is only possible when the mortgage is so framed as to authorize it. *Hebert v. Bulte*, 4 N. W. 215, 216, 42 Mich. 489.

#### **Impeachment of public officer.**

The originating and trying of an impeachment of a public officer is a judicial proceeding. *Beall v. Beall*, 8 Ga. 210, 228.

#### **Investigation of financial affairs of town.**

A proceeding under the general municipal law for a summary investigation into the financial affairs of the town is judicial in the narrowest and strictest sense of that term, that of pertaining to the administration of justice through the courts, since the power granted a judge in this proceeding is not one to make an investigation, but as a result of that investigation he determines the legality and propriety of the conduct of public officers. *In re Town of Hempstead*, 52 N. Y. Supp. 618, 619, 32 App. Div. 6.

#### **Justice's or police magistrate's proceeding.**

Judgments of a justice court in Pennsylvania are "judicial proceedings," to which full faith and credit is required to be given by the Constitution of the United States. *Silver Lake Bank v. Harding*, 5 Ohio, 546, 547.

A proceeding before a police magistrate is within Code Civ. Proc. § 1907, providing that a newspaper publication of a fair and true report of judicial proceedings, without malice, is not actionable. *Bissell v. Press Pub. Co.*, 17 N. Y. Supp. 393, 394, 62 Hun, 551.

#### **Probate proceeding.**

The probate of a will is regarded as a judicial proceeding, entitled to full faith and credit in other states under the Constitution. *Haile v. Hill*, 13 Mo. 612, 613, 618; *Bright v. White*, 8 Mo. 421, 422, 426.

Where a note provides for attorney's fees if judicial proceedings be used in collecting it, undoubtedly, collecting through the probate court on the death of the maker was collecting by judicial proceedings. *Wicks-Nease v. James*, 72 S. W. 87, 89, 31 Tex. Civ. App. 151.

A record of the final settlement of an administrator, containing debits and credits in full, and an order to the administrator to distribute the balance found in his hands according to the will and the law, is a record of a "judicial proceeding," within Const. U. S. art. 4, § 1, which provides that "full faith and credit shall be given in each state to the judicial proceedings of every other state." The fact that the court did not adjudge that the administrator should pay a particular sum or sums to a particular person or persons, and award execution therefor, does not render what was done by the court any the less a judicial proceeding. *Fitzsimmons v. Johnson*, 17 S. W. 100, 104, 90 Tenn. (6 Pickle) 416.

#### **Proceeding before United States commissioner.**

The term "judicial proceeding," as used in a statute defining perjury, refers solely to judicial proceedings under the laws of the state and in its own tribunals of justice; hence it is held that a proceeding before a United States commissioner, in which a false oath was taken, was not a judicial proceeding within the meaning of the statute relative to perjury, so that the state had no authority to punish therefor. *Boon v. Aetna Ins. Co.* (U. S.) 3 Fed. Cas. 871, 874.

#### **Proceeding for summary process.**

Act 1850, creating the office of city judge of New York City, conferred on him the judicial powers vested by law in the recorder of the city of New York, and empowered him to perform and discharge all judicial duties imposed on the recorder. The statute in regard to summary proceedings (Rev. St. p. 513) conferred on the recorder authority to hear and decide in such proceedings. Held, that proceedings before the city judge for summary process were strictly judicial, and hence a writ of prohibition would not lie to correct irregularities in such a proceeding, where there was no want of jurisdiction. *People v. Russell* (N. Y.) 29 How. Prac. 176-178.

#### **Proceeding to obtain liquor license.**

A proceeding to obtain a license to sell intoxicating liquor is a judicial proceeding.

Ludwig v. State, 48 N. E. 390, 18 Ind. App. 518.

#### **Removal of policeman.**

In *People v. Board of Police Com'rs*, 155 N. Y. 40, 43, 49 N. E. 257, in reviewing the action of the police board on the trial of a delinquent policeman, the court said: "The relator was not subject to removal, except from some legal cause, to be ascertained and adjudged as matter of fact. This contemplates a judicial investigation. The proceeding was judicial in character." *People v. Jerome*, 73 N. Y. Supp. 306, 307, 36 Misc. Rep. 256.

#### **Seizure of distiller's books.**

The seizure of books kept by a distiller in accordance with Rev. St. §§ 3303, 3304, by a Collector of Internal Revenue, upon an order of one of the executive departments of the government, given in the legitimate exercise of its duties, is not a judicial proceeding, within the meaning of Rev. St. § 866, so as to deprive the government of the right to use the same as evidence in the trial of a libel for forfeiture filed against a distillery. *United States v. Distillery at Petersburg* (U. S.) 25 Fed. Cas. 853.

#### **JUDICIAL PROCESS.**

"Judicial process," in its largest sense, comprehends all the acts of the court from the beginning of its proceedings to the end. In a narrower sense it is "the means of compelling the defendant to appear in court for suing out the original writ in civil, and after indictment in criminal, cases." *Bouvier*. In every sense it is the act of the court. The process required by the law of the land is the process of the common law. That the Legislature may provide for a substituted service of judicial process, when it is required by necessity, is not doubted. In a suit to adjudicate the rights of persons in property within the state, such necessity is apparent; for the process of the state has no efficacy beyond its borders. Other cases of necessity are recognized. The principle is that the state may provide for the adjudication of all adversary rights of persons in property within its borders, and, to the end that such jurisdiction may be complete, the Legislature may provide a substituted service shall be such as, in the exercise of legislative discretion, shall be found most apt to accomplish the purposes of actual service. *State v. Guilbert*, 47 N. E. 551, 556, 56 Ohio St. 575.

#### **JUDICIAL PROOF.**

Judicial proof is a clear and evident declaration and demonstration of a matter which was before doubtful, conveyed in a judicial manner. *Powell v. State*, 29 S. E. 309, 317, 101 Ga. 9, 65 Am. St. Rep. 277.

#### **JUDICIAL PURPOSES.**

"Judicial purposes," in Act March 5, 1885, relating to lands ceded by the Crow Indians from their reservation to a certain county for judicial purposes, means purposes of the courts and the administration of justice. *Yellowstone County Com'rs v. Northern Pac. R. Co.*, 25 Pac. 1058, 1060, 10 Mont. 414 (citing *In re Sinking Fund Cases*, 99 U. S. 700, 761, 25 L. Ed. 504).

"Judicial purposes," within Gen. St. 1886, c. 64, § 33, providing that a certain county should be attached to another county for judicial purposes to enforce civil rights, includes the enforcement of civil rights through a district court. *Beebe v. Fridley*, 16 Minn. 518, 519 (Gil. 467).

The phrase "judicial purposes," as used in Laws 1862, c. 7, providing that "every county which is attached to an organized county for judicial purposes shall, for the administration of civil and criminal justice, be taken and deemed a part of said organized county," does not prevent Pine county, attached to Chisago county for judicial purposes, from having a sheriff who may conduct a foreclosure sale of lands situate in Pine county under a power of sale in the mortgage. *Berthold v. Holman*, 12 Minn. 335 (Gil. 221, 222), 93 Am. Dec. 233.

#### **JUDICIAL QUESTION.**

By "judicial question," where the validity of acts of a municipal council are involved, is meant one the determination of which under our form of government is intrusted to the judiciary, as distinguished from the other co-ordinate departments, when and only when such question is made by a person who has suffered or is threatened with some special injury which he seeks to redress or prevent. *Patton v. City of Chattanooga*, 65 S. W. 414, 420, 108 Tenn. 197.

#### **JUDICIAL RECORD.**

A judicial record is a precise history of a suit from its commencement to its termination, including the conclusions of law thereon, drawn by the proper officer for the purpose of perpetuating the exact state of facts. *Burge v. Gandy*, 41 Neb. 149, 59 N. W. 359 (citing *Davidson v. Murphy*, 13 Conn. 213).

A judicial record is the record or official entry of a proceeding in the court of justice, or of the official acts of a judicial officer in an action or special proceeding. Rev. St. Utah 1898, § 3383; Code Civ. Proc. Cal. 1903, § 1904.

A judicial record is the record, official entry, or files of the proceedings in a court of justice, or of the official act of a judicial officer in an action, suit, or proceeding. *Ann.*

Codes & St. Or. 1901, § 741; *Neff v. Penoyer* (U. S.) 17 Fed. Cas. 1279, 1287.

Blackstone says there is a "judicial record" where the acts and judicial proceedings are enrolled on parchment or paper, for a perpetual memorial and testimony, which rolls are called the "records of the court," and are of such high and supereminent authority, that their truth is not to be questioned. 2 Chit. Bl. Comm. 264. Sir Edward Coke observes: "A record or enrollment is a monument of so high a nature, and importeth in itself such absolute verity, if it be pleaded there is no such record, it shall not receive any trial by witness, jury, or otherwise, but by itself." When a final judgment has once been pronounced in a cause, and the term at which it is given has finally expired, it becomes a public judicial record, carrying with it the sanctity of truth, which cannot be impeached or set aside, except on the ground of fraud. *Smith v. Dudley*, 2 Ark. (2 Pike) 60, 62-65.

Within the meaning of Shannon's Code, § 5579, providing that a judicial record is proved by production of the original or by a copy thereof, certified by the clerk and authenticated by his seal of office, the term "judicial record" includes the bond of the constable, which is required to be filed in the county court. *Morgan v. Betterton*, 69 S. W. 969, 970, 109 Tenn. 84.

#### JUDICIAL REMEDY.

"Judicial remedies" are such as are administered by the courts of justice, or by judicial officers empowered for that purpose by the Constitution and statutes of the state. Code Civ. Proc. Cal. 1903, § 20.

"Judicial remedies" are such as are determined by the courts of justice, or by judicial officers empowered for the purpose by the Constitution and the statutes of the state. Code Civ. Proc. Mont. 1895, § 3469.

#### JUDICIAL SALE.

See, also, "Forced Sale."

A judicial sale is one which is made by a court of competent jurisdiction in a pending suit through its authorized agent. *Terry v. Cole's Ex'r*, 80 Va. 695, 701; *McAllister v. Harman* (Va.) 42 S. E. 920, 922.

A judicial sale is a sale made by some competent tribunal by an officer authorized by law for the purpose. *Terry v. Cole's Ex'r*, 80 Va. 695, 701 (citing *Bouvier*); *Sturdevant v. Norris*, 30 Iowa, 65, 71 (citing *Bouv.* 681); *Stidger v. Evans*, 19 N. W. 850, 851, 64 Iowa, 91; *National Nickel Co. v. Nevada Nickel Syndicate Co.* (U. S.) 103 Fed. 391, 395.

A judicial sale is one made by the court, and one who bids in the property of such

a sale becomes subject to the orders of the court. *Black v. Caldwell* (U. S.) 83 Fed. 880, 886.

By a judicial sale is meant one made under the process of a court having competent authority to order it by an officer legally appointed and commissioned to sell. *Williamson v. Berry*, 49 U. S. (8 How.) 495, 547, 12 L. Ed. 1170; *Lawson v. De Bolt*, 78 Ind. 563, 565.

All authorities concur that judicial sales are sales made by the court, and it matters not to the contrary that such sale is made through the instrumentality of a master, a commissioner, or other functionary appointed thereto by the court. *Ousley v. Bailey*, 36 S. E. 750, 752, 111 Ga. 783.

"Judicial sale" is defined as a sale under a judgment, order, or decree of the court; a sale under judicial authority by an officer legally authorized for the purpose, such as a sheriff's sale, an administrator's sale, etc. *Strasburger v. Guinter*, 23 Pa. Co. Ct. R. 481, 488.

Forced sale and judicial sale are identical in Louisiana, and either term means a sale made under authority and process at law in any legal proceeding had contradictorily with the owner before any court of competent jurisdiction. *Woodward, Wight & Co. v. Dillworth* (U. S.) 75 Fed. 415, 418, 21 O. C. A. 417.

The courts of Nebraska have construed "judicial sale" to apply to a sale of real estate under process of the court, whether upon execution or order of sale. *Neligh v. Keene*, 20 N. W. 277, 278, 16 Neb. 407.

Some of the cases hold that a sale may be considered a judicial one only where made pendente lite, and this may perhaps be considered the general technical rule. *Lawson v. De Bolt*, 78 Ind. 563, 565. See, also, *Ousley v. Bailey*, 36 S. E. 750, 752, 111 Ga. 783; *National Nickel Co. v. Nevada Nickel Syndicate* (U. S.) 103 Fed. 391, 395.

A judicial sale is in the contemplation of the law a sale made pendente lite—a sale of the court; and the court is vendor. *Neligh v. Keene*, 20 N. W. 277, 278, 16 Neb. 407; *Emerick v. Miller* (Ind.) 62 N. E. 284, 285.

#### Confirmation necessary.

Confirmation is necessary to give judicial character to a sale by the court. *Emerick v. Miller* (Ind.) 62 N. E. 284, 285; *Dresbach v. Stein*, 41 Ohio St. 70, 77.

Sales by order of court in partition proceedings, being judicial sales, must be reported to the court for confirmation, and until confirmed they are of no effect. *Burden v. Taylor*, 27 S. W. 349, 350, 124 Mo. 12.

Sales made by order or decree under direction of the court, and requiring confirmation by the court, are judicial sales. *Maul v. Hellmann*, 58 N. W. 112, 113, 39 Neb. 322.

A sale by one authorized to execute the decree in chancery is not, until confirmed, a sale in the legal sense. It is only a sale in the popular sense, and not a judicial sale. An accepted bidder acquires by the mere acceptance of his bid no independent right to have his purchase completed, but is merely a preferred proposer until confirmation by the court. *Jennings v. Dunphy*, 50 N. E. 1045, 1046, 174 Ill. 86 (citing *Rorer*, Jud. Sales, § 124).

A judicial sale is not absolute until confirmed. The order of confirmation gives the judicial sanction of the court, and, when made, relates back to the time of sale, and carries all defects and irregularities, except those founded in want of jurisdiction or in fraud. *Nevada Nickel Syndicate v. National Nickel Co.* (U. S.) 103 Fed. 391, 395.

Sales by the court through the instrumentality of a master, a commissioner, or other functionary appointed thereto by the court, are not binding or valid, and confer upon the purchaser no right to the property, until confirmed by the court; and, as the confirmation is the judicial act of the court, such a sale becomes a judicial sale. *Ousley v. Bailey*, 36 S. E. 750, 752, 111 Ga. 783.

The law requiring an administrator's sale to receive the approbation of the court before it shall be binding or valid to pass the title in effect makes the sale the act of the court; hence the propriety of denominating such a sale a "judicial sale." In those states in which execution sales are not required to be reported to the courts for approval, the sheriff sells by the naked authority of the writ, and if his sale is not void the title passes at once by his deed without the approval of the court; whereas, if the sale is a technical judicial sale as it is now understood—that is to say, a sale under a decree or order of the court, and which must be reported to the court for its approval—no title passes until its approval. *Noland v. Barrett*, 26 S. W. 692, 694, 122 Mo. 181, 43 Am. St. Rep. 572.

When a sale under foreclosure is confirmed, it becomes the act of the court, or in other words is a judicial sale; and until such confirmation there is no judicial sale, and no title passes to the purchaser. *State v. Campbell*, 60 N. W. 32-34, 5 S. D. 636.

#### **Administrator's sale.**

A sale of land made by an administrator under order of the probate court to raise money for payment of debts is a judicial sale. *Maunly v. Pemberton*, 75 N. C. 219, 220.

A sale of real estate of an intestate, made by his administrator in pursuance of the order of the district court, and requiring confirmation by the court, is a judicial sale. *Maule v. Hellmann*, 58 N. W. 112, 113, 39 Neb. 322.

A sale of land for assets made by an administrator pursuant to the judgment of the court of probate in a special proceeding therein instituted for that purpose, is a judicial sale, as much as a sale for partition or any other purpose. *Mauney v. Pemberton*, 75 N. C. 219, 220.

An administrator's sale of real estate under the orders of a probate court, in those states which require such sales to be reported to the court for its approval or rejection, is a judicial sale. The law requiring such sales to receive the approbation of the court before it shall be binding or valid to pass the title in effect makes the sale the act of the court; hence the propriety of denominating such sales "judicial sales." *Noland v. Barrett*, 26 S. W. 692, 694, 122 Mo. 181, 43 Am. St. Rep. 572.

#### **Assignee's sale.**

A sale made by an assignee for the benefit of creditors, and confirmed by the court, is a "judicial sale," within the meaning of Act March 11, 1875, vesting the inchoate interests of married women in the lands of their husbands, when their title has been divested by a judicial sale, and entitling the wife to immediate possession on partition. We do not believe that the Legislature, in enacting that the wife might assert her right to her interest in the lands of her husband, intended that the words "judicial sale" should have a meaning so narrow and technical as to include only one made pendente lite, and thus excluding a sheriff's sale. If such a meaning were assigned to the words, the purpose of the statute would be defeated, and the statute would be of very little practical effect. There would not be one case in a thousand where it would apply. The decisions heretofore made clearly annex a much broader signification to the words "judicial sale" than that which in an exact technical sense they possess. But if we were driven to assign to the words "judicial sale" the most rigid and narrow technical meaning, there would be no difficulty in the case of a sale by an assignee in insolvency, acting under the order of the court in which the matter was pending, who made report of the sale to the court, and on which an order of confirmation was entered. *Lawson v. De Bolt*, 78 Ind. 563, 565.

Where a husband assigned under the statute certain real estate for the benefit of his creditors, the assignee's sale thereof is such a judicial sale as will, under Code, § 2440, bar the wife's interest therein; for,

while not strictly a sale under order of the court, it was made in pursuance of the mode provided by law to dispose of an insolvent person's property, and Code, § 2123, provides that the assignee shall at all times be subject to the order of a court of justice. *Stidger v. Evans*, 19 N. W. 850, 851, 64 Iowa, 91 (citing *Sturdevant v. Norris*, 30 Iowa, 65).

Where a probate court, in the exercise of statutory power, made an order for the private sale of real estate by the assignees for the benefit of creditors, under which, and on the terms and conditions authorized by the court, the land was sold by the assignees, and where the sale was reported to the court and confirmed by it, and deeds ordered by the court were made and delivered to the purchasers, the sale was a judicial sale. *Dresbach v. Stein*, 41 Ohio St. 70, 77.

#### Assignment for creditors.

A voluntary assignment and conveyance of property by a debtor for the benefit of all his creditors to an assignee is not a "judicial sale," and will not entitle the wife of the debtor to have partition. *Willson v. Miller*, 66 N. E. 757, 759, 30 Ind. App. 586 (citing *Hall v. Harrell*, 92 Ind. 408).

#### Attachment sale.

A sale under judgment and order of a court of law, in a suit in which an attachment issues, is not a judicial sale, from which there can be no redemption. *Beard v. Wilson*, 12 S. W. 567, 569, 52 Ark. 290.

#### Execution sale.

In Georgia the term "judicial sale" is used to denote more than what are known in the text-books as such, and includes execution sales. *Seymour v. National Building & Loan Ass'n*, 42 S. E. 518, 519, 116 Ga. 285, 94 Am. St. Rep. 131.

In most states the distinction has been consistently maintained between judicial sales and execution sales. In those states in which execution sales are not required to be reported to the courts for approval, the sheriff sells by the naked authority of the writ, and if his sale is not void the title passes at once by his deed, without the approval of the court; whereas, if the sale is a technical judicial sale, as it is now understood—that is to say, a sale under a decree or order of the court, and which must be reported to the court for its approval—no title passes until its approval. *Noland v. Barrett*, 26 S. W. 692, 694, 122 Mo. 181, 43 Am. St. Rep. 572.

"Execution sales are not judicial. They must, it is true, be supported by a judgment, decree, or order. But the judgment is not for the sale of any specific property. It is only for the recovery of a designated sum of money. The court gives no directions, and can give none, concerning what property can

be levied on. It usually has no control over the sale, beyond setting it aside for non-compliance with the statute. The chief differences between execution and judicial sales are these: The former are based on a general judgment for so much money, and the latter on an order to sell specific property. The former are conducted by an officer of the law in pursuance of the directions of a statute; the latter are made by the agent of the court in pursuance of the directions of the court. In the former the sheriff is the vendor; in the latter, the court. In the former the sale is usually complete when the property is struck off to the highest bidder; in the latter it must be reported to and approved by the court." *Norton v. Reardon*, 72 Pac. 861, 863, 67 Kan. 302 (citing *Freeman*).

#### Foreclosure sale.

A sale under a decree of foreclosure of a mortgage in Montana, while it may not possess all of the characteristics of a judicial sale under the equity practices, must be classed as such a sale. *Black v. Caldwell* (U. S.) 83 Fed. 880, 886.

The term "judicial sale," in Laws Iowa 1802, c. 151, providing that a widow shall be entitled on the death of her husband to one-third of all the real estate in which he had a legal or equitable interest during the marriage which had not been sold on execution or other judicial sale, does not include a foreclosure sale by notice under the provisions of Laws 1851, c. 118. *Sturdevant v. Norris*, 30 Iowa, 65, 71.

A sale of real estate at public outcry by a mortgagee, under a power in the mortgage authorizing him to sell at public or private sale, is not such a judicial sale as is required to be in writing by the Code, though for some purposes it is equivalent to a sale under a foreclosure of the mortgage by a court of competent jurisdiction. *Seymour v. National Building & Loan Ass'n*, 42 S. E. 518, 519, 116 Ga. 285, 94 Am. St. Rep. 131.

A power of sale granted by the mortgagor at the time when the mortgage is made does not conflict with the rules established by courts of equity. The object of the pledge is to secure a debt. To effect that purpose the right of disposition must exist somewhere and be founded on the contract of the parties, either express or implied. A "judicial sale" is but the enforcement of the contract; one mode of appropriating the mortgaged property to the satisfaction of the debt. The authority resulting from the contract which a court may exercise in behalf of one of the parties the mortgagor may confer upon the mortgagee or a third person without any violation of principle. A power to dispose of the property to satisfy the debt for which it is pledged is not collateral, but, like the right of redemption, inheres in the subject. It is not any addition to the mort-

gage, but a part of it; and the mode in which it may be exercised is as proper a subject of agreement as the terms of the mortgage itself. *Lawrence v. Farmers' Loan & Trust Co.*, 13 N. Y. 200, 209.

#### **Partition sale.**

Sales of land by order of the court, in proceedings for partition, are judicial sales. As such they must be reported to the court for confirmation, and until confirmed they are of no effect. *Burden v. Taylor*, 27 S. W. 349, 350, 124 Mo. 12.

After the commencement of proceedings in partition, one of the co-tenants, who was a defendant, mortgaged his undivided interest. Judgment quod partitio fiat was entered, under which the premises were sold. Held, that the lien of the mortgage was discharged, notwithstanding Act March 23, 1867, which provides that the lien of the first mortgage shall not be destroyed by any judicial or other sale whatever; the sale not being a judicial one within the statute, the phrase "judicial sale" therein meaning such a sale as should transfer the title to a special and particular estate mortgaged, while a single co-tenant's interest is only a fractional proportion of the land of which it forms a part. *Wright v. Vickers*, 81 Pa. (31 P. F. Smith) 122, 128.

#### **Receiver's sale.**

A sale made by a receiver of a national bank under an order of a court of competent jurisdiction is a judicial sale. *Schaberg v. McDonald*, 83 N. W. 737, 739, 60 Neb. 493.

A sale by a receiver of the property of a national bank under an order of court, in accordance with the provisions of section 5234 of the Revised Statutes, constitutes a judicial sale. *In re Third Nat. Bank* (U. S.) 4 Fed. 775, 776.

The term "judicial sale," within the rule that the doctrine of caveat emptor applies to such sales, includes the sale of real estate by a receiver. *Campbell v. Parker*, 45 Atl. 116, 118, 59 N. J. Eq. 342.

The receiver of a bank having instituted proceedings to obtain the instruction of the court as to the disposition to be made of certain assets, a reference was directed, pending which defendants offered to purchase a judgment in favor of the bank. The referee in his report recommended that the defendants' offer be accepted, whereupon the court authorized the receiver to sell and transfer the judgment to the defendants for the sum offered. The receiver and defendants then made arrangements for completing the contract. It was held that it was a "judicial sale," which, on defendants' refusal to complete, could be enforced by motion. *White v. Rand* (N. Y.) 21 N. E. 97, 99.

#### **Sheriff's sale.**

A sale by a sheriff under a general execution, which he has levied on real or personal property, is not a judicial sale, strictly speaking. Such a sale is a ministerial act, and at common law, if the officer conformed to the established regulations, the sale was final and valid as soon as made. Confirmation was required only in chancery sales. *Norton v. Reardon*, 72 Pac. 861, 863, 67 Kan. 302.

Some of the cases hold that a sale may be considered a judicial one only where made pendente lite, and that a sale by a sheriff is therefore not a judicial sale, and this may, perhaps, be considered the general technical rule. *Lawson v. De Bolt*, 78 Ind. 563, 565.

A sheriff's sale is a judicial sale. *Strasburger v. Guinter*, 23 Pa. Co. Ct. R. 481, 486.

Article 2616 of the Revised Civil Code of Louisiana says that sales made by authority of law are of two kinds: (1) Those which take place when the property of a debtor has been caused by order of the court to be sold for the purpose of paying the creditors; (2) those which are ordinary, in matters of succession or partition. Thus a sale, though made by a sheriff and under order of a court, which was wholly voluntary, is not a forced or a judicial sale. *Woodward, Wight & Co. v. Dillworth* (U. S.) 75 Fed. 415, 418, 21 C. C. A. 417.

#### **Trustee's sale.**

A sale made by a trustee, who has been authorized by decree to sell lands, is not a judicial sale, but simply a sale by a private individual authorized to make it. Such a sale is made without process, not by an officer in any sense of the word, but by a private person to a private person, after negotiation between them. *Williamson v. Berry*, 49 U. S. (8 How.) 495, 547, 12 L. Ed. 1170.

Where suit was brought by M., as trustee of R., to partition lands between C. and the heirs of R., and to sell the part assigned to R.'s heirs, and after confirmation of the report partitioning the land H. purchased the land under an agreement with C. and M., and the sale was reported to the court by M., trustee, and it entered a decree approving and confirming it, and directing that the purchase price be paid to the general receiver of the court, by referring to it as a sale made by M., trustee, and C. in his own right, it was not a judicial sale. *McAllister v. Harman* (Va.) 42 S. E. 920, 922.

A sale under a decree of court is judicial, when such sale is not made exclusively under the powers of a trust deed. *Chew v. Hyman* (U. S.) 7 Fed. 7, 15.

**JUDICIAL SEQUESTRATION.**

By the Code of Louisiana a mandate ordering the sheriff in certain cases to take into his possession and to keep a thing of which another person has the possession until after the decision of a suit, in order that it be delivered to him who shall be adjudged entitled to have the property or possession of that thing, is called a "judicial sequestration." *Baldwin v. Black*, 7 Sup. Ct. 323, 323, 119 U. S. 643, 30 L. Ed. 530.

**JUDICIAL SETTLEMENT.**

The expression "judicial settlement," where it is applied to an account, signifies a decree of a surrogate's court, whereby the account is made conclusive upon the parties to the special proceeding, either for all purposes, or for certain purposes specified in the statute; and an account thus made conclusive is said to be "judicially settled." Code Civ. Proc. N. Y. 1899, § 2514, subd. 8.

A settlement of an executor's account in a proceeding to which decedent's wife alone was cited is a judicial settlement, though the remaindermen were not bound thereby. *In re Willard's Estate*, 9 N. Y. Supp. 555, 557, 2 Con. Sur. 112.

**JUDICIAL SUBDIVISION.**

Whenever the terms "county," "subdivision," or "judicial subdivision," as employed in the Code of Criminal Procedure, in defining or describing the territorial or local jurisdiction of any magistrate or court, or in restraining, enlarging, or otherwise conferring authority upon any court, officer, or person of this state, they are deemed to be employed in the same sense and interchangeably, except when a different sense plainly appears; as, for example: (1) The term "county," when so employed, includes an organized county, or an organized county and such unorganized counties, or other territory or parts of this state, as now are or as may be hereafter by law attached to such organized county for judicial purposes; (2) the term "subdivision" when so employed includes an organized county, or an organized county and such unorganized county or counties, or other territory or parts of this state, as now are or as may be hereafter by law attached to such organized county for judicial purposes; (3) the term "judicial subdivision," when so employed, includes an organized county, or an organized county and such unorganized county or counties, or other territory or parts of this state, as now are or as may be hereafter, by law, attached to such organized county for judicial purposes. Rev. Codes N. D. 1899, § 8511.

**JUDICIAL TRIAL.**

A "judicial trial" means a fair trial. The court has no discretionary power to com-

pel a party to submit to a trial that is not fair. *Baldwin v. Grand Trunk Ry. Co.*, 15 Atl. 411, 412, 64 N. H. 596.

**JUDICIAL TRIBUNAL.**

The term as it is ordinarily used does not include the board of railroad commissioners. It is a body who has the power and whose duty it is to ascertain and determine the rights and enforce the relative duties of contending parties. *State v. New Haven & N. Co.*, 43 Conn. 351, 382.

A board of arbitrators is not a "court," or "judicial tribunal," in any proper sense of those terms. It has none of the powers that appertain to courts to regulate their proceedings or enforce their decisions. An "award," when made, is more in the nature of a contract than of a "judgment." It is but the consummation of the contract of submission; its appropriate and legitimate result. Hence it is held that the fact that a judgment rendered on Sunday is void does not render an award made on Sunday illegal. *Blood v. Bates*, 31 Vt. 147, 148.

**JUDICIAL WRIT.**

*Scire facias* is deemed a "judicial writ," though unlike other judicial writs, as, for example, the ordinary writs of execution. It is so in the nature of an original that the defendant may plead to it, so that the proceeding is considered an action, and is embraced in a release of actions; but it is said on the highest authority that, when it is founded on a recognizance, its purpose is, as in case of judgments, to have execution. Although it is not a continuation of a former suit, as in the case of an execution, yet, not being a commencement or foundation of an action, it is not an original writ, but a judicial writ, and, at most, only in the nature of an original action. *Pullman's Palace Car v. Washburn* (U. S.) 66 Fed. 790, 792.

**JUDICIALLY NOTIFY.**

By the expression "judicially notify" the defendant the court must be understood to mean judicially notify him by means of a citation, because no other mode of judicial notification interruptive of prescription is known to our law. *Schwartz v. Lake*, 34 South. 96, 98, 109 La. 1081.

**JUDICIARY.**

The laws of a free government are construed and applied by the judiciary, or judicial department. This department has distinct and independent powers, designed to operate as a check upon those of the legislative and executive departments. It is confined to its own functions, and can neither encroach upon nor be made subordinate to



those of another. In determining the validity of the anti-monopoly act (Laws 1899, c. 690), authorizing a justice of the Supreme Court to appoint a referee to take testimony, which the Legislature could authorize the judge himself to take out of court, the court said: "While the performance of administrative duties cannot be imposed by the Legislature upon the Supreme Court as such, except as to matters incidental to the exercise of judicial powers, yet for many years and without serious question acts have been passed conferring upon the justices of that court authority out of term to perform a variety of functions administrative or semiadministrative in character." In *re Davies*, 61 N. E. 118, 121, 168 N. Y. 89, 56 L. R. A. 855.

The judiciary is a co-ordinate department of the government, and is not a mere subordinate branch, dependent for existence and power on the legislative will. *Edwards v. Dykeman*, 95 Ind. 509, 518.

The word "judicial," as used in speaking of a judicial department of government, means that department of government which interprets and applies laws. In *re Railroad Com'rs*, 50 N. W. 276, 277, 15 Neb. 679 (citing *Webst. Dict.*).

#### JUDICIARY POWERS.

"Judiciary powers" is used to designate with clearness that department of government which it was intended should interpret and administer the law. *State v. Whitford*, 11 N. W. 424, 426, 54 Wis. 150.

#### JUDICIOUSLY.

In an action for damages for injury to property caused by grading of streets, the lower court, in defining the degree of care incumbent upon the city in doing such work, charged that it was the city's duty to act "judiciously, prudently, and cautiously." In the same connection it charged that the city was bound to construct such work in a safe, careful, and skillful manner. It was held that there was no error in using the words "judiciously and prudently." The analysis of these words made by the court is as follows: "A prudent man is a cautious man, practically wise; and to act judiciously is to exercise good judgment, to act skillfully, with discretion or wisdom, prudently. \* \* \* It would be doing violence to the language used in the several parts of the charge," said the court, "to suppose that the jury held the city to any higher degree of care or skill than the law clearly requires in consequence of the use of these words. They do not imply the use of a high scientific skill or the largest amount of wisdom, but such as might be necessary for a proper and prudent accomplishment of the work undertaken; and this is required to be in proportion to the character

of the improvement and the magnitude or extent of the injury, which will be likely to result from the want of proper skill and prudence." *Cotes v. City of Davenport*, 9 Iowa, 227, 236.

Acting judiciously is not always acting judicially, so that, though a county court may be required to act judiciously—that is, with good judgment—they do not necessarily act judicially. In *re Saline County Subscription*, 45 Mo. 52, 53, 100 Am. Dec. 837.

#### JUDICIUM.

"Judicium" is a proceeding before a judge, or judge. *State v. Whitford*, 11 N. W. 424, 426, 54 Wis. 150.

#### JUGGLER.

One who practices or exhibits tricks by sleight of hand; one who makes sport by tricks which make a false show of extraordinary dexterity. Thus tricks of a mesmerist, as mesmerizing part of the body, making the leg and arm stiff, bring the show within the definition of jugglers, who are required to have a license. *Thurber v. Sharp* (N. Y.) 13 Barb. 627, 628.

#### JUMP.

The phrase, "Jump off quick, if you are going to," as used by the conductor of a railroad train to a party who assisted another onto the train, which started before he could alight, were words of advice, and did not constitute a requirement to leave the train. *Evansville & T. H. R. Co. v. Athon*, 33 N. E. 469, 471, 6 Ind. App. 295, 51 Am. St. Rep. 303; *Vimont v. Chicago & N. W. R. Co.*, 32 N. W. 100, 101, 71 Iowa, 58.

#### JUNCTION.

In the ordinary acceptance, as applied to railroads, the "junction" is the point or locality where two or more lines of railway meet. Two lines of distinct companies, or separate roads of the same company, or a main line and a branch road of the same company, may have points of union or meeting, styled "junctions"; but this can hardly be predicated of a single continuous road from one point to another. *United States v. Oregon & C. R. Co.*, 164 U. S. 526, 540, 17 Sup. Ct. 165, 41 L. Ed. 541; *Id.* (U. S.) 57 Fed. 426, 429.

The phrase, "junction of Gold street and Fiske avenue," in a notice to a city that plaintiff fell and was injured on "a sidewalk or highway known and called Gold street, at the junction of Gold street and Fiske avenue" was used in a loose, popular, practical

sense, as including the open space made where these highways met and mingled, as it would appear to one on the ground there, and did not mean, and could not be well understood to mean, a fixed mathematical point. The notice was a sufficient description of the place where the injury occurred, within Pub. Acts 1895, c. 172, requiring such notice to describe the place of the accident. *Wood v. Borough of Stafford Springs*, 51 Atl. 129, 130, 74 Conn. 437.

Where a boundary line of a lot is described as beginning at the junction of certain streets, it will be understood to mean the junction of the side lines of the streets adjoining the property conveyed. *Hughes v. Providence & W. R. Co.*, 2 R. I. 508, 513.

The "mouth" of a creek or river, or the "junction" of a creek or river with a river, is the point where the middle of the channel of each intersects the other. *Rev. St. Ariz.* 1901, par. 931.

## JUNE LOADING.

Contracts for the shipment of grain and cattle in a vessel for "June loading" are to be construed to mean that the shippers may cancel the contracts if the vessel is not ready to receive their shipments during the month of June. *Stumore v. Shaw*, 11 Atl. 360, 362, 68 Md. 11, 6 Am. St. Rep. 412.

## JUNIOR.

The word "junior," or "Jr.," meaning younger, later born, later in office or rank, is no part of the name of a person who uses it, but is a mere description of the person. *Goodwin v. State*, 15 South. 571, 574, 102 Ala. 87; *Windom v. State*, 72 S. W. 193, 194, 44 Tex. Cr. R. 514.

The word "junior," as added to a person's name, is no part of the name, but only an addition or description used to designate the individual referred to, and where no addition is required by law an error in it cannot invalidate it. Therefore an enrollment in the militia of "L. C., Jr.," as "L. C., Second," is valid. *Cobb v. Lucas*, 32 Mass. (15 Pick.) 7, 9.

The addition of the character "Jr." to a man's name is not a part of the name, and though attached to the name in one case and not in another, raises no doubt of the identity of the person, when the change is readily accounted for on other grounds. *Blake & Goodhue v. Tucker*, 12 Vt. 39, 45; *Commonwealth v. Perkins*, 18 Mass. (1 Pick.) 388; *Headley v. Shaw*, 39 Ill. 354, 365; *State v. Weare*, 38 N. H. 314, 317.

The addition of "junior" is no part of the name of a person. It is a mere description of the person, and intended only to des-

ignate between different persons of the same name. It is a casual and temporary discrimination. It may exist one day and cease the next. *People v. Collins* (N. Y.) 7 Johns. 549, 552; *Simpson v. Dix*, 131 Mass. 179, 184; *Commonwealth v. Perkins*, 18 Mass. (1 Pick.) 388; *Coit v. Starkweather*, 8 Conn. 289, 293; *Padgett v. Lawrence* (N. Y.) 10 Paige, Ch. 170, 177, 40 Am. Dec. 232; *Johnson v. Ellison*, 20 Ky. (4 T. B. Mon.) 526, 527, 18 Am. Dec. 163; *Jameson v. Isaacs*, 12 Vt. 611, 613; *Brainard v. Stilphin*, 6 Vt. 9, 27 Am. Dec. 532; *Carleton v. Townsend*, 28 Cal. 219, 222; *Dauids v. People*, 61 N. E. 537, 540, 192 Ill. 176; *Bonardo v. People*, 182 Ill. 411, 55 N. E. 519.

### In deed.

The addition of "junior" is no part of a person's name, but it is used as merely descriptive of the person, and is assumed, applied, and discarded at will. Where a father and son were of the same name, and land was purchased by the father, and the deed made in such name with the addition of the word "junior," such addition was not conclusive that the son was intended as the grantee. This addition to a name is at the best but presumptive evidence that of two persons bearing the same name the person thus designated is the younger, and the deed, though not conclusive, was held to furnish a presumption that by the addition of the word "junior" the son was intended to be designated. *Prentiss v. Blake*, 34 Vt. 460, 465, 466.

### In indictment.

The addition of the word "junior," or "Jr.," to a name in an indictment, is mere matter of description, and the failure to add it to the name in another place in the indictment is no variance. *Geraghty v. State*, 11 N. E. 1, 2, 110 Ind. 104; *City and County of San Francisco v. Randall*, 54 Cal. 408, 410; *Allen v. State*, 52 Ind. 486, 488; *State v. Best*, 12 S. E. 907, 908, 108 N. C. 178, 747; *Wesley v. State* (Tex.) 73 S. W. 960, 961.

Where there are two persons of the same name, father and son, residing in the same town, and the latter uses a well-known addition to his name, as "Jr.," to distinguish him from his father, and he is usually known by such designation, an indictment, in order to allege any offense as committed by, with, or against him, should connect with his name the ordinary addition which is by himself and others used to distinguish him from his father, and in the absence of such addition the indictment must be understood to allege the offense to have been committed by, with, or against the latter. *State v. Vittum*, 9 N. H. 519, 521.

### In legal proceedings and papers.

"Junior," as added to the name of a person, is mere matter of description, and forms

no part of the name. It is not necessary to add the word to a person's name in a writ or other legal paper. *People v. Cook*, 14 Barb. 259, 299; *Bidwell v. Coleman*, 11 Minn. 78, 87 (Gil. 45, 52).

Where a patent to land was issued "to the heirs of David E. Groce," and the proceedings in probate court were on administration of the estate of "David E. Groce, Jr.," the court held that the addition of "Jr." was no part of the name, and that the identity of the intestate was sufficiently shown. *Clark v. Groce*, 41 S. W. 668, 669, 16 Tex. Civ. App. 453.

The word "junior," or its abbreviation, "Jr.," when added to a name, is no part thereof, but merely serves for convenient distinction. If the description is omitted from the plaintiff's name in a summons, and the right defendant appears and pleads, he cannot afterwards object to the uncertainty. *Kincaid v. Howe*, 10 Mass. 203, 205.

In an action of debt brought by "S. B., Junior," on a judgment, the declaration set forth the record of a judgment in favor of "S. B.," but the record produced set forth a judgment recovered by "S. B., Junior." Held, that the word "junior," while not being a part of the person's name, is used to distinguish a person, as where the father and son are of the same name, and should not be disregarded as meaningless; hence there was a variance between the declaration and the proof. *Boyden v. Hastings*, 34 Mass. (17 Pick.) 200.

"Jr." is no part of a name of the person, and hence, where plaintiff is spoken of in the title to one action as "Mary Mahoney," and in the other as "Mary Mahoney, Jr.," the abbreviation "Jr." may be regarded as surplusage and will not constitute a variance. *State v. Dankwardt*, 77 N. W. 495, 496, 107 Iowa, 704.

In an action by "F." to recover on a judgment alleged to have been recovered by him, an objection to the record, when it was introduced in evidence, because the judgment appeared to have been recovered in favor of "F., Jr.," was not well taken. Such evidence did not constitute a variance; it having been held in various cases that "Jr." is no part of a man's name. *Weber v. Fickey*, 52 Md. 500, 512.

A record of a judgment against "Daniel Goodrich, Jr.," will not support the issue under a nuli tiel record pleaded to a record of a judgment against "David Goodrich." *De Kentland v. Somers*, 2 Root (Conn.) 437.

The addition of "Junior" to a name is mere matter of description and forms no part of the name. It is generally to distinguish between a father and a son of the same name who reside at the same place; but the addition is useless, and the omission thereof fur-

nishes no ground of objection on account of variance, where there is any other addition or description by which the real party intended can be ascertained. The omission of the addition "Junior" to the name of a defendant in a writ of error is no cause for quashing the writ, where there is any other descriptive personæ by which the real party can be ascertained. *Fleet v. Youngs* (N. Y.) 11 Wend. 522, 526.

The word "junior" is no part of a name, but is merely descriptive of the person, and is usually adopted to designate the son when the father bears the same name. The omission of the term "Jr." after plaintiff's name in rendering judgment in his favor is immaterial, though he is so described in the pleadings and summons. *Loveland v. Sears*, 1 Colo. 433, 435.

#### JUNIOR MORTGAGEE.

As assigns, see "Assigns."

#### JUNIOR TITLE.

Const. art. 14, § 2, provides that land certificates shall be located only upon vacant and unappropriated public land, and not upon any land titled or equitably owned under color of title from the sovereignty of the state, etc. Held, that while a grant made by the state of Coahuila and Texas, subsequent to the issuance of title, which would, whether valid or not, constitute the land "titled land," or a patent from Texas issued prior to the adoption of the present Constitution, or subsequently under a location made before, would constitute a "junior title," yet a mere location made after the adoption of the Constitution on such "titled land" would not constitute those making it the holders of a "junior title." *Texas Mexican Ry. Co. v. Locke*, 12 S. W. 80, 90, 74 Tex. 370.

#### JUNK.

"Junk" is defined as worn-out and discarded material in general that may be turned to some use, especially old rope, chain, iron, copper, parts of machinery, and bottles, gathered up and bought by tradesmen, called "junk dealers"; hence rubbish of any kind, odds and ends. Cent. Dict. But within Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 588, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1690], allowing junk to be imported free of duty, second hand bottles, capable of being used as bottles, are not junk. *Carberry v. United States* (U. S.) 116 Fed. 773.

#### JUNK BUSINESS.

The "junk business" is purchasing old iron, brass, bottles, and things of that sort, and selling them again. *Henningberg v. State* (Tex.) 72 S. W. 175, 177.

**JUNK SHOP.**

A "junk shop" is defined to be a place where junk is bought and sold, and junk seems to consist of odds and ends, such as old metal, ropes, rags, etc. Every junk shop, it is said, is a secondhand store; but not every secondhand store is a junk shop. The term "secondhand store," if not qualified or limited, would include any store in which any kind of secondhand goods are dealt in, as, for example, secondhand furniture or secondhand books. But stores in which these articles are dealt in would not necessarily be junk shops. The word "junk," which is of nautical origin, originally meant old or condemned cable and cordage cut into small pieces, which, when untwisted, were used for various purposes on the ship. Hence the word afterwards came to mean worn-out or discarded material in general. A store in which furniture, both new and secondhand, is exclusively dealt in, is held not to be a "junk shop," within the meaning of a city ordinance requiring a license of any person keeping a secondhand store and junk shop. *City of Duluth v. Bloom*, 55 Minn. 97, 56 N. W. 580, 21 L. R. A. 689 (cited in *Commonwealth v. Ringold*, 65 N. E. 374, 182 Mass. 308).

A "junk shop" is a place where odds and ends are purchased or sold, and a conviction for keeping a junk shop without a license is proper, where the proof shows that defendant bought and sold old metals, old ropes, rags, and other odds and ends. *Charleston City Council v. Goldsmith* (S. C.) 12 Rich. Law, 470, 473.

**JUNKET.**

The *Century* and *Standard Dictionaries* show that the word "junket" is recognized in the English language as meaning a sweetmeat or cream cheese, or a delicacy made of curds, flavored and served with cream; also a drink made of cream, rennet, spice, and spirits. The word, when used in connection with the word "tablets," in making a food or delicacy sold and advertised under the name of "junket tablets," was held to have acquired a secondary meaning as identifying the preparation, and the owner thereof was held entitled to an injunction against the use by defendant, a later manufacturer, of the name of "junket capsules," for a similar preparation put up in capsules, but that defendant had the right to designate his preparation as for use in making junket, provided the word was given no greater prominence than the rest of the designation. *Hansen v. Siegel-Cooper Co.* (U. S.) 106 Fed. 691, 692.

**JURA IN PERSONAM.**

"Jura in Personam" are rights primarily available against specific persons, and are

thus distinguished from "jura in rem," which are rights only available against the world at large. *Cross v. Armstrong*, 10 N. E. 190, 164, 44 Ohio St. 613.

**JURA IN REM.**

See "Jura in Personam."

**JURA MAJESTATIS.**

The term "jura majestatis" is used in the civil law to designate certain rights which belong to each and every sovereignty, and which are deemed essential to its existence. *Gilmer v. Lime Point*, 18 Cal. 229, 250.

**JURAT.**

As part of affidavit, see "Affidavit."

A "jurat" means that the affiant swore before the officer taking the affidavit. Although the jurat is ordinarily added at the foot of the affidavit by the officer, the affidavit is sufficient if it shows in the body thereof that the affiant was sworn. *Hanson v. Cochran* (Del.) 31 Atl. 880, 881, 9 Houst. 184.

The certificate of the officer before whom the oath in an affidavit is taken is usually called the "jurat." It is essential, not as a part of the affidavit, but as official evidence that the oath was taken before the proper officer. *Lutz v. Kinney*, 46 Pac. 257, 258, 23 Nev. 279 (citing *Alford v. McCormac*, 90 N. C. 161; *Gill v. Ward*, 23 Ark. 16).

The "jurat" is not a certificate to a deposition in the ordinary sense of the term, but a certificate of the fact that the witness appeared before the commissioner and was sworn to the truth of what he had stated. *United States v. Julian*, 16 Sup. Ct. 801, 162 U. S. 324, 40 L. Ed. 984.

The jurat of an officer authorized to receive and file oaths is the certificate of the officer who administered the oath that the affiant had subscribed and sworn to the same before such officer. As so spoken of, it is included within the term "certificate." *United States v. McDermott*, 11 Sup. Ct. 745, 746, 140 U. S. 151, 35 L. Ed. 391.

The primary meaning of the word "jurat" is "sworn," but the derivative signification is "proved." *Cochran v. Linville Imp. Co.*, 127 N. C. 386, 37 S. E. 496, 500.

**JURIDICAL EVIDENCE.**

Juridical evidence is evidence of mutable phenomena, through human agency, addressed to a human tribunal; and both as to the witnesses and the things to which they testify credit is given only on probable grounds. The logical process in all juridical reasoning

is only imperfect deduction or analogy, and there is no case depending on moral evidence where we can reach a result which excludes all possibility of the contrary being true. These principles apply to criminal, as well as to civil, cases; the distinction being as to the degree of probability. The former require a very high degree, amounting, as we sometimes say, to an abiding conviction of the truth, while the latter may be determined on the evidence by the mere balance of probability. *Mead v. Husted*, 52 Conn. 53, 57, 52 Am. Rep. 554.

## JURISDICTION.

See "Admiralty Jurisdiction"; "Appellate Jurisdiction"; "Civil Jurisdiction"; "Common-Law Jurisdiction"; "Competent Jurisdiction"; "Concurrent Jurisdiction"; "Criminal Jurisdiction"; "Equity Jurisdiction"; "Exclusive Jurisdiction"; "Extraterritorial Jurisdiction"; "Final Jurisdiction"; "Full Jurisdiction"; "General Jurisdiction"; "Limited Jurisdiction"; "Municipal Jurisdiction"; "Ordinary Jurisdiction"; "Original Jurisdiction"; "Plea to the Jurisdiction"; "Police Jurisdiction"; "Probate Jurisdiction"; "Territorial Jurisdiction"; "Within Their Jurisdiction."

Other jurisdiction, see "Other."

### Commissioner of patents.

The term "jurisdiction," in its common-law and technical acceptation, cannot be applied to the authority of the Commissioner of Patents, or of the Commissioner of the Land Office, or of the President, to issue grants. As in regard to patents for land, so in regard to patents for inventions, the proper officer issues the grant when he has evidence satisfactory to his own mind that the claimant is entitled to receive it; but that adjudges nothing as to the real right. *Wilder v. McCormick* (U. S.) 29 Fed. Cas. 1220, 1221.

### School board.

"Jurisdiction," as used in a statute defining a school district as the territory under the jurisdiction of a single school board, means the power and authority to levy taxes upon the property within the limits of a school district for school purposes. *Chicago, B. & Q. R. Co. v. Case County*, 70 N. W. 955, 960, 51 Neb. 369.

### State.

"Jurisdiction," as applied to a state, signifies the authority to declare, the power to enforce the law as well as the territory within which such authority and power may be exercised. The jurisdiction of the state is coextensive with its sovereignty. Therefore,

by conferring on Missouri "concurrent jurisdiction" on the river Mississippi, so far as the said river shall form a common boundary to the said state and any other state or states bounded by the same, Congress intended to declare that, subject to the other laws of the United States, transactions occurring anywhere on that river between the two states might lawfully be dealt with by the courts of either, according to its laws, and that, where a court of one state assumed jurisdiction in a particular case, the same should be exclusive therein until relinquishment. *Sanders v. St. Louis & N. O. Anchor Line*, 10 S. W. 595, 597, 97 Mo. 26, 3 L. R. A. 390.

### State school superintendent.

The use of the word "jurisdiction" in relation to the determination by the State Superintendent as to the alteration of school districts on an appeal from the town board is not strictly proper. *State v. Whitford*, 11 N. W. 424, 426, 54 Wis. 150.

## JURISDICTION (Of Courts).

Jurisdiction is controlling authority; the right of making and enforcing laws or regulations; the capacity of determining rules of action or use, and exacting penalties; the function or capacity of judging or governing in general; the inherent power of decision or control. *People v. Pierce*, 41 N. Y. Supp. 858, 860, 18 Misc. Rep. 83.

In Const. art. 6, § 8, providing that there shall be the existing Supreme Court, with general jurisdiction in law and equity, the term "jurisdiction" means jurisdiction of every kind that a court can possess of the person, subject-matter, territorial, and generally the power of the court in the discharge of its judicial duties. Among such powers that have been exercised by courts of general jurisdiction from time immemorial has been the power to change the place of trial of an action not involving real estate in the furtherance of justice. Hence a statute providing that a Supreme Court of the First judicial district and the courts of common pleas and Supreme Court of New York City shall have exclusive jurisdiction of all actions or special proceedings wherein such city is a party is in conflict with the Constitution. *Mussen v. Ausable Granite Works*, 18 N. Y. Supp. 267, 268, 63 Hun. 367.

By "jurisdiction," as applied to judicial proceedings, is meant the right to act. *Bumstead v. Read* (N. Y.) 31 Barb. 661, 665.

When an action is dismissed as out of the court's jurisdiction, there cannot be a judgment for costs, which is in some sort assuming the jurisdiction. *Williams v. Blunt*, 2 Mass. 207, 215.

Any movement of a court is necessarily the exercise of jurisdiction. *Wilson v. Atlanta K. & N. Ry. Co.*, 41 S. E. 699, 704, 115 Ga. 171 (citing *Rhode Island v. Massachusetts*, 37 U. S. [12 Pet.] 657, 719, 9 L. Ed. 1233); *Borden v. State*, 11 Ark. (6 Eng.) 519, 544, 44 Am. Dec. 217.

In the meaning of the law "jurisdiction" is the authority or power which a man hath to do justice in causes of complaint brought before him. *State v. Whitford*, 11 N. W. 424, 426, 54 Wis. 150 (citing *Jac. Law Dict.*).

Within the provisions of Act 1875, § 5, providing that if it shall appear to the satisfaction of the Circuit Court, at any time after a suit has been brought or removed thereto from a state court, that such suit does not involve a dispute or controversy properly within the jurisdiction of the Circuit Court, the Circuit Court shall dismiss the suit, etc., the expression "within the jurisdiction" means within the judicial cognizance, within the capacity to determine the merits of the dispute or controversy and to grant the relief asked for. *Rosenbaum v. Bauer*, 7 Sup. Ct. 633, 637, 120 U. S. 450, 30 L. Ed. 743.

The word "jurisdiction," as used in Code Prac. art. 130, recognizing the existence of all the power necessary to the jurisdiction of the court, is used in a broad, and not a restricted, sense, and means everything necessary for the maintenance of the rightful power and authority. The statute was not enacted simply for the defining of rights and obligations, but for their protection and enforcement; and the very object of the organization of courts is through their instrumentality to make certain that justice shall be administered by due process of law, without denial or unnecessary delay, and with strict impartiality. *State ex rel. Phelps v. Judge of Civil Dist. Court*, 14 South. 310, 315, 45 La. Ann. 1250, 40 Am. St. Rep. 282.

The term "jurisdiction," when confined to the judicial department of the government, means the legal authority to administer justice. *Holmes v. Campbell*, 12 Minn. 221, 227 (Gil 141, 146).

Jurisdiction is *coram iudice*. *Kimble v. Short*, 43 Pac. 317, 321, 2 Kan. App. 130.

Chief Justice Shaw said: "To have jurisdiction is to have power to inquire into the facts and apply the law." *Robertson v. State*, 10 N. E. 582, 583, 109 Ind. 79 (citing *Hopkins v. Commonwealth*, 44 Mass. [3 Metc.] 460).

Bouvier defines "jurisdiction" as the authority by which judicial officers take cognizance of and decide cases. In *re Taylor*, 64 N. W. 253, 257, 7 S. D. 382, 45 L. R. A. 136, 58 Am. St. Rep. 843; *State v. Wakefield*, 15 Atl. 181, 183, 60 Vt. 618; *Sigmond*

*v. Bebbler*, 73 N. W. 1027, 1028, 114 Iowa, 431; *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315, 326; *Parker v. Lynch*, 56 Pac. 1082, 1088, 7 Okl. 631; *Chicago Title & Trust Co. v. Brown*, 55 N. E. 632, 633, 183 Ill. 42, 47 L. R. A. 798.

Jurisdiction is the power to try. *Yates v. Lansing* (N. Y.) 9 John. 395, 413, 6 Am. Dec. 277.

Bouvier defines jurisdiction to be a power constitutionally conferred upon a judge or magistrate to take cognizance of and decide causes according to law, and to carry his sentence into execution. *Succession of Weigel*, 17 La. Ann. 70, 71.

#### As authority or power.

The word "jurisdiction," as used in a statute providing that, on petition of the electors of a village for annexation of contiguous territory, the county judge shall issue a call for an election, and "conferring jurisdiction upon him," is used as synonymous with "power" and "authority," and not in the literal definition of the term; the act being ministerial, rather than judicial. *People v. Morrow*, 54 N. E. 839, 840, 181 Ill. 315.

#### As authority to hear and determine.

Jurisdiction is the power to hear and determine. *Le Roy v. Clayton* (U. S.) 15 Fed. Cas. 358, 360; *United States v. Arredondo*, 31 U. S. (6 Pet.) 691, 8 L. Ed. 547; *In re Bogart* (U. S.) 3 Fed. Cas. 796, 801; *In re White* (U. S.) 17 Fed. 723, 724; *Hickman v. O'Neal*, 10 Cal. 292, 295; *Cromwell v. Burr* (N. Y.) 2 City Ct. R. 6, 7; *Bumstead v. Read* (N. Y.) 31 Barb. 665; *In re Foley's Estate*, 51 Pac. 834, 836, 24 Nev. 197; *MacLachlan v. McLaughlin*, 18 N. E. 544, 545, 126 Ill. 427; *Robertson v. State*, 10 N. E. 582, 583, 109 Ind. 79.

Jurisdiction, when applied to courts, is defined to be the power to hear and determine a cause. *Wightman v. Karsner*, 20 Ala. 446, 451; *Pullman Palace Car Co. v. Harrison*, 25 South. 697, 699, 122 Ala. 149, 82 Am. St. Rep. 68; *In re Greenough St.*, 32 Atl. 427, 428, 169 Pa. 210; *State v. Wakefield*, 15 Atl. 181, 183, 60 Vt. 618; *Bassick Min. Co. v. Schoolfield*, 14 Pac. 65, 67, 10 Colo. 46; *Whipple v. Stevenson*, 55 Pac. 188, 190, 25 Colo. 447; *People v. McKane*, 28 N. Y. Supp. 981, 982, 78 Hun. 154; *People v. Murray Hill Bank*, 41 N. Y. Supp. 804, 805, 10 App. Div. 328; *Chicago Title & Trust Co. v. Brown*, 55 N. E. 632, 633, 183 Ill. 42, 47 L. R. A. 798; *People v. Talmadge*, 61 N. E. 1049, 1050, 194 Ill. 67; *Ginn v. Rogers*, 9 Ill. (4 Gilman) 131, 134; *Peak v. People*, 71 Ill. 278, 279; *Fleischman v. Walker*, 91 Ill. 318, 321; *Montour v. Purdy*, 11 Minn. 384, 404 (Gil. 278, 297) 83 Am. Dec. 88; *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 90 N. W. 378,

380, 86 Minn. 140; *State v. Matter*, 81 N. W. 9, 10, 78 Minn. 377; *Cason v. Harrison*, 35 N. E. 268, 270, 135 Ind. 330; *Spencer v. Spencer*, 67 N. E. 1018, 1021, 31 Ind. App. 321; *State v. Osborn*, 58 N. E. 491, 493, 155 Ind. 385; *State v. Sheriff of Middlesex*, 15 N. J. Law (3 J. S. Green) 68, 70; *Territory v. Ashenfelter*, 12 Pac. 879, 883, 4 N. M. (Johns.) 85; *Parker v. Lynch*, 56 Pac. 1082, 1088, 7 Okl. 631; *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315, 326; *In re Taylor*, 64 N. W. 253, 257, 7 S. D. 382, 45 L. R. A. 136, 58 Am. St. Rep. 843; *Sigmond v. Bebbler*, 73 N. W. 1027, 1028, 104 Iowa, 431; *Jones v. Brown*, 54 Iowa, 74, 79, 6 N. W. 140, 37 Am. Rep. 185; *Freem. Judgm. § 118*; *Oliver v. Riley*, 60 N. W. 180, 181, 92 Iowa, 28; *Trammell v. Town of Russellville*, 34 Ark. 105, 110, 36 Am. Rep. 1; *Stevenson v. Christie*, 42 S. W. 418, 419, 64 Ark. 72; *Smiley v. Sampson*, 1 Neb. 56, 69.

The power to hear and determine a cause is jurisdiction. It is *coram iudice* whenever a case is presented which brings this power into action. *Holmes v. Oregon & C. R. Co. (U. S.)* 9 Fed. 229; *Grigon's Lessee v. Astor*, 43 U. S. (2 How.) 319, 338, 11 L. Ed. 283; *United States v. Maney (U. S.)* 61 Fed. 140, 142; *Kelly v. People*, 115 Ill. 583, 586, 4 N. E. 644, 646, 56 Am. Rep. 184 (citing *United States v. Arredondo*, 31 U. S. [6 Pet.] 691, 709, 8 L. Ed. 547; *Bush v. Hanson*, 70 Ill. 482); *Schroeder v. Merchants' & Mechanics' Ins. Co.*, 104 Ill. 71, 76; *Bush v. Hanson*, 70 Ill. 480, 482; *Goodman v. Winter*, 64 Ala. 410, 431, 38 Am. Rep. 13; *Belles v. Miller*, 38 Pac. 1050, 1052, 10 Wash. 259; *Trammell v. Town of Russellville*, 34 Ark. 105, 110, 36 Am. Rep. 1 (citing *United States v. Arredondo*, 31 U. S. [6 Pet.] 691, 709, 8 L. Ed. 547).

"Jurisdiction," as the term is applied to courts, is the legal power of hearing and determining controversies. As the derivatives of the word import, it is the law declaring or speaking. *Huber v. Beck*, 32 N. E. 1025, 6 Ind. App. 47.

"Jurisdiction" has been defined to be the power to hear and determine a cause or a matter in controversy; but, while a court may have jurisdiction to issue writs of certiorari generally, it does not follow that they have authority to issue such writs, and thereby review the proceedings of inferior tribunals in all cases. *Gregory v. Dixon*, 34 Pac. 212, 213, 7 Wash. 27.

Jurisdiction has often been said to be the power to hear and determine. It is in truth a power to do both, or either to hear without determining, or to determine without hearing. *Ex parte Bennett*, 44 Cal. 84, 88.

Jurisdiction is the arbitrary power to hear, try, and determine, and make an

award. *Jones v. Brown*, 6 N. W. 140, 143, 54 Iowa, 74, 37 Am. Rep. 185.

Jurisdiction is the power of hearing and determining causes, and of doing justice in matters of complaint. *State v. Whitford*, 11 N. W. 424, 426, 54 Wis. 150.

Jurisdiction is authority to try and determine. *Thornton v. Baker*, 10 Atl. 617, 619, 15 R. I. 553, 2 Am. St. Rep. 925.

#### Same—Particular controversy.

Jurisdiction in the court is the power to hear and determine the particular case involved. If this power to hear and determine the particular case does not exist in the court in point of law, then there can be no jurisdiction in the case. *People v. District Court of Lake County*, 58 Pac. 604, 605, 26 Colo. 386, 46 L. R. A. 850 (citing *Bassick Min. Co. v. Schoolfield*, 10 Colo. 46, 14 Pac. 65); *In re Mahany*, 68 Pac. 235, 236, 29 Colo. 442; *Bennett v. Wilson*, 65 Pac. 880, 883, 133 Cal. 379, 85 Am. St. Rep. 207; *Douglass v. State*, 23 South. 142, 143, 117 Ala. 185.

Jurisdiction is defined to be the authority of law to act officially in the matter then in hand. *Jones v. Brown*, 6 N. W. 140, 143, 54 Iowa, 74, 37 Am. Rep. 185; *Grove v. Van Duyn*, 44 N. J. Law (15 Vroom) 654, 657, 43 Am. Rep. 412.

In its more general sense, the term "jurisdiction," when applied to a court, is the power residing in such court to determine judicially a given action, controversy, or question presented to it for decision. If this power does not exist with reference to any particular case, its determination by the court is an absolute nullity. *Bigham v. Henriel (Pa.)* 16 Atl. 618.

Jurisdiction of a court is the power to hear and determine the particular case involved. If this power to hear and determine the particular case does not exist, then, to confer actual jurisdiction of the particular case or subject-matter thereof, the judicial power of the court must be invoked or brought into action by such measures and in such manner as is required by the local law of the tribunal. When this is done, it is then *coram iudice*. *Bassick Min. Co. v. Schoolfield*, 14 Pac. 65, 67, 10 Colo. 46.

Jurisdiction is the power to hear and determine. As applied to a particular claim or controversy, it is the power to hear or determine that controversy. *Central Pac. R. Co. v. Board of Equalization of Placer County*, 43 Cal. 365, 368.

"Jurisdiction" may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this, there are three essentials: First, the court must have cognizance of the class of cases

to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue. *Reynolds v. Stockton*, 11 Sup. Ct. 773, 777, 140 U. S. 254, 35 L. Ed. 464 (citing *Munday v. Vail*, 34 N. J. Law, 418); *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914; *St. Louis, I. M. & S. Ry. Co. v. State*, 17 N. W. 806, 807, 55 Ark. 200.

It is not enough that the court should have jurisdiction of the subject-matter. It must have jurisdiction of, or power to try, the individual cause. *Yates v. Lansing* (N. Y.) 9 Johns. 395, 413, 6 Am. Dec. 290.

There are three indispensable requisites touching the exercise of jurisdiction that always must exist. Judge Story defines them by saying that the court pronouncing jurisdiction should have jurisdiction over the cause, by which he means the subject-matter, over the thing in dispute, and over the parties. *Stevenson v. Christie*, 42 S. W. 418, 419, 64 Ark. 72.

#### Same—Subject-matter in controversy.

Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, or to adjudicate or exercise any judicial power over them. *Ritter v. Kunkle*, 39 N. J. Law (10 Vroom) 259, 262; *Myers v. Berry*, 41 Pac. 580, 3 Okl. 612; *Twine v. Carey*, 37 Pac. 1096, 1099, 2 Okl. 249; *Nashville, C. & St. L. Ry. v. Taylor* (U. S.) 86 Fed. 168, 171; *Rhode Island v. Massachusetts*, 37 U. S. (12 Pet.) 657, 718, 9 L. Ed. 1233; *People v. Bouchard*, 27 N. Y. Supp. 201, 202, 6 Misc. Rep. 459; *Perry v. Kent*, 34 N. Y. Supp. 843, 845, 88 Hun, 407; *Fisher v. Hepburn*, 48 N. Y. 41, 52, 53; *Oliver v. Riley*, 60 N. W. 180, 181, 92 Iowa, 23; *Reed v. City of Muscatine*, 73 N. W. 579, 104 Iowa, 183; *Babb v. Bruere*, 23 Mo. App. 604, 606; *Chicago Title & Trust Co. v. Brown*, 55 N. E. 632, 633, 183 Ill. 42, 47 L. R. A. 798.

"Jurisdiction" is defined to be "the right to adjudicate concerning the subject-matter in a given case." There must be, therefore, a subject-matter presented which is within the jurisdiction. That subject must be so presented in the case before the court as to justify action thereon. *Dodd v. Una*, 5 Atl. 155, 161, 40 N. J. Eq. (13 Stew.) 672; *Munday v. Vail*, 34 N. J. Law (5 Vroom) 418, 422; *St. Lawrence Boom & Mfg. Co. v. Holt*, 41 S. E. 351, 356, 51 W. Va. 352; *Gille v. Emmons*, 48 Pac. 569, 570, 58 Kan. 118, 62 Am. St. Rep. 609.

#### As authority to declare the law.

"Jurisdiction" in courts is the power and authority to declare the law. The very word, in its origin, imports as much. It is derived from "juris" and "dico"—"I speak by the law." And that sentence ought to be in-

scribed in living light on every tribunal of criminal power. It is the right of administering justice through the laws, by the means which the law has provided for that purpose. *Johnston v. Hunter*, 40 S. E. 448, 449, 50 W. Va. 52; *Mills v. Commonwealth*, 13 Pa. (1 Harris) 627, 630; *Robertson v. State*, 10 N. E. 582, 583, 109 Ind. 79.

"Jurisdiction" is the power and authority constitutionally conferred upon, or constitutionally recognized as existing in, a court or judge to pronounce the sentence of law, or to award the remedies provided by law upon a state of facts proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of or against persons or a res who present themselves or who are brought before the court in some manner sanctioned by law as proper and sufficient. *Isham v. Sienknecht* (Tenn.) 59 S. W. 779, 784.

Bouvier defines "jurisdiction" as follows: "Jurisdiction is the right of a judge to pronounce a sentence of the law in a case or issue before him, acquired through due process of law." *Chicago Title & Trust Co. v. Brown*, 55 N. E. 632, 633, 183 Ill. 42, 47 L. R. A. 798.

#### Authority to enforce judgment included.

Jurisdiction is simply the power to hear and determine, and to enforce the judgment, order, or decree made or rendered on such hearing. *Dillon v. Heller*, 18 Pac. 693, 696, 39 Kan. 599. Jurisdiction is the power to hear and determine causes between parties, and to carry judgments into effect. *Alexander v. Archer*, 24 Pac. 373, 376, 21 Nev. 22.

"Jurisdiction is the power of a court to hear and determine a cause, and enforce its decree. The exact legal signification of the word varies with the circumstances under which it is used, and a failure to observe this fact often produces confusion, and leads to the statement of inaccurate legal propositions. The question of the validity of judicial proceedings for want of jurisdiction arises in two classes of cases. Thus there are classes of cases over which a court has not, under the very law of its creation, any possible power; e. g., an administration upon the estate of a living person, an administration upon the estate of a deceased soldier when prohibited by statute, an administration in bankruptcy upon the estate of a person deceased before the institution of the proceedings, a suit for divorce in a foreign country in which neither of the parties is domiciled, or a suit to recover against a nonresident, upon service by publication, a purely personal judgment. In such cases the entire proceedings are *coram non iudice*. The law raises no presumptions in their support, and the



facts bringing any particular case within one of such classes may be established by evidence dehors the record, either in a direct or collateral attack, for the purpose of destroying the apparent binding force of such proceedings. This is upon the principle that the court, being, as a matter of law, without power to investigate or determine any question connected with such matters, cannot, by a clear usurpation of power, preclude inquiry into the facts establishing such usurpation, and the consequent nullity of its proceedings. In such cases the court is without jurisdiction of the subject-matter, the status of the parties, or the person of the defendant, as the case may be; and other courts have no difficulty or hesitation in ignoring its proceedings or decrees. Again, there are classes of cases over which the law has conferred upon the court general judicial power, but its right to exercise such power in a particular case is challenged, and the nullity of its proceedings urged, not upon the ground that the case does not belong to one of such classes, but upon the ground that no such state of facts existed, or that no such preliminary steps had been taken, as authorized the court to exercise its powers in the given case; e. g., where the power of a probate court to grant an administration of an estate or to make an order of sale in a pending administration is called in question, and the validity of its proceedings denied on the ground that no necessity therefor existed, or where the validity of a personal judgment against a resident is questioned upon the ground that the court had not, by service of process or otherwise, acquired jurisdiction over the person of the defendant." *Templeton v. Ferguson*, 33 S. W. 329-332, 89 Tex. 47.

The jurisdiction of the court is the power or authority which is conferred upon it by the Constitution and laws to hear and determine causes between parties, and to carry its judgments into effect. *Withers v. Patterson*, 27 Tex. 491, 495, 86 Am. Dec. 643.

The Supreme Court of Texas, in *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643, said the jurisdiction of a court means the power or authority which is conferred upon the court by the Constitution and laws to hear and determine cases between parties, and to carry its judgments into effect. *Robertson v. State*, 10 N. E. 582, 583, 109 Ind. 79.

Jurisdiction is a power constitutionally conferred upon a judge or magistrate to take cognizance of and determine causes according to the law, and to carry his sentence into execution. *Johnson v. Jones*, 2 Neb. 126, 135.

There is some difficulty in finding a satisfactory definition of "jurisdiction," as applied to the powers of the court. We define it to be the power or authority to pronounce the law on the case presented, and to pass upon and settle by its judgment the rights of the

parties touching the subject-matter in controversy, and to enforce such sentence. *Ex parte Walker*, 25 Ala. 81, 91.

#### As authority to render judgment.

Jurisdiction, says a recent writer, is the right to pronounce judgment acquired by due process of law. *Robertson v. State*, 10 N. E. 582, 583, 109 Ind. 79 (citing *Herm. Estop.* § 69).

The question of jurisdiction is whether the question before the court is judicial or extrajudicial—with or without the authority of law to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction. *Rhode Island v. Massachusetts*, 37 U. S. (12 Pet.) 657, 718, 9 L. Ed. 1233; *Perry v. Kent*, 34 N. Y. Supp. 843, 845; *People v. Seelye*, 146 Ill. 189, 32 N. E. 458; *Chicago Title & Trust Co. v. Brown*, 55 N. E. 632, 633, 183 Ill. 42, 47 L. R. A. 798; *Oliver v. Riley*, 60 N. W. 180, 181, 92 Iowa, 23; *People v. Bouchard*, 27 N. Y. Supp. 201, 202, 6 Misc. Rep. 459; *Babb v. Bruere*, 23 Mo. App. 604, 606.

The term "jurisdiction" implies that the person or tribunal which has acquired it is thereby empowered to declare or establish an enforceable charge or liability against the person or subject over which it has been acquired. *Santa Cruz Rock Pavement Co. v. Broderick*, 45 Pac. 863, 865, 113 Cal. 623.

Jurisdiction is the power to hear and determine a cause—the authority by which judicial officers take cognizance of and decide causes—and unquestionably implies authority to render such judgment as the court may conclude should be given, unless a limitation is manifest from the nature of the proceeding, the character of the tribunal, or by clear and positive legislative restriction. *City of Brownsville v. Basse*, 43 Tex. 440, 449.

#### Same—Particular judgment.

In discussing the statement that there is a tendency in the later decisions in the United States to hold that jurisdiction is not only the power to hear and determine, but also the power to enter the particular judgment in the particular case, the court said: "If by this is meant that when a court invested with general jurisdiction over a particular subject-matter wrongly applies the law to a proved or admitted state of facts, its judgment is outside of its jurisdiction and subject to collateral review, we unhesitatingly say that no such tendency is to be observed in the later decisions, because such a tendency, instead of modifying the general rule or introducing an exception to it, would go to its absolute subversion. Generally speaking, when a court is invested with power upon evidence to determine a state of facts, and declares the law applicable thereto, its deci-

sion, no matter how erroneous, is conclusive, unless the error of its judgment is apparent upon the face of the record." *J. B. Watkins Land Mortg. Co. v. Mullen*, 61 Pac. 385, 386, 62 Kan. 1, 84 Am. St. Rep. 372.

Jurisdiction is the authority to hear and determine the cause, and refers to the power of the court over the parties, the res or property in contest, and the authority of the court to entertain the suit or proceedings, and render the judgment or decree which it assumes to make. *Morawetz v. Sun Ins. Office*, 71 N. W. 109, 110, 96 Wis. 175, 65 Am. St. Rep. 43.

The definition of "jurisdiction" as the power to hear and determine the cause implies that, if a court having power to hear and determine a cause enters a judgment therein, the validity of such judgment is not affected by the power of the court to enter the judgment in question. *Sigmond v. Beiber*, 73 N. W. 1027, 1028, 104 Iowa, 431.

Jurisdiction is not only the power to hear and determine, but also the power to render the particular judgment entered in the particular case. *J. B. Watkins Land Mortg. Co. v. Mullen*, 64 Pac. 921, 922, 8 Kan. App. 705.

The definition of "jurisdiction," as given by later decisions, includes the element that jurisdiction is not merely the power to hear and determine, but also the power to render the particular judgment which was rendered. *Clapp v. McCabe*, 32 N. Y. Supp. 425, 430, 84 Hun, 379; *Ex parte Reed*, 100 U. S. 13, 23, 25 L. Ed. 538; *Crew v. Pratt*, 51 Pac. 38, 42, 119 Cal. 139; *Konold v. Rio Grande W. Ry. Co.*, 51 Pac. 256, 257, 16 Utah, 151.

The court may have jurisdiction of the subject-matter and of the parties, and yet the particular judgment rendered in the particular case may be void because in excess of the jurisdiction of the court. The judgment rendered must be one which is authorized by law in the class of cases to which the case before the court belongs. *In re Foley's Estate*, 51 Pac. 834, 836, 24 Nev. 197.

#### As authority to act judicially.

"Jurisdiction" is power, and, when applied to a judicial tribunal, means authority to hear and decide judicially. *Una v. Dodd*, 39 N. J. Eq. (12 Stew.) 173, 179.

Jurisdiction means the power to act judicially; to determine any question presented in a controversy between parties. *King v. Poole*, 36 Barb. (N. Y.) 244.

Jurisdiction means legal power to make a judicial decision. *Browning v. Wheeler* (N. Y.) 24 Wend. 258, 259, 35 Am. Dec. 617.

The term "jurisdiction," as used in the Constitution of 1848, limiting the jurisdiction of courts to be established in the cities, relates to the exercise of such powers only as

are judicial in their nature, and the power of authorizing a guardian to sell his ward's real estate is not a power of this description. *Reid v. Morton*, 6 N. E. 414, 421, 119 Ill. 118.

#### Consent.

Jurisdiction is given by the law of the land, and cannot be conferred by consent of the parties. *Bent's Ex'r v. Graves* (S. C.) 3 McCord, 280, 15 Am. Dec. 632; *Cottrell v. Thompson*, 15 N. J. Law (3 J. S. Green) 344, 345; *State v. Mortensen* (Utah) 73 Pac. 562, 565.

Neither the consent nor request of the parties can give jurisdiction where the court would otherwise be without it. *Phillips v. Thralls*, 26 Kan. 780, 781.

Consent of parties will not confer jurisdiction upon a court in which the law has not vested it (*Ginn v. Rogers* [Ill.] 4 Gilman. 131; *Peak v. People*, 71 Ill. 278), and therefore cannot give the Supreme Court of Illinois jurisdiction of an appeal brought in a chancery suit from the circuit court. *Fleischman v. Walker*, 91 Ill. 318, 321.

As a general principle, consent cannot give jurisdiction, but this only applies to original jurisdiction, or, in other words, to those cases where the court never had by law jurisdiction in the case. But where the court once has had jurisdiction, although the power may have been exhausted, so that without the consent of the parties the former judgment or decree cannot be changed, the jurisdiction may nevertheless be restored by consent. Consequently an exercise of jurisdiction by the Court of Appeals by the consent of the parties at a term subsequent to that at which the first decree was pronounced was not *coram non judice*. *Brown v. Crow's Heirs*, 3 Ky. (Hardin) 443, 448.

It is the law which gives jurisdiction, and consent of parties cannot therefore confer it in a matter which the law excludes. But when the court has jurisdiction of the subject-matter of the suit and the person of the defendant, and the defendant has some privilege which exempts him from jurisdiction, he may waive the privilege. The failure of the plaintiff to swear to the petition is not a jurisdictional defect, but one which the defendant may waive. *Johnson v. Jones*, 2 Neb. 126, 135.

The circuit court of one county, acting under statutory power, made an order for change of venue in an action in ejectment to the circuit court of another county, providing a certain time within which the transcript should be filed in such other circuit court. The transcript was not filed until after the specified time, but the parties afterwards appeared and tried the cause. Held, that the cause of action being local, and not transitory or dependent for its inception up-

on the will of the parties as to the choice of jurisdiction, the consent of the parties could bestow no jurisdiction on the second court, and that it therefore acquired no jurisdiction whatever, since its jurisdiction was but statutory, and the conditions were not strictly complied with. *McHenry's Lessee v. Wallen*, 10 Tenn. (2 Yerg.) 441, 444.

#### **Correctness of decision immaterial.**

Jurisdiction does not depend upon the correctness of the decision made. *People v. Talmadge*, 61 N. E. 1049, 1050, 194 Ill. 87; *Sherer v. Superior Court*, 96 Cal. 653, 31 Pac. 565; *State ex rel. Johnson v. Withrow*, 108 Mo. 1, 8, 18 S. W. 41, 43.

It is said the jurisdiction of the court can never depend upon its decision upon the merits of the case brought before it, but upon its right to hear and decide it all. *Ex parte Watkins*, 32 U. S. (7 Pet.) 568, 572, 8 L. Ed. 786; *United States v. Maney* (U. S.) 61 Fed. 140, 142.

The mere grounds upon which the determination is reached may or may not be correct in themselves. These may be supported by evidence inadmissible when tested by the rules governing the introduction of evidence. The reasons given for the conclusion arrived at may or may not be such as address themselves to the judgment of others, but erroneous rules entertained, or incorrect reasons assigned, or evidence erroneously admitted in deciding the controversy do not make a case of want of jurisdiction. *Central Pac. R. Co. v. Board of Equalization of Placer County*, 43 Cal. 365, 368.

If the petitioner states such a case in his petition that on demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction. The court would be then bound to hear and determine, and its judgment, however erroneous, would bind parties and privies, and would be conclusive of the right established, and could be impeached only in an appellate tribunal. *Goodman v. Winter*, 64 Ala. 410, 431, 38 Am. Rep. 13.

Jurisdiction does not relate to the rights of the parties as between each other, but to the power of the court. The question of its exercise is an abstract inquiry, not involving the existence of an equity to be enforced, nor the right of the plaintiff to avail himself of it if it exists. It precedes these questions, and a decision upholding the jurisdiction of the court is entirely consistent with a denial of any equity either in plaintiff or in any one else. The case we are considering illustrates the distinction I am endeavoring to point out as well as any supposed case would. It presents these questions: Have the plaintiffs shown a right to the relief which they seek? And has the court authority to determine whether or not

they have shown such a right? A wrong determination of the question first stated is error, but can be re-examined only on appeal. The other question is the question of jurisdiction. *People v. Sturtevant*, 9 N. Y. (5 Seld.) 263, 59 Am. Dec. 536 (quoted and approved in *Fisher v. Hepburn*, 48 N. Y. 41, 53).

It is not the particular decision given which makes up jurisdiction, but it is the authority to decide the question at all. Otherwise the distinction between the erroneous exercise of jurisdiction on the one hand, and the total want of it on the other, must be obliterated. *Chase v. Christianson*, 41 Cal. 253. The distinction is between a lack of power or want of jurisdiction in the court, and a wrongful or defective execution of the power. In the first instance, all acts of the court not having jurisdiction or power are void, in the latter only voidable. *Paine's Lessee v. Mooreland*, 15 Ohio, 435, 45 Am. Dec. 585. This principle applies to a judgment of courts of limited or special jurisdiction, as well as to judgments of superior courts of record. Under these principles, where a justice of the peace rendered a judgment against a husband, without the joinder of his wife, for an antenuptial debt of the wife, the judgment was not subject to collateral attack on the ground that the husband was not liable for the antenuptial debts of his wife, and, if he was so liable, could only be made so in an action to which she was joined as defendant. *Babb v. Bruere*, 23 Mo. App. 604, 606.

#### **Docket entries.**

Jurisdiction is a substantive fact, and docket entries are only evidence of that fact. It is absolutely independent of docket entries, and can neither be given nor taken away by them. Under this definition, 18 Laws, c. 32, providing that judgments of the justices of the peace shall not be reversed for failure of the record to show the residence of the parties, does not touch upon the jurisdiction or validity of any contract, but is simply a matter of evidence which is to govern the appellate court when called upon to review the judgment of the court. *Cunningham v. Dixon* (Del.) 41 Atl. 519, 520, 1 Marv. 163.

#### **Equity.**

The word "jurisdiction" is employed in different senses. When equity jurisdiction is spoken of, as that a case in the Supreme Court did not fall within the equity jurisdiction as it exists, there is not meant the power of the court to try the dispute, in the sense that a county court cannot try an action in ejectment, or a state court offenses against the federal government, but the question whether the action in equity will lie. *Anderson v. Carr*, 19 N. Y. Supp. 992, 993, 65 Hun. 179.

The term "jurisdiction" relates not to the naked question of power, but rather to the fact that such power has or has not been usually exercised. Thus the question presented to a court of equity by the objection that the complaining party has a full, adequate, and complete remedy at the common law relates to the jurisdiction of the court, and is commonly spoken of in that way. *Reynolds v. Everett*, 22 N. Y. Supp. 306, 314, 67 Hun, 294.

The question presented to the court of equity by the objection that the complaining party had a full, adequate, and complete remedy at the common law related to the jurisdiction of the court of equity, and is constantly spoken of in the cases in that way; but so far was it from presenting the question of mere power, that, if the objection was neither taken by demurrer, plea, nor answer, the court proceeded and gave judgment on the merits, notwithstanding it would have rejected the jurisdiction, had the question been raised at the right time. This points to the true line of distinction in the use of the term "jurisdiction." The question is properly one of jurisdiction only when a judgment asserting the power of the court would be void and assailable collaterally in every other court. *Bangs v. Duckinfield*, 18 N. Y. 592, 595.

The Minnesota statute confers the authority to administer justice in all civil cases, "whether heretofore termed legal or equitable," on the same person, the same officer, and by the pleadings, process, and proceedings. It expressly abolishes the distinction between actions at law and suits in equity, and authorizes but one form of action for the enforcement or protection of any private rights, or for the redress of any private wrongs. In the same complaint legal and equitable causes of action, and in the same answer legal and equitable defenses, may be set up; and to a complaint strictly legal a defense purely equitable may be interposed. And if this statute is a valid law, the equitable jurisdiction of the court is certainly not separate and distinct from the legal. *Holmes v. Campbell*, 12 Minn. 221, 227 (Gil. 141, 146).

#### **Essentials.**

Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in a given case. To constitute this, there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issues. *Munday v. Vail*, 84 N. J. Law (5 Vroom) 418, 422. This was quoted with approval in *Reynolds v. Stockton*, 140 U. S. 254, 268, 11 Sup. Ct. 773, 777, 35 L. Ed. 464; *St. Lawrence Boom*

*& Mfg. Co. v. Holt*, 41 S. E. 351, 356, 51 W. Va. 352; *Gille v. Emmons*, 48 Pac. 569, 570, 58 Kan. 118, 62 Am. St. Rep. 609; *Hope v. Blair*, 105 Mo. 85, 16 S. W. 595, 597, 24 Am. St. Rep. 366. So that a judgment which is entirely outside of the issues in the case, and upon a matter not submitted to the court for its determination, is a nullity. *Gille v. Emmons*, 48 Pac. 569, 570, 58 Kan. 118, 62 Am. St. Rep. 609.

#### **Exemption from liability.**

Although the word "jurisdiction" is frequently and somewhat loosely used to indicate the right of the plaintiff to sue, or the liability of the defendant to be sued, in a particular case, yet, where the suit is against an individual by name, and he desires to plead an exemption by reason of his representative character, he does not raise a question of jurisdiction, in its proper sense. *Illinois Cent. R. Co. v. Adams*, 21 Sup. Ct. 251, 255, 180 U. S. 28, 45 L. Ed. 410.

#### **Interest of judge.**

A judge who is interested in an action, having no authority to hear it, can have no jurisdiction over such action, and a writ of prohibition will lie to restrain him from proceeding therein. *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315, 326.

#### **Limited or inadequate.**

The word "jurisdiction," when considered in connection with the exercise of judicial functions, includes the power to compel a person to appear and answer a complaint, or to punish him for not doing so; the power to take property in dispute into the custody of the law; the power to compel the production of evidence and hear the contention of parties; the power to determine the question of right between parties, and to enforce the determination. And where there is a lack of power in either of the directions mentioned, whether because intentionally withheld, or because of the incapacity of the grantor to confer it, the jurisdiction may be said to be limited in the one case, and incomplete or inadequate in the other. *State v. North American Land & Timber Co.*, 31 South. 172, 176, 106 La. 621, 87 Am. St. Rep. 309.

#### **As original jurisdiction.**

The word "jurisdiction," as used in a charter providing that "the city court shall have cognizance of cases of which it now has jurisdiction by virtue of the original charter of said city, and its jurisdiction is hereby declared to embrace all cases in law or in equity," etc., in both clauses, means original, and not appellate, jurisdiction; appellate jurisdiction being provided in a subsequent clause. *Loomis v. Bourn*, 28 Atl. 509, 570, 63 Conn. 445.

**Sufficiency of pleading to confer.**

If a petitioner states such a case in his petition that on a demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction. *Belles v. Miller*, 38 Pac. 1050, 1052, 10 Wash. 259 (citing *United States v. Arredondo*, 31 U. S. [6 Pet.] 601, 8 L. Ed. 547); *Goodman v. Winter*, 64 Ala. 410, 431, 38 Am. Rep. 13; *Grignon's Lessee v. Astor*, 43 U. S. (2 How.) 319, 338, 11 L. Ed. 283; *United States v. Maney* (U. S.) 61 Fed. 140, 142.

**Satisfaction of judgment pending suit to enforce.**

The fact that a judgment was satisfied of record while a suit was pending to subject land to its payment did not deprive the court of further jurisdiction in such suit, so as to render a decree of sale void. *Oliver v. Riley*, 60 N. W. 180, 181, 92 Iowa, 23.

**Subject-matter and person.**

Jurisdiction is of two sorts—jurisdiction over the subject-matter, and jurisdiction over the party with reference to that subject-matter. *White v. Borough of Neptune City*, 28 Atl. 378, 379, 56 N. J. Law (27 Vroom) 222.

Jurisdiction has reference to both the subject-matter and the person. *Ex parte State*, 71 Ala. 371, 375; *In re Merlet*, Id.

No court can be said to have acquired complete jurisdiction, so as to hear and determine any cause, until it has obtained, through the due procedure prescribed by law, jurisdiction over both subject-matter and the parties. *Chamberlain v. Finley*, 23 South. 559, 561, 40 Fla. 91.

Within the constitutional provision (article 6, § 9, par. 1) requiring uniformity in the jurisdiction, powers, proceedings, and practice of all courts or officers invested with judicial powers of the same grade or class, the word "jurisdiction" refers to subject-matter alone, and not to the person or territory in which it may be exercised. *Starnes v. Mutual Loan & Banking Co.*, 29 S. E. 452, 454, 102 Ga. 597.

Jurisdiction of the court is power in the court, and is of two kinds: First, it must have jurisdiction of the kind of action that is brought; second, it must have jurisdiction of the party against whom the action is brought. First, as to the jurisdiction as to the kind of action. For instance, if you should bring an action of divorce in the circuit court of the county of Essex, and serve process on the defendant in the county of Essex, and a decree should be pronounced, that decree would be absolutely valueless and void, because the circuit court of the county of Essex has no power to deal with a question of divorce. The other is jurisdiction of the person, and that must be obtained by

service of process within the territorial limits of the jurisdiction. *Dumont v. Dumont* (N. J. Ch.) 45 Atl. 107.

It is stated in *Gwynne v. Pool*, Lut. 290, that no action will lie against a judge acting in a judicial capacity for any errors which he may commit in a matter within his jurisdiction. The words "in a matter within his jurisdiction" mean that, when the person assumed to do the act as judge, he had judicial jurisdiction of the person acted upon, and of the subject-matter as to which it was done. *Lange v. Benedict*, 73 N. Y. 12, 25, 27, 31, 29 Am. Rep. 80.

To enable a court to render a complete determination of the controversy, it must have jurisdiction of the parties and of the subject-matter. If the court has not jurisdiction of the person of the defendant, there can be no judgment even of abatement given against the plaintiff, for the defendant must become a party in the court before he can have a judgment. But where all parties are rightfully before the court, and the question is raised whether it has jurisdiction to determine the controversy between them, the question itself calls for a judicial determination, and the decision is a judicial act, and necessarily an exercise of jurisdiction. Upon principle, a court possesses power to determine whether it has authority to entertain a particular controversy, although its decision and the law be that it has no such authority, and it therefore dismisses the suit. *King v. Poole* (N. Y.) 36 Barb. 242, 244.

The word "jurisdiction," as used in *Burns' Rev. St. 1894*, § 1643 (*Rev. St. 1881*, § 1574), providing that every person committing an offense against the laws of the state is liable to punishment in the county having "jurisdiction," refers to jurisdiction of the person, and not of the subject-matter of the offense. *State v. Herring*, 48 N. E. 598, 599, 21 Ind. App. 157, 69 Am. St. Rep. 351.

The word "jurisdiction," in an act of Congress creating three judicial districts in the Indian Territory, and, after conferring jurisdiction upon them, providing that, in all criminal cases where courts outside of the territory shall have acquired jurisdiction, they shall retain jurisdiction to try and finally dispose of such cases, does not refer to the subject-matter—that is, the nature of the cause of action or relief sought—but relates to the jurisdiction of the person. *United States v. Lee* (U. S.) 84 Fed. 626, 629.

As used in act of March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508], providing for removal of cases from state court to United States court of which the United States courts are given original jurisdiction, the word "jurisdiction" refers to jurisdiction of the subject-matter, and means a jurisdiction which would enable any cir-

cuit court to entertain and determine the controversy if the parties were before it. *Vinal v. Continental Const. & Imp. Co.* (U. S.) 34 Fed. 228; *Johnson v. Wells, Fargo & Co.* (U. S.) 91 Fed. 1, 4.

#### **Territorial Limitation.**

By the jurisdiction of a state court is meant "within the state." *Stevens v. Irwin*, 12 Cal. 306, 308.

"Jurisdiction," as defined in article 76, Code Prac., means the power of him who has the right of judging, or sometimes that word means also the space or extent of country over which the judge is entitled to exercise that power. The tract of land or district within which a judge or magistrate has jurisdiction is called his territory, and his power in relation to his territory is called his territorial jurisdiction. These definitions clearly relate to the competency, the power of the judge to entertain and pass upon causes in regard to the subject-matter, the parties, and the place where the action is brought, but do not regulate or restrain his power as to the conduct of proceedings, the jurisdiction of which is legally vested in his court. They do not imply that the judge must always be personally present in his territory, in order to direct incidental matters as they become necessary in a cause pending in his court, and any order which the judge may grant in chambers upon an *ex parte* application may be signed by him outside his territorial jurisdiction. *Succession of Weigel*, 17 La. Ann. 70, 71.

The word, "jurisdiction," as used in Const. art. 6, § 19, requiring that the jurisdiction, powers, etc., of the several district courts should be uniform, embraces not only the subject-matter of the cause, but as well the territory within which a court may act or send processes for service. *State v. Magney*, 72 N. W. 1006, 1008, 52 Neb. 508.

The exercise of jurisdiction—the power to hear and determine—must be considered with reference to the territory within which it is to be exercised. *Konold v. Rio Grande W. Ry. Co.*, 51 Pac. 256, 257, 16 Utah, 151.

In Rev. St. art. 363, which, after defining the power of a marshal as to city matters, provides that, in the prevention and suppression of crime and arrest of offenders, he shall have, possess, and execute like power, authority, and jurisdiction as the sheriff of a county under the laws of the state, the word "jurisdiction" refers to the territory in which such power or authority can be exercised; and, since the jurisdiction of the marshal is measured by that of the sheriff in the prevention and suppression of crime and arrest of offenders against the state, it must be coextensive with the limits of the county. *Newburn v. Durham*, 32 S. W. 112, 116, 10 Tex. Civ. App. 655.

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#### **Trial as affecting.**

The reading of proofs, the argument of counsel—in other words, the trial had—or the absence of any or all three, neither confer jurisdiction in the first instance, nor take it away after it has once fully attached. *Ex parte Bennett*, 44 Cal. 84, 88.

#### **JURISDICTION OF A CASE.**

The expression that "the court has jurisdiction of a case" means jurisdiction of all proceedings connected therewith, from the filing of the complaint till the satisfaction of the judgment. *Comstock Mill. & Min. Co. v. Allen*, 31 Pac. 434, 21 Nev. 325.

#### **JURISDICTION OF THE CAUSE.**

"Jurisdiction of the cause is the power over the subject-matter given by the law of the sovereignty in which the tribunal exists." In *re Taylor*, 64 N. W. 253, 257, 7 S. D. 382, 45 L. R. A. 136, 58 Am. St. Rep. 843; *Weiner v. Rumble*, 19 Pac. 760, 761, 11 Colo. 607 (citing *Bouv. Law Dict.*)

#### **JURISDICTION OF THE PERSON.**

Jurisdiction of the person must be obtained by service of process within the territorial limits of the jurisdiction. *Dumont v. Dumont* (N. J. Ch.) 45 Atl. 107. And where a declaration, warrant of attorney and affidavit of its execution, the note on which the declaration was based, and cognovit by the attorney authorized, were filed, the defendant was before the court, and there was enough to set the court in motion to hear and determine. If after this the court, in the rendering of its judgment, acted without sufficient evidence, the case would be presented, not of want of jurisdiction, but of error in the exercise of jurisdiction. Moreover, a warrant of attorney to confess judgment is a familiar common-law security, and the entry of judgment by cognovit thereunder is a proceeding according to the course of the common law; and, though the statute has regulated the mode of such procedure, it did not therefore convert the proceeding into one of such special character that the same presumptions do not obtain as in the case of ordinary judgments of superior courts of general jurisdiction. *Bush v. Hanson*, 70 Ill. 480, 482.

Jurisdiction of the person which will relieve a judge from individual liability for acts done in his judicial capacity attaches when the citizen acted upon is before the judge, either constructively or in fact, by reason of the service upon him of some process known to the law, and which has been duly issued and executed. *Lange v. Benedict*, 73 N. Y. 12, 27, 29 Am. Rep. 80.

If a court has not acquired jurisdiction of the person of the defendant—that is, if

sufficient process has not been served upon him—there can be no judgment, even of abatement, given against the plaintiff, for the defendant must become a party in the court before he can have a judgment. But where the court has jurisdiction of both parties, it has also the power to decide whether it has jurisdiction of the action, and its decision of that question is a judicial act. *King v. Poole* (N. Y.) 36 Barb. 242, 244.

Jurisdiction of a court depends on the law of the country to which it is subject, and hence, if a state law enacts that an advertisement of a notice of a pending suit in a newspaper shall authorize the defendant's appearance to be entered in an action against him, the courts of that state have jurisdiction over him in such a case, and are bound to exercise it; but when a judgment thus obtained comes to be the foundation of a proceeding in the courts of a state not bound by the particular law, in the absence of constitutional provisions, it will depend on the law of comity what effect shall be given it. By the law of comity and by the constitutional laws of the United States, the question will be whether the court had "properly jurisdiction," or, in other words, did it obtain jurisdiction in a way consonant to natural justice? for, in the absence of positive law, this is the only standard. The record of a personal judgment in the court of another state of general jurisdiction is *prima facie* conclusive as to the jurisdiction. *Moulin v. Trenton Mut. Life Ins. Co.*, 24 N. J. Law (4 Zab.) 222, 232.

#### JURISDICTION OF THE SUBJECT-MATTER.

"Jurisdiction of a subject-matter, in its general sense, is defined to be a power constitutionally conferred upon a judge or magistrate to take cognizance of and decide causes according to law, and to carry the sentence into execution." *Lindsay v. People*, 1 Idaho, 438, 446.

"Jurisdiction of the subject-matter" is the power to hear and determine cases of the general class to which the proceeding in question belongs. *Musick v. Kansas City, S. & M. Ry. Co.*, 21 S. W. 491, 492, 114 Mo. 309.

If a court has jurisdiction of the persons to the action, and the cause is the kind of a cause triable in such court, it has jurisdiction of the subject of the action, and has the power to render any rightful judgment therein. *Parker v. Lynch*, 56 Pac. 1082, 1087, 7 Okl. 631.

The court has jurisdiction of the subject-matter when it has the legal right to sit upon a case and determine it. Such jurisdiction arises: (1) Where the tribunal has general jurisdiction of the subject-mat-

ter or investigation, and the special facts which give it the right to act in a particular case are averred, and are not controverted, upon notice to proper parties jurisdiction is acquired, and cannot be assailed in any collateral proceeding; (2) where the judicial tribunal has not general jurisdiction of the subject-matter under any circumstances, no averment can supply the defect, and no consent can confer jurisdiction; (3) where the judicial tribunal has no general jurisdiction of the subject-matter, but may exercise it under a particular state of facts, those facts must be specially averred and established, and, when so established on a hearing of all proper parties, cannot be impeached in any collateral proceeding. *Bumstead v. Read* (N. Y.) 31 Barb. 661, 665.

By "jurisdiction over the subject-matter" is meant the nature of the cause of action and of the relief sought, and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. *Manley v. Park*, 64 Pac. 28, 30, 62 Kan. 553 (citing *Cooper v. Reynolds*, 77 U. S. [10 Wall.] 308, 316, 19 L. Ed. 931); *Dayton v. Board of Equalization*, 50 Pac. 1009, 1011, 33 Or. 131.

Jurisdiction over the subject-matter is the right of the court to exercise judicial power over that class of cases,—not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending, and not whether the particular case is one that presents a cause of action, or, under the particular facts, is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial. *Peyton v. Peyton*, 68 Pac. 757, 764, 28 Wash. 278; *Christiansen v. Mendham*, 61 N. Y. Supp. 323, 327, 45 App. Div. 554; *Manley v. Park*, 64 Pac. 28, 30, 62 Kan. 553.

"Jurisdiction of the subject-matter" is power to adjudge concerning the general question involved, and is not dependent on the state of facts which may appear in the particular case arising, or which is claimed to have arisen, under that general question. *Hunt v. Hunt*, 72 N. Y. 217, 231, 28 Am. Rep. 129; *Perry v. Kent*, 34 N. Y. Supp. 843, 845, 88 Hun. 407; *Belden v. Wilkinson*, 60 N. Y. Supp. 1083, 1084, 44 App. Div. 420; *Christiansen v. Mendham*, 61 N. Y. Supp. 326, 327, 45 App. Div. 554; *Dayton v. Board of Equalization*, 50 Pac. 1009, 1011, 33 Or. 131; *Bigham v. Henrici* (Pa.) 16 Atl. 618.

By "jurisdiction of the subject-matter" is not meant simply jurisdiction of the particular case occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs; and by "subject-matter" is meant the abstract

thing, and not the particular case. *State v. Wolever*, 28 N. E. 762, 765, 127 Ind. 306.

There is a more general meaning to the phrase "subject-matter" than the power to act upon a particular state of facts. It is the power to act upon the general and—so to speak—the abstract questions, and to determine and to judge whether the particular facts presented call for the exercise of the abstract power. It is the power lawfully conferred to deal with the general subject involved in the action. *Hunt v. Hunt*, 72 N. Y. 217, 219, 28 Am. Rep. 129; *Bigham v. Henrici* (Pa.) 16 Atl. 618.

#### **Allegations of cause of action.**

The question of jurisdiction of the subject-matter has nothing to do with the question whether the allegations of the complaint set out a good cause of action upon a subject of which jurisdiction exists. *Belden v. Wilkinson*, 60 N. Y. Supp. 1083, 1084, 44 App. Div. 420.

#### **Consent.**

Jurisdiction of the subject-matter always comes from the law, and it cannot be waived, nor conferred by the consent of the parties or their counsel. *Huber v. Beck*, 32 N. E. 1025, 6 Ind. App. 47.

#### **Ultimate determination immaterial.**

Jurisdiction of the subject-matter is the power to adjudge concerning that matter, and does not depend upon the ultimate determination arrived at, or means by which such ultimate determination is reached. In *re Klock*, 51 N. Y. Supp. 897, 906, 30 App. Div. 24.

#### **Of the general or particular subject distinguished.**

There is a distinction between jurisdiction of the general subject and jurisdiction of the particular subject. If the case in question belongs to the former class, then it is within the jurisdiction of the court, and neither insufficiency of allegations nor informality in proceedings will affect that jurisdiction. If there is jurisdiction of the general subject, there may be a waiver of objection to the jurisdiction of the particular subject. *Reed v. City of Muscatine*, 73 N. W. 579, 104 Iowa, 183.

### **JURISDICTIONAL FACTS.**

See "Quasi Jurisdictional Facts."

Facts, the existence of which is necessary to the validity of the proceeding, and without which the act of the court is a mere nullity, are jurisdictional facts. *Noble v. Union River Logging R. Co.*, 13 Sup. Ct. 271, 273, 147 U. S. 105, 37 L. Ed. 123.

### **JURISPRUDENCE.**

See "Equity Jurisprudence."

"In every nation that has advanced a few steps beyond the first organization of political society, and that has made any progress in civilization, an extensive and important part of the rules which govern men is derived from what is called in certain countries 'common law,' and here 'jurisprudence.' This jurisprudence or common law in some nations is found in the decrees of their courts; in others it is furnished by private individuals eminent for their learned integrity, whose superior wisdom has enabled them to gain the proud distinction of legislating, as it were, for their country, and enforcing their legislation by the most noble of all means—that of reason alone. After a long series of years, it is sometimes difficult to say whether these opinions and judgments were originally the effect of principles previously existing in society, or whether they were the cause of the doctrines which all men at last recognize. But whether the one or the other, when acquiesced in for ages, their force and effect cannot be distinguished from the statutory law. No civilized nation has been without such a system. None, it is believed, can be without it, and every attempt to expel it only causes it to return with increased strength on those who are so sanguine as to think it may be dispensed with." *Saul v. His Creditors* (La.) 5 Mart. (N. S.) 509, 582, 10 Am. Dec. 186.

### **JUROR.**

See "Impartial Juror"; "Lawful Jurors"; "Tales Juror." As officer, see "Officer."

Jurors are men qualified and sworn to try a cause according to the evidence. *State v. Potts*, 22 Pac. 754, 757, 20 Nev. 389.

The term "jurors" means nothing more than 12 men qualified and sworn to try a cause according to the evidence. *Fife v. Commonwealth*, 29 Pa. (4 Casey) 429, 439.

"In the narrowest and most literal definitions of the word 'juror,' it means a man who is sworn or affirmed to serve on a jury. *Bouv. Law Dict.* In this sense, no one would be either a grand or petit juror unless he was actually impaneled and sworn. But all the statutes of the state and all law writers universally apply the term 'jurors' to persons selected and summoned according to law, for the purpose of serving as grand or petit jurors, whether they have been actually impaneled and sworn or not. Therefore all persons who are lawfully selected and summoned to serve as jurors are,



in legal terminology, called jurors, and they are called grand or petit jurors according to the functions they are intended to perform." *State v. McCrystol*, 9 South. 922, 924, 43 La. Ann. 907.

Bouvier defines a juror as a man who is sworn or affirmed to serve on a jury; the word juror coming from the Latin "juro," to swear. Men in the jury box, each of whom had been passed for cause, but none of whom had been sworn as jurors, are not jurors, so as to prevent their separation during a recess taken in order to summon an additional venire. *State v. Voorhies*, 40 Pac. 620, 12 Wash. 53.

A juror is a person selected and summoned according to law to serve in that capacity, whether the jury has been actually impaneled and sworn or not. *Bouv. Law Dict.* Our Code evidently treats a person selected and summoned and in attendance as a juror. It provides that a juror shall not be excused for slight cause, and that the court shall designate by number the grand and trial jurors. And as the court said in *Mason v. Culbert*, 108 Cal. 247, 249, 41 Pac. 464, a juror may be in attendance upon court without being impaneled to try any cause, and for every day of such attendance the statute authorizes him to be compensated. *Jackson v. Baehr*, 71 Pac. 167, 168, 138 Cal. 266.

The word "juror" includes a talesman, and extends to jurors in all courts, whether of record or not of record, and in special proceedings and before any officer authorized to impanel a jury in any case or proceeding. *Gen. St. Minn.* 1894, § 6357; *Pen. Code N. Y.* 1903, § 81.

The word "juror," in Acts 1878, No. 59, making it criminal to directly or indirectly give any sum or sums of money, or any other bribe, present, or reward, or any other thing, to any "grand or petit juror," with intent, etc., includes tales jurors as well as regular jurors. *State v. McCrystol*, 9 South. 922, 924, 43 La. Ann. 907.

A juror is a man who is sworn or affirmed to serve as a juror; one of a jury; a juryman. So that a person who was merely sworn in order to ascertain his qualifications as a juror, but was not accepted as such, is not a juror, within the provisions authorizing a fee for administering an oath or affirmation, except to a juror. *Marsh v. United States* (U. S.) 88 Fed. 879, 882.

Under *Rev. St. U. S.* § 828, par. 4 [U. S. Comp. St. 1901, p. 635], allowing a clerk certain fees for administering an oath, except to a juror, it was contended that the clerk was entitled to a fee for administering an oath to persons who had been drawn and summoned as jurors for the purpose of their preliminary examination as to their

fitness and qualifications to serve as jurors, and that by the word "juror" was meant a man who is sworn or affirmed to serve as a juror. It was held that such was not the meaning of the term. Thus the act of Congress fixing the fees of the marshal provided that he should be entitled to a mileage for summoning petit and grand jurors, and certainly included the mileage for summoning a juror, whether he was qualified to sit or not. Again, it was provided that the marshal should pay to jurors all such fees as they were entitled to, and the court would order such fees to be paid to a person who had been summoned to appear as a juror, even though he were discharged without having been sworn to serve. And the same construction was undoubtedly intended in reference to the fee of a clerk. A person who is sworn to answer questions as to his eligibility is sworn because of his being summoned to act as a juror, and in that sense he is sworn as a juror. It proves too much to argue that he is not a juror until he is sworn as such; for he is not a juror, in the technical and narrow meaning of the word, until he is sworn and impaneled. This construction would strike out the words in the statute, "except to jurors." A juror is defined in *State v. McCrystol*, 43 La. Ann. 907, 6 South. 922, as any person selected and summoned according to law to serve in that capacity, whether the jury has been actually impaneled or not. The word "juror" is uniformly used by the jurists most familiar with the subject as including persons designated or ordered to be summoned as jurors. For stronger reasons it would include them after they were summoned and have appeared in court. *United States v. Marsh* (U. S.) 106 Fed. 474, 481, 45 C. C. A. 436.

#### Grand juror.

The terms "juror" and "juryman," as appearing in an act declaring ineligible any person drawn or summoned as a juryman or talesman, or any person appearing or offered as a juror or talesman, who is or has been living in the practice of polygamy, include members of the grand jury as well as of the petit jury. A grand juror is a juryman and a juror, and is drawn and summoned, and the fact that the word "talesman" is used will exclude him from being included in such terms. *Clawson v. United States*, 5 Sup. Ct. 949, 952, 114 U. S. 477, 29 L. Ed. 179.

#### Officer distinguished.

"A juror is one of a body of twelve men, possessing the requisite qualifications, duly summoned, and sworn to well and truly try the questions of fact submitted to them by the court, and a true verdict render according to the law and the evidence. He is neither appointed nor elected to his position of

duty, but his name is drawn from a list of names prepared by the clerk of the district court and the judge of the probate court within and for the county where the district court is held. He has a duty of a public nature to perform, and for it he is compensated out of the public treasury, but in no other respect does his position or his duties correspond with the essential elements of office. He has no certain term of office. He has no right to, and has no power to enforce a right to, the performance of any act or service which constitutes the performance of official duty. He is liable at any moment to be discharged by the court from all service, and to be excused by either party from serving in the trial of any cause, without consulting his wishes or interests. The oath he takes, in its terms and scope, limits his duty to the facts of the particular case then on trial, and is not the oath required by the laws of this territory, or by the Constitution and laws of the United States, to be taken by public officers. His position is, to a certain extent, a place of public trust and emolument." *People v. Hopt*, 4 Pac. 250, 255, 3 Utah, 396.

## JURY

See "Grand Jury"; "Impartial Jury"; "Petit Jury"; "Struck Jury"; "Trial by Jury"; "Trial Jury."

"A jury is a body of men summoned and sworn to decide on the facts in issue at the trial." *Hunnell v. State*, 88 Ind. 431, 434 (citing 1 Abb. Law Dict.).

A jury is a body of men temporarily selected from the citizens of a particular district, and invested with power to present or indict a person for a public offense, or try a question of fact. *Code Civ. Proc. Cal.* 1903, § 190; *Code Civ. Proc. Idaho* 1901, § 3043.

A jury is a body of persons temporarily selected from the citizens of a particular county, and invested with power to present and indict a person for a public offense, or to try a question of fact. *Rev. St. Utah* 1898, § 1291.

A jury is a body of men temporarily selected from the qualified inhabitants of a particular district, and invested with power (1) to present or indict a person for a public offense; or (2) to try a question of fact. *Ann. Codes & Sts. Or.* 1901, § 959; *Ballinger's Ann. Codes & St. Wash.* 1897, § 4730.

The late Mr. Justice Miller, in his *Lectures on Constitutional Law*, quotes with approval the following from the *Encyclopædia Britannica*, in its article "Jury," to wit: "The essential features of trial by jury, as practiced in England and countries influenced by English ideas, are the following: The jury are a body of laymen, selected by lot,

to ascertain, under the guidance of a judge, the truth, in questions of fact arising either in a civil litigation or a criminal process.

\* \* \* Their province is strictly limited to questions of fact, and within that province they are still further restricted to the exclusive consideration of matters that have been proved by evidence in the course of the trial. They must submit to the direction of the judge as to any rule or principle of law that may be applicable to the case," etc. Again, Forsyth in his *History of Trial by Jury*, published in 1852, says: "The distinctive characteristic of the system is this: That the jury consists of a body of men taken from the community at large, summoned to find the truth of disputed facts. They are to decide upon the effect of the evidence, and thus to assist the court to pronounce a right judgment; but they have nothing to do with the judgment or sentence which follows the verdict. They are not, like the judges, members of a class charged with the duty of judicial inquiry. They are taken from varied pursuits, to make a special inquiry, and return to their ordinary avocations when this labor is over." *Hopkins v. Nashville, C. & St. L. R.*, 34 S. W. 1029, 1031, 96 Tenn. 409, 32 L. R. A. 354.

The terms "jury" and "trial by jury" are, and for ages have been, well known in the meaning of the law. They were used at the adoption of the Constitution, and always, it is believed, before that time, and almost always since, in a single sense. A jury for the trial of a cause is a body of 12 men, described as being upright, well-qualified, and lawful men, disinterested and impartial, not of kin or personal dependents of either of the parties, having their home within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party, duly impaneled under the direction of a competent court, sworn to render a true verdict according to the law and the evidence given them, who, after hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their unanimous verdict on the issues submitted to them. *Dennet v. McCoy (Ind.)* 69 S. W. 858, 860.

Trial by jury is by 12 free and lawful men, who are not of kin to either party, for the purpose of establishing the truth of the matter in issue. *Smith v. Times Pub. Co.*, 36 Atl. 296, 297, 178 Pa. 481, 35 L. R. A. 819 (citing *Dowling v. State*, 13 Miss. [5 Smedes & M.] 664, 685).

"Jury," as the term is used in the clause of the Constitution providing that the right of trial by jury shall not be denied, "means twelve competent men, who are free from all

ties of consanguinity, and all other relations that would tend to make them dependent on either party. It means twelve men who are not interested in the event of the suit and who have no such bias or prejudice in favor of or against either party as would render them partial towards either party." *State v. McClear*, 11 Nev. 39, 46.

#### **Drawing and summoning.**

A requisite number of persons having the qualifications of jurors will not constitute a jury or panel of jurors unless they are drawn and summoned as jurors in conformity with the law. They must be men selected from the proper place, and drawn and summoned according to law. A panel of jurors not drawn according to law is a nullity. *Dupont v. McAdow*, 9 Pac. 925, 926, 6 Mont. 226.

#### **Householders.**

In the constitutional provision that the right of a trial by jury should be preserved, the framers of the Constitution used the word "jury" with reference to its signification at common law, which was a jury of 12 men and householders. Hence a statute which provides that only taxpayers shall be eligible to sit on a jury fixes another requirement, and hence is invalid. *Reece v. Knott*, 24 Pac. 757, 758, 3 Utah, 451.

#### **Number.**

The word "jury," as employed in the constitutional guaranty of the right of trial by jury, means a common-law jury of 12 men. *Baxter v. Putney* (N. Y.) 37 How. Prac. 140-141; *Cancemi v. People*, 18 N. Y. 128, 135; *People v. Dunn*, 52 N. E. 572, 574, 157 N. Y. 528, 43 L. R. A. 247; *Cairo & F. R. Co. v. Trout*, 32 Ark. 17, 25; *May v. Milwaukee & M. R. Co.*, 3 Wis. 219, 220; *Norval v. Rice*, 2 Wis. 22, 28; *Cowles v. Buckman*, 6 Iowa, 161, 163; *Higgins v. Farmers' Ins. Co.*, 14 N. W. 118, 60 Iowa, 50; *Eshelman v. Chicago, R. I. & P. R. Co.*, 25 N. W. 251, 252, 87 Iowa, 295; *Dennee v. McCoy* (Ind. T.) 69 S. W. 858, 960; *First Nat. Bank of Rock Springs v. Foster*, 61 Pac. 466, 9 Wyo. 157, 54 L. R. A. 549; *Work v. State*, 2 Ohio St. 296, 304, 59 Am. Dec. 671; *Bloomer v. Todd*, 19 Pac. 135, 142, 3 Wash. T. 599, 1 L. R. A. 111; *Thompson v. State of Utah*, 18 Sup. Ct. 620, 622, 170 U. S. 343, 42 L. Ed. 1061; *United States v. Shaw* (U. S.) 59 Fed. 110, 113; *Territory v. Ortiz*, 42 Pac. 87, 88, 8 N. M. 154; *Carpenter v. State*, 5 Miss. (4 How.) 163, 166, 34 Am. Dec. 116; *State v. Everett*, 14 Minn. 439, 444 (Gil. 330, 332).

All the authorities agree that one of the substantial features of trial by jury, which are to be as heretofore, is the number 12. This cannot be altered, and the uniform result of the very numerous cases growing out of legislative attempts to make juries out of a less number is that, as to all matters which were the subject of jury trials at the date of

the Constitution, the right which is to remain inviolate is to a jury of 12 men. *Smith v. Times Pub. Co.*, 36 Atl. 296, 297, 178 Pa. 481, 35 L. R. A. 819.

A jury is a body of 12 men assembled for consultation, argument, and mutual assistance in arriving at the truth, and no single member of it has the right to make up his verdict apart from, and unaided by, the others. *Ætna Ins. Co. v. Grube*, 6 Minn. 82, 85 (Gil. 32, 37).

To constitute a jury, every lawyer knows that 12 lawful men are necessary, and that without this number no jury can exist. Where only 8 have been sworn, although they constitute so many constituent parts, they are not a jury, and therefore are incompetent to pronounce a verdict. *State v. Burket* (S. C.) 2 Mill, Const. 155, 156, 12 Am. Dec. 662.

Where the record recites that the defendant, on indictment, pleaded not guilty, and "thereupon came a jury of good and lawful men, to wit"—following with the names of 11 men—it appears upon the face of the record that no jury was impaneled. There can be no valid trial jury of less than 12 men, and a consent even by the defendant to a trial by a less number is absolutely void. Though in several of our cases it seems understood that the word "jury" necessarily imports 12 men, it is clearly decided by several cases that the court must reverse when the clerk uses that word, and at the same time affirmatively certifies that less than that number composed the panel which tried the particular case. *Hunt v. State*, 61 Miss. 577, 580, 581.

The charter of a city provided that assessments for certain improvements might be made either "by a jury, or by commissioners appointed by the city council," as the council should by ordinance prescribe. Held that, if the word "jury" was used in the sense in which it is understood in all Constitutions and statutes when not expressly qualified, it meant a jury of 12 men, and the city council had no authority to reduce the number; and if, on the other hand, it was employed as synonymous with "commissioners," and the number left to the discretion of the council, it was necessary that they be appointed by the council, and the delegation by that body of power to the mayor to select them was unauthorized. Therefore an ordinance providing that the assessment be made by a jury of six, to be selected by the mayor, was unauthorized and void. *Bibel v. People*, 67 Ill. 172, 175.

The term "jury" does not necessarily imply 12 men. *Fitchberg R. Co. v. Boston & M. R. Co.*, 57 Mass. (3 Cush.) 58, 85.

The provision of the Constitution securing the trial by jury "in all cases in which it has heretofore been used" does not prevent the Legislature from authorizing a trial to

be had otherwise than by the common-law jury of 12, in civil courts of local jurisdiction, in the case of actions in which the amount claimed does not exceed the limit of such jurisdiction as it was established before the Constitution took effect. *People v. Lane* (N. Y.) 6 Abb. Prac. (N. S.) 105, 120, 125.

Sess. Laws 1895, p. 182, revising the laws relating to justices, in article 18, § 12, prohibits imprisonment, except upon conviction of a jury. Article 5, § 13, declares that the number of jurors shall be 6, or any greater number, not exceeding 12, as either party may desire. Held, that the term "jury" embraced both classes of juries; that is to say, one class of less than 12 men in trials before justices of the peace, and the other class of 12 men in other judicial tribunals. *Hermanek v. Guthmann*, 53 N. E. 966, 968, 179 Ill. 563.

#### **Same—Consent to less than twelve.**

The Constitution provides that the right of trial by jury shall remain inviolate forever, but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. Article 1, § 3, Practice Act, § 179, prescribes that the jury may be waived, among other modes, by the parties failing to appear for trial. Section 159 fixes the number of persons who shall constitute a trial jury at 12, unless the parties consent to a less number, and provides that they may consent to any number, not less than 3. Held that, while the failure of a party to appear at the trial of a civil cause operates as a consent on his part that the issue be tried by the court without a jury, it does not authorize the trial to be had, at the request of the party who did appear, by a jury of less than 12 persons. *Gillespie v. Benson*, 18 Cal. 409, 411.

A common-law jury consists of 12 persons. This is the jury secured and guaranteed by the Constitution. By the law of the land, 12 persons form a part of the tribunal before whom a defendant charged with a capital crime is to be tried. In *Chitty* it is said the petit jury must consist of precisely 12, and is never to be more or less. This right to be tried by a jury of 12 men is not a mere privilege. It is a positive requirement of the law which cannot be changed by the consent of the prisoner. *Territory v. Ah Wah*, 1 Pac. 732, 4 Mont. 149, 47 Am. Rep. 341.

There can be no valid trial jury of less than 12 men, and a consent even by the defendant to a trial by a less number is absolutely void. *Hunt v. State*, 61 Miss. 577, 580, 581.

#### **Oath.**

The administration of an oath is an indispensable requisite to the formation of a

legal jury. *Lumsden v. City of Milwaukee*, 8 Wis. 485, 486.

A "jury" is defined to be a body of men who are sworn to declare the facts of a case as they are proven from the evidence placed before them. Code Proc. § 50, defines a jury as a body of men temporarily selected from the qualified inhabitants of a particular district, and invested with the power (1) to present or indict a person for a public offense; (2) to try a question of fact. Section 53 defines a petit jury as a body of men, 12 in number in the superior court, and 6 in a justice's court, drawn by lot from the jurors in attendance upon the court at a particular session, and sworn to try and determine a question of fact. It was held that 11 men in the jury box, who had been passed for cause, but had not been sworn, did not constitute a jury, within Code Proc. § 1311, forbidding juries to separate, except by the consent of defendant. *State v. Voorhies*, 40 Pac. 620, 12 Wash. 53.

#### **As part of court.**

See "Court."

#### **Special or struck jury.**

In the constitutional provision that trial by jury shall remain inviolate, by "jury" is meant a common-law jury, which is a tribunal of 12 persons impartially selected for the purposes of the trial in accordance with rules of law previously established. *Cooley*, Const. Law (3d Ed.) p. 321. Laws 1896, c. 378, providing for a special jury in criminal cases, does not violate such section of the Constitution. *People v. Dunn*, 52 N. E. 572, 574, 157 N. Y. 528, 43 L. R. A. 247.

The term "jury," in the constitutional provision which declares that the right of trial by jury shall remain inviolate, includes a struck jury. *Fowler v. State*, 34 Atl. 682, 58 N. J. Law (29 Vroom) 423.

#### **Unanimity of verdict.**

The courts have uniformly held that the word "jury," as used in our Constitutions, when not otherwise modified, means a common-law jury, composed of 12 men, whose verdict shall be unanimous. Hence, Const. art. 1, § 9, providing that the right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts not of record may consist of less than 12 men, does not authorize a statute permitting three-fourths of the jurors to return a verdict in civil cases. *First Nat. Bank of Rock Springs v. Foster*, 61 Pac. 466, 9 Wyo. 157, 54 L. R. A. 549.

All the authorities agree that the substantial features of trial by jury, which are to be as heretofore, are the number of 12, and the unanimity of the verdict. These cannot be altered, and the uniform result of the

very numerous cases growing out of legislative attempts to make juries out of a less number, or to authorize less than the whole to render a verdict, is that, as to all matters which were the subject of jury trials at the date of the Constitution, the right which is to remain inviolate is to a jury of 12 men, who shall render a unanimous verdict. *Smith v. Times Pub. Co.*, 36 Atl. 296, 297, 178 Pa. 481, 35 L. R. A. 819. See, also, *Dennet v. McCoy* (Ind. T.) 69 S. W. 858, 860.

#### **Eminent domain proceedings.**

The word "jury," as used in the constitutional provision that, when private property shall be taken for any public use, the compensation to be made therefor shall be ascertained by a jury, is to be taken in its usual meaning. Therefore, while it might be that a law providing for the selection of jurors less than 12, to be summoned in such a mode as to secure the drawing by lot of a given number from a larger body, so as to give each party a fair chance in their selection, would be unobjectionable, yet a statute providing that five freeholders should be arbitrarily named by the common council for such a purpose, without any hearing of the parties interested, or opportunity given them to participate in their selection or to be certified of their competency, was clearly not in compliance with the constitutional provision. *Clark v. City of Utica* (N. Y.) 18 Barb. 451, 453, 455.

A jury, within the meaning of the statutory provision requiring the compensation of the owner of property taken for public use to be ascertained by a jury, or by not less than three commissioners appointed by the court of record, means a body of jurymen drawn by the ordinary mode of drawing jurors for service in the courts. *People v. Board of Trustees of Village of Haverstraw*, 45 N. E. 384, 386, 151 N. Y. 75; *People v. Board of Trustees of Village of Haverstraw*, 30 N. Y. Supp. 325, 326, 80 Hun. 385.

At the time of the adoption of the Constitution, providing in article 1, § 7, that "when private property shall be taken for any public use the compensation to be made therefor, when not made by the state, shall be ascertained by a jury or by not less than three commissioners appointed by the court as shall be prescribed by law," there was a known legislative usage in respect to this subject, according to which the term "jury" did not necessarily import a tribunal consisting of 12 men acting only upon a unanimous determination, but, on the contrary, the term was used to describe a body of jurors of different numbers, and deciding by majorities or otherwise as the Legislature in each instance directed. The term "jury" therefore should be considered as having been used in view of that usage, and, within such meaning, the body provided for by Laws

1847, c. 31, § 4, to be appointed on a petition for a jury of appraisers to assess the value of property to be taken, by drawing from the grand jury box of the county the names of 12 competent and disinterested jurors, which would take the official oath prescribed by the Constitution, and with power to examine witnesses and to return a verdict of such appraisers, to be signed by a majority thereof, is such a jury as provided for. *Cruger v. Hudson River R. Co.*, 12 N. Y. (2 Kern.) 190, 196, 200.

A jury of 12, drawn from the general panel, is not a legal jury, in condemnation proceedings, under Civ. Code, § 243, providing that the landowner may demand a jury of six freeholders to be drawn as provided in the succeeding sections. *Colorado Cent. R. Co. v. Humphreys*, 26 Pac. 165, 16 Colo. 34.

Act May 29, 1879 (Hurd's Rev. St. 1899, p. 699), provides for the organization of sanitary and drainage districts, and for the taking of land necessary for the establishment of drains. Section 16 provides that the assessment of compensation for land taken by a jury, and declares that the court shall impanel a jury of 12 men having the qualifications of jurors in courts of record; that the jury shall be sworn to faithfully and impartially perform the duties required of them, and to make their assessments of damages or benefits according to law. Section 17 requires the jury to examine the lands, and to ascertain the damages and benefits, and to make an assessment roll thereof. Section 19 provides that the jury shall attend before the court for the purpose of correcting their assessment; and section 20 requires them to hear all objections that may be made thereto, at which hearing section 21 authorizes the parties to appear and be heard either in person or by counsel, after which the jury is to retire and make corrections or amendments to the assessment if necessary. Held, that a jury so constituted was not a jury within the meaning of that word as used in the constitutional provision that the right of trial by jury in such cases shall remain inviolate, etc., since no provision is made for the challenging of the jurors for bias, incompetency, or other cause, and hence an assessment of damages by such a jury was void. *Wabash R. Co. v. Ocon Run Drainage & Levee Dist.*, 62 N. E. 679, 683, 194 Ill. 310.

The word "jury," as employed in Const. art. 1, § 9, providing that private property shall not be taken for public use without just compensation in money, which compensation shall be assessed by a jury, means a tribunal of 12 men, presided over by a court hearing the allegations, the evidence, and arguments of the parties, *Lamb v. Lane*, 4 Ohio St. 167, 177, and declaring the truth upon the evidence submitted, and the law given

them by the court. And a body of men provided by an act relative to the condemnation of private property for public purposes, but not authorized to hear testimony, nor subject to judicial direction in the hearing of the case or in the making up of their finding or report, are not a jury, within the meaning of the Constitution. *Smith v. Atlantic & G. W. R. Co.*, 25 Ohio St. 91, 102.

Under a constitutional provision that no municipal corporation shall take private property for public use, against the consent of the owner, without the necessity thereof being first established by the verdict of a jury, a charter providing for the appointment of a jury to view the premises proposed to be taken for public use, but not providing that such jury should be sworn before acting, was unconstitutional, for failing to provide for a legal jury. It is also held that the fact that the jury appointed in such a case were actually sworn did not render their acts any more valid than if they had acted without oath, since no indictment would lie upon such oath, however corruptly the jury might act. *Lumsden v. City of Milwaukee*, 8 Wis. 485, 486.

#### Same—Number.

The phrase "jury according to law," in a constitutional provision entitling either party appealing from a preliminary assessment of compensation for condemned lands to have the damages determined by a jury according to law, means a jury of 12 men according to the usages of the common law. *Postal Tel. Cable Co. v. Alabama G. S. R. Co.*, 3 South. 555, 92 Ala. 331.

Const. art. 12, § 4, providing that the right of trial by a jury shall be held inviolate in all trials of claims for compensation arising out of the exercise of the right of eminent domain in which an incorporated company shall be interested, refers to the historical jury of 12 men, with all its incidents. *Kansas City, C. & S. R. Co. v. Story*, 10 S. W. 203, 206, 96 Mo. 611. And consequently either party is entitled to a change of venue because of the prejudice of the inhabitants. *St. Louis, O. H. & C. Ry. Co. v. Fowler*, 20 S. W. 1069, 1071, 113 Mo. 453.

The term "jury" does not necessarily imply 12 men. There are statutes (as in case of coroner's inquest or others) which provide for a jury to consist of less than 12 persons. So it is held that under a statute providing for a jury in behalf of any person aggrieved by the doings of commissioners in the assessment of damages, the officer is not restricted to summoning only 12 persons to constitute a jury, but that, in order to insure the attendance of 12, it is not irregular to summon 14. *Fitchburg R. Co. v. Boston & M. R. Co.*, 57 Mass. (3 Cush.) 58, 85. See, also, *Lamb v. Lane*, 4 Ohio St. 167, 177;

*Smith v. Atlantic & G. W. R. Co.*, 25 Ohio St. 91, 102.

#### Justice court trials.

"Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of 12 men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict, but it is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law, and to advise them on the facts, and, except on acquittal of a criminal charge, to set aside their verdict if, in his opinion, it is against the law or the evidence. A trial by jury of 12 men before a justice of the peace, having been unknown in England or America before the Declaration of Independence, can hardly have been within the contemplation of Congress or the people in ratifying the seventh amendment to the Constitution, but in such cases the right of trial by jury is preserved by allowing a common-law trial by jury in a court of record on appeal from the judgment of the justice. *Capital Traction Co. v. Hof*, 19 Sup. Ct. 580, 585, 174 U. S. 1, 43 L. Ed. 873.

The term "jury," in Const. art. 3, § 13, providing that in suits at common law, where the value in controversy exceeds \$20, the right of jury trial shall be preserved, etc., is to be construed as meaning a common-law jury of 12 sitting in courts of record, and the clause has no application to trials in justice court. *Richmond v. Henderson*, 37 S. E. 653, 657, 48 W. Va. 389.

The word "jury," as used in the Constitution, does not mean a jury of 12 men, exclusively. A jury of 6 men in a justice court is as much a jury, in the eye of the law, as a jury of 12 men in a court of record, and is the jury which had been "heretofore used" in that tribunal at the time of the adoption of the Constitution. The constitutional provision embraces juries in justices' courts as they existed and had been used before the Constitution was adopted, and does not render unconstitutional a provision of the Code extending the jurisdiction of justices of the peace to actions of replevin, though thereby it transfers cases from courts where juries are composed of 12 men to courts in which they consist of 6 only. *Mullen, P. J.*, dissented, however, and gave *Bouvier's* definition of the word "jury," as importing a body of 12 men in a court of justice. To the same effect is cited *People v. Kennedy* (N. Y.) 2 Parker, Cr. R. 312, 317; 2 Kent, Com. 13, note "b"; *People v. Toynbee*, 13 N. Y. (3 Kern.) 378; and *People v. Carroll*, 3 Parker, Cr. R. 22. *Knight v. Campbell* (N. Y.) 62 Barb. 16, 25, 26.

The constitutional provision that "the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever" was meant to secure the continuancy of the right of trial by a common-law jury of 12 men in all cases in which a trial by a jury of 12 men was used when the Constitution was adopted. *Cruger v. Hudson River R. Co.*, 12 N. Y. (2 Kern.) 190, 198; *Wynehamer v. People*, 13 N. Y. (3 Kern.) 378, 427, 458; *Greason v. Keteltas*, 17 N. Y. 491, 498; *People v. Kennedy* (N. Y.) 2 Parker, Cr. R. 312, 321; *People v. Carroll* (N. Y.) 3 Parker, Cr. R. 22; *Warren v. People* (N. Y.) 3 Parker, Cr. R. 544; *Duffy v. People*, 6 Hill, 75, 78; *People v. Goodwin* (N. Y.) 5 Wend. 251, 253; *Murphy v. People* (N. Y.) 2 Cow. 815. Consequently the provision does not prevent the Legislature from authorizing trials to be had by a jury of less number in civil courts of local jurisdiction in actions in which the amount claimed does not exceed the limit of such jurisdiction as it was established before the Constitution went into effect. Nor does it render a statute unconstitutional which provides for a trial by a jury of 6 in a justice's court, although the amount exceeds that limit, provided the statute also allows the defendant the right to remove the case to a court where he can have a trial by a jury of 12 men. *People v. Lane* (N. Y.) 6 Abb. Prac. 105, 120.

#### JURY COMMISSIONERS.

As county officers, see "County Officer."  
As officers, see "Officers."

#### JURY DUTY.

"Jury duty is in the nature of service due from the citizen to the government, necessarily required in the administration of its laws. Its character has but little similarity to tenure, duration, power, and the right to exercise powers conferred by the appointment of government, which are essential characteristics of office, 'and not mere transient, occasional, or incidental.'" *People v. Hopt*, 4 Pac. 250, 255, 3 Utah, 396.

#### JURY LIST.

Under a statute requiring the clerk of court to furnish to the sheriff a list of the jurors and alternates selected to serve at a term of court, no intelligent clerk, having any knowledge of legal forms, would furnish the sheriff with mere lists of names. He would surely add a mandate, in the name of the state, commanding the sheriff to summon the persons named to attend court, etc., and authenticate the list with his signature and seal of office. When so made out, a list would be a process, and properly—to use a familiar legal designation—a writ of venire facias. *Williams v. Hempstead County*, 39 Ark. 176, 179.

#### JURY OF THE COUNTY.

A "jury of the county," in the language of the Bill of Rights, means a jury of 12 men. In re Powers, 25 Vt. 261, 272, note.

"Jury of the county," as used in Const. art. 1, § 6, providing that in all criminal prosecutions the accused shall enjoy the right to a trial by the jury of the county or district wherein the crime shall have been committed, only means a jury selected in the county, or some portion thereof; and hence a law providing that the list of persons selected to serve as jurors before a city justice shall be composed of the qualified electors of said city, exclusively, is not unconstitutional. *State v. Kemp*, 24 N. W. 349, 350, 34 Minn. 61.

#### JURY OF INQUEST.

A jury of inquest is a body of men, six in number, summoned from the qualified inhabitants of a particular district, before the sheriff, coroner, or other ministerial officer, to inquire of particular facts. Ann. Codes & Sts. Or. 1901, § 963; Ballinger's Ann. Codes & St. Wash. 1897, § 4734.

A jury of inquest is a body of persons summoned from the citizens of a particular city or precinct before a justice of the peace to inquire into particular facts. Rev. St. Utah 1898, § 1296.

A jury of inquest is a body of men summoned from the citizens of a particular district, before the sheriff, coroner, or other ministerial officer, to inquire of particular facts. Code Civ. Proc. Cal. 1903, § 195.

#### JURY OF THE STATE AND DISTRICT.

The expression, "jury of the state and district where the crime shall have been committed," as used in the federal Constitution (amendment 6), providing that in a criminal prosecution the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district where the crime shall have been committed, which district shall have been previously ascertained by law, applies only to the cases of offenses committed within the limits of a state, and not to offenses committed outside of a state—as within the Indian country, for example. *United States v. Dawson*, 56 U. S. (15 How.) 467, 487, 14 L. Ed. 775.

#### JURY TRIAL.

"Jury trial," within the meaning of Const. art. 2, § 28, providing that "the trial by jury as heretofore enjoyed shall remain inviolate," refers to a right well known and defined by prior adjudications on that subject, which was never extended to issues in purely equitable proceedings. The proposal

tion that the mere interposition of an equitable defense does not deprive the plaintiff of his right to a trial by jury has not been held maintainable when the answer, instead of setting up an equitable defense only, seeks affirmative equitable relief. *Grand Lodge Order of Hermann-Soehne v. Elsner*, 28 Mo. App. 108, 112.

## JURYMAN.

See "Juror."

## JUS.

Within the universal rule that "*ignorantia juris non excusat*," the word "*jus*" is used to denote the general law or ordinary law of the land, and not a private right. *Churchill v. Bradley*, 5 Atl. 189, 191, 58 Vt. 403, 56 Am. Rep. 563.

In *Cooper v. Fibbs*, L. R. 2 H. L. 149, Lord Westbury used this language: "It is said, '*Ignorantia juris haud excusat*,' but in that maxim the word '*jus*' is used in the sense of denoting general law—the ordinary law of the country—but, when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application." I am not prepared to agree with Lord Westbury that in all cases the ownership of property is to be classed among matters of fact, or that in the maxim, "*Ignorantia juris haud excusat*," "*jus*" denotes only general law—the ordinary law of the country, as distinct from the legal interpretation of private instruments. But I think it will be found to accord with the decisions, and with the safe and equitable conduct of affairs, to establish this rule that whenever the mistake of law is mutual, and the party jeopardized thereby can be relieved without substantial injustice to the other side, there equity will afford redress, especially if the party to be benefited by the mistake invokes the aid of equity to put him in a position where the mistake will become advantageous to him. *Freichnecht v. Meyer*, 39 N. J. Eq. (12 Stew.) 551, 561.

## JUS AD REM.

A *jus ad rem* is a valid claim on one or more persons to do something by the force of which a *jus ad rem* will be acquired. *The Young Mechanic* (U. S.) 30 Fed. Cas. 873, 875.

The assignment of bills of lading of goods afloat transfers the *jus ad rem*, but not necessarily the *jus in rem*. The *jus in re* or *in rem* implies the absolute dominion—the ownership independently of any particular relation with another person. The *jus ad rem* has for its foundation an obligation incurred by another. *The Carlos F. Roses*, 20 Sup. Ct. 803, 807, 177 U. S. 655, 44 L. Ed.

929 (citing *Sand. Inst. Just. Introduct. xlviii*; 2 *Marcadé Expl. du Code Napoleon* 350; 2 *Bouvier [Rawle's Rev.]* 73; *The Young Mechanic* [U. S.] 30 Fed. Cas. 873, 875); *Gilman v. Brown* (U. S.) 10 Fed. Cas. 392.

## JUS EMMINS.

"*Jus emmins*" is a term of the civil law used to designate the supreme power of the state over its members and whatever belongs to them. *Gilmer v. Lime Point*, 18 Cal. 229, 250.

## JUS IN RE.

"A *jus in re* is a right or property in a thing, valid as against all mankind." *The Young Mechanic* (U. S.) 30 Fed. Cas. 873, 875.

The *jus in re* or *in rem* implies the absolute dominion—the ownership independently of any particular relation with another person. Hence, while the assignment of bills of lading of goods afloat transfers the *jus ad rem*, it does not necessarily transfer the *jus in rem*. *The Carlos F. Roses*, 20 Sup. Ct. 803, 807, 177 U. S. 655, 44 L. Ed. 929.

A lien is not a *jus in re*. *Gilman v. Brown* (U. S.) 10 Fed. Cas. 392.

## JUS PRIVATUM.

Within the rule that the several states own the lands covered by navigable waters within their respective boundaries, and have in them double right—"jus publicum" and "*jus privatum*"—the latter right is proprietary and the subject of private ownership, but it is alienable only in strict subordination to the former. *City of Oakland v. Oakland Water Front Co.*, 50 Pac. 277, 285, 118 Cal. 160.

## JUS PUBLICUM.

Within the rule that a state holds its tide lands in the double right of a *jus publicum* and a *jus privatum*, the right *jus publicum* pertains to the political power—the sovereign domains—and cannot be irrevocably alienated or materially impaired. *City of Oakland v. Oakland Water Front Co.*, 50 Pac. 277, 285, 118 Cal. 160.

## JUST.

The word "*just*" is derived from the Latin "*justus*," which is from the Latin "*jus*," which means a right, and more technically a legal right—a law. Thus "*jus dicere*" was to pronounce the judgment; to give the legal decision. The word "*just*" is defined by the *Century Dictionary* as right in law or ethics, and in the *Standard Dictionary* as conforming to the requirements of right or of positive law, and in *Anderson's Law Dictionary*



as probable, reasonable. Kinney's Law Dictionary defines "just" as fair, adequate, reasonable, probable; and *justa causa* as a just cause, a lawful ground. *Bregman v. Kress*, 81 N. Y. Supp. 1072, 1073, 83 App. Div. 1.

#### **As true.**

A verification of a mining claim that the affiant "has read the foregoing notice, knows the contents thereof, and that said claim is true," is a sufficient compliance with the statute requiring such verification to be to the effect that the affiant believes the same to be just. *Johnston v. Harrington*, 31 Pac. 316, 318, 5 Wash. 78.

The word "just," in a statute requiring the verification to a lien notice to state that the claim is just, is satisfied by a verification reciting that the lien notice which shows a certain amount due after deducting all just credits and offsets is true. *Fairhaven Land Co. v. Jordan*, 32 Pac. 729, 731, 5 Wash. 729.

#### **As at this moment.**

As an adverb of time "just" is equivalent to "at this moment," or "the least possible time since." An allegation in an indictment that an offense has "just" come to the knowledge of an officer having authority to prosecute is, by implication, a sufficient allegation that the offense had not previously come to the knowledge of any other public officer having authority to prosecute. *State v. Hinton*, 22 South. 617, 618, 49 La. Ann. 1354.

#### **As morally just.**

"Just," as used in Laws 1866, p. 182, § 1 (Comp. Laws 155, § 200), providing that an affidavit for attachment shall show the nature of the plaintiff's claim, and that it is just, etc., should be construed to mean just in a moral sense. The claim must be morally just, as well as legally just, in order to entitle a party to an attachment. *Robinson v. Burton*, 5 Kan. 293, 301.

#### **JUST AND FAIR.**

The words "just and fair" apply to the moral qualities of acts, dealings, and transactions, and cannot be properly construed as having reference to formal legal proceedings. *People v. White* (N. Y.) 14 How. Prac. 498, 501.

The term "just and fair proceedings," in a statute providing that, on the petition of a debtor for discharge from imprisonment, he shall not be discharged unless his proceedings have been just and fair, is not limited to proceedings in court under the statute, the correctness of the petition, schedule, and account, and the truth of his oath, but the terms "just and fair" involve a more

extended inquiry, and therefore conveyances made by the debtor to defraud his creditors will preclude his discharge. *Matter of Roberts* (N. Y.) 8 Daly, 95, 97.

#### **JUST AND TRUE.**

Under a statute requiring an assignor for the benefit of creditors to make and file a full and true inventory, showing all his property at the date of the assignment, of every kind, and the incumbrances existing thereon, and the value of such property, and to make an affidavit that the same is in all respects "just and true," according to the best of such assignor's knowledge and belief, an affidavit that the inventory is "a full and true statement of all his estate" is insufficient, and not equivalent to a statement that it is just and true. *Farmer v. Cobban*, 29 N. W. 12-14, 4 Dak. 425.

The omission of the words "just and true" from an inventory by an assignor for the benefit of creditors does not invalidate the inventory, though section 4608 requires the affidavit to be to the effect that the inventory is in all respects just and true, if other words having the same effect are used. Thus an affidavit which only states that the inventory is true is sufficient, as Webster's Dictionary shows that the words "just" and "true" are synonymous. *Landauer v. Conklin*, 54 N. W. 322, 325, 8 S. D. 462.

#### **JUST AND REASONABLE TERMS.**

"Just and reasonable terms," as used in Practice Act, § 24, providing that at any time before a final judgment in civil suits amendments may be allowed on such terms as are just and reasonable, means terms which would be just and reasonable by the common-law practice. *Empire Fire Ins. Co. v. Real Estate Trust Co.*, 1 Ill. App. (1 Bradw.) 391, 394.

#### **JUST AND REASONABLE TIME.**

The return of a survey made 30 years after the survey was made will not be deemed to have been made within a "just and reasonable time." *Paxton v. Griswold*, 7 Sup. Ct. 1216, 1220, 122 U. S. 441, 30 L. Ed. 1143 (citing *Chambers v. Miffin* [Pa.] 1 Pen. & W. 74, 78).

#### **JUST AND TRUE ACCOUNT.**

Within the statute requiring the notice of a mechanic's lien to contain a just and true account of the demand due, a "just and true account" means a fairly itemized account, showing what the materials are, and the work that was done and the price charged, so that it can be seen from the face of the account that the law gives a lien therefor. *Turner v. St. John*, 78 N. W. 340, 344, 8 N. D.

245 (citing *Gwin v. Waggoner*, 11 S. W. 227, 98 Mo. 315).

"Just and true account," as used in Rev. St. 1889, § 6709, requiring a materialman to file a just and true account in order to entitle him to a lien, means an account containing all the various items and dates that go to make it up, this being the real meaning of the term. *Landau v. Cottrill*, 60 S. W. 64, 65, 159 Mo. 308.

The "just and true account" mentioned in the mechanic's lien law, requiring a person claiming such a lien to state a just and true account, means an account honestly stated. It does not require the statement of the exact account which a jury or court may find to be due. *Black v. Appolonio*, 1 Mont. 342, 346.

Rev. St. c. 90, § 79, provides that, where property of one person is attached while in the hands of another as security for a claim of the latter against a common debtor, the person so holding the property shall state in writing a "just and true account" of the debt or demand for which the property was liable to him. A mortgagee of personal property which was attached for the debt of the mortgagor demanded of the attaching officer payment of the money due him, and delivery of a judgment in writing that the property was held by the mortgagor to secure the payment of the mortgagor's note to him for a certain specified sum. Held, that the words "just and true account," as used in the statute, should not be construed to include the mortgagee's statement, since it was not a statement of the amount then due on the note, but only a description of what the mortgage was given for. *Sprague v. Branch*, 57 Mass. (3 Cush.) 575, 577.

As used in Code 1873, § 2123, requiring a statement for a mechanic's lien to contain a just and true account of the demand, a "just and true account" means a statement that is made and verified in good faith, though unintentional errors may be found to exist therein. *Ewing v. Stockwell*, 75 N. W. 657, 658, 106 Iowa, 26 (citing *Green Bay Lumber Co. v. Miller*, 98 Iowa, 468, 62 N. W. 742, 67 N. W. 383).

#### JUST CAUSE.

In an action against a railroad company for damages for having been arrested by the conductor of the train while plaintiff was a passenger thereon, an instruction which, in defining the right of a conductor as a conservator of the peace to arrest, uses the words "just cause" for "probable cause," is erroneous, for, while probable cause is just cause, just cause may be and is something else; and hence the charge is misleading so far as the jury is concerned, for it may be taken to mean full or complete cause, such as would

secure the criminal conviction of the defendant. Probable cause is a state of facts actually existing, known to the prosecutor personally or by information derived from others, which would lead a reasonable man of ordinary caution, acting conscientiously upon these facts, to believe a person guilty of an offense justifying his arrest, and is a question of law for the court. *Claiborne v. Chesapeake & O. R. Co.*, 46 W. Va. 363, 371, 33 S. E. 262, 265.

#### JUST CLAIM.

"Just claim," as used in an affidavit filed by a claimant of property, levied on under execution, stating that he has a just claim to the action, means "a title not founded in fraud, not set up to defeat the better title of others, but one that the claimant considers good, though it could be viewed only as a claim, because in the necessity of making the affidavit he had abundant proof that his title was questioned, and that he must resort to the courts of justice to establish it." *McGregor v. Hall* (Ala.) 3 Stew. & P. 397, 400.

The statement in an affidavit for attachment of the amount of the debt, and that it is on the defendant's note or bond, a copy of which is appended, showing that it was made under the defendant's seal and contained a promise to pay amount stated, is equivalent to the employment of the actual use of the words "just claim," as required by a statute. *Ludlow v. Ramsey*, 78 U. S. (11 Wall.) 581, 588, 20 L. Ed. 216.

"Just claim of the assured," as used in an insurance policy providing that the company would pay a certain sum to the insured's wife 90 days after due notice and satisfactory evidence of the death of the insured, and on the just claim of the assured, refers to the wife's claim or title to the policy, and not to the justness of her cause of action thereon. *Charter Oak Life Ins. Co. v. Rodel*, 95 U. S. 232, 237, 24 L. Ed. 433.

#### JUST COMPENSATION.

"Just," as used in reference to the just compensation which the owner of a water right is entitled to on the deprivation of such right by a city, is used in a double sense: In the first place it is used in the sense of fairness, and in the next place in the sense of limitation—just compensation. *Butler Hard-Rubber Co. v. City of Newark*, 40 Atl. 224, 232, 61 N. J. Law, 32.

"Just and reasonable compensation," as used in an agreement that solicitors should have a just and reasonable compensation for their services, means neither more nor less than the fees or compensation allowed them by law for the services. *Culley v. Hardenbergh* (N. Y.) 1 Denio, 508, 510.

The just compensation which must be paid for taking or damaging property for public purposes "is for the loss sustained in dollars and cents, and the loss must be shown, together with its amount, not necessarily with precision and accuracy, but approximately; and if damage is shown, but the amount is not approximately proved, there can be no more than nominal damages allowed. *Peoria & P. U. Ry. Co. v. Peoria & F. Ry. Co.*, 105 Ill. 110." Thus only nominal damages can be recovered by a railroad against a city for extending a street across a strip of land owned by the railroad company, and only used by it for a right of way, as the company still retains the right to use the land as before, and the possibility of it using it for other purposes is purely speculative. *Chicago & N. W. R. R. Co. v. Town of Cicero*, 41 N. E. 640, 642, 157 Ill. 48.

#### **Adequate fund and appropriate remedy implied.**

The phrase "without just compensation," within the meaning of the constitutional provision prohibiting the taking of land for public purposes without just compensation, requires that there be an adequate fund, and an appropriate remedy to enforce its application. Thus it was held that a judgment purporting to vest title to land sought to be taken by a railroad company in the company, and awarding damages to the landowner, was not sufficient to pass title to the railroad company, but actual payment of damages was necessary. *Walther v. Warner*, 25 Mo. 277.

#### **Benefits included.**

"Just compensation," within the constitutional provision that private property shall not be taken or damaged for public use without just compensation having been first made to the owner, means that compensation which was based on damages sustained and benefits received, or the excess of damages sustained over the benefits received. *Martin v. Tyler*, 60 N. W. 392, 397, 4 N. D. 278, 25 L. R. A. 838 (citing *San Francisco, A. & S. R. Co. v. Caldwell*, 31 Cal. 367, 368; *California Pac. R. Co. v. Armstrong*, 46 Cal. 85; *Nichols v. City of Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *Trinity College v. City of Hartford*, 32 Conn. 452; *State v. Graves*, 19 Md. 351, 81 Am. Dec. 639; *Page v. Chicago, M. & St. P. Ry. Co.*, 70 Ill. 324; *Harlow v. Marquette, H. & O. R. Co.*, 41 Mich. 336, 2 N. W. 48. Contra, see *Carpenter v. Jennings*, 77 Ill. 250; *Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300; *Penrice v. Wallis*, 37 Miss. 172; *Robbins v. Milwaukee & H. R. Co.*, 6 Wis. 636; *Redman v. Philadelphia M. & M. Co.*, 33 N. J. Eq. (6 Stew.) 165, 167 (cited and approved *Martin v. Tyler*, 60 N. W. 392, 398, 4 N. D. 278, 25 L. R. A. 838); *Moran v. Ross*, 21 Pac. 958, 959, 79 Cal. 549; *San Francisco, A. & S. R. Co. v. Caldwell*, 31 Cal. 367, 368, 875;

*Fisher v. Baden Gas Co.*, 138 Pa. 301, 306, 22 Atl. 29; *Whiteman's Ex'r v. Wilmington & S. R. Co. (Del.)* 2 Har. 514, 524, 33 Am. Dec. 411; *Louisiana & Frankford Plank Road Co. v. Pickett*, 25 Mo. 535, 539; *Simmons v. City of Passaic*, 42 N. J. Law (13 Vroom) 619, 621; *Betts v. City of Williamsburgh (N. Y.)* 15 Barb. 255, 256; *Alton & S. R. Co. v. Carpenter*, 14 Ill. (4 Peck) 190, 192; *Chesapeake & O. Canal Co. v. Key (U. S.)* 5 Fed. Cas. 563, 564.

Just compensation for the taking part of one entire tract of land for public use cannot be ascertained without considering all the proximate effects of the taking. These are the withdrawal of the part taken from the domain of the former owner, the damage done to the residue by the separation, and the benefit immediately accruing to the residue from the devotion of the part taken for a certain public use. What is just compensation is ascertained by combining the pecuniary value of all these facts; if any be excluded, what is given is more or less than just. *Mangles v. Hudson County Board of Chosen Freeholders*, 25 Atl. 322, 323, 55 N. J. Law (26 Vroom) 88, 17 L. R. A. 785; *Bauman v. Ross*, 17 Sup. Ct. 966, 978, 167 U. S. 548, 42 L. Ed. 270.

The requirement that just compensation shall be paid for property taken for public purposes does not require the payment of damages to the owner of property abutting on a railroad, for damages to his easements of light and air, when the result of the construction of the railroad has been to increase instead of decrease the value of his property; and the result is the same, even though the increase is common to all the neighboring property, and is greater to property on side streets than on the street on which the road is constructed. *Bohm v. Metropolitan Elevated Ry. Co.*, 29 N. E. 802, 805, 129 N. Y. 576, 14 L. R. A. 344.

The term "just compensation," in the Constitution, prohibiting the taking of property for public use without just compensation, does not mean that the property so taken shall be valued and its price paid in money, but that the individual who claims to be a sufferer in consequence of the exercise of the right of eminent domain over his property shall be recompensed for the actual injury which he may have sustained, all circumstances considered, by the measure of which he complains. In ascertaining the question of the injury, undoubtedly an estimation of the value of the property taken at the time of the taking is a necessary step; but if the benefits, real and substantial, resulting to the complainant, are equal in pecuniary value to the value of that of which the public has deprived him, they constitute a just and constitutional compensation for the deprivation to which he has been subjected. *Putnam v. Douglas County*, 6 Or. 328, 332, 25 Am. Rep. 527.

Where a strip is taken out of a farm, in estimating the damages to the balance the inconvenience to which the owner is put, and the danger to which he and his family and his stock are exposed in passing from one part of the farm to the other, would compose the elements for assessing the damages. Against these should be set off the facilities afforded by the road and a convenient depot for getting the products of the farm to market, and, if that be grain or pork, they would be considerable, and can be approximated by witnesses. The actual increase in the market value of the land, if caused by the railroad, should also be estimated and set off against the damages. *Wilson v. Rockford*, R. I. & St. L. R. Co., 59 Ill. 273, 275, 276.

#### Same—Contra.

The term "just compensation," in Const. art. 10, § 12, providing that private property shall not be taken or applied to public use without just compensation, means the "actual value of the property in money, without any deduction on account of profit or advantages which may be expected to accrue to him from the public use of the property." *Jacob v. City of Louisville*, 39 Ky. (9 Dana) 114, 33 Am. Dec. 533.

In Rev. Const., declaring that private property shall not be taken for public use unless just compensation be made therefor, "just compensation" means a recompense in value equal to the property taken, and quid pro quo paid in money. Any benefit to the remaining property of the owner of the property taken, arising from public works for which a part has been taken, cannot be considered as compensation. *Alabama & F. R. Co. v. Burkett*, 42 Ala. 83, 89.

#### Same—Future or prospective benefits.

In Bill of Rights, § 13, which declares that no personal property shall be taken for public use without "just compensation being first made" therefor, "just compensation" means an equivalent in money for the injury or deprivation of right thus inflicted. "That equivalent should not only be in money, but should be immediate. That compensation is the present injury sustained by such deprivation of right, without regard to future or prospective benefits, or to the unreal advantages likely to accrue on account of the contemplated construction of the road in the future." *Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300, 312.

#### Costs of action to obtain included.

The just compensation to which a property owner is entitled on the taking or damaging of his property for public purposes includes costs of an action to obtain a judgment for damages for lands so taken or damaged. *Epling v. Dickson*, 48 N. E. 1001, 1003, 170 Ill. 329.

#### Damages to land not taken included.

"Just compensation," as used in the Bill of Rights, requiring just compensation to be made for private property taken for public purposes, means the cash value of the land taken, and also damages to adjacent land as a result of such taking. *Brown v. Beatty*, 34 Miss. 227, 242, 69 Am. Dec. 389.

The statute requiring a just compensation to be made for land taken requires the paying to the owner thereof, not only the value of the portion taken, but also the diminution of the value of that from which it is severed. *Grantier v. Rosecrance*, 27 Wis. 478, 488 (citing *Rochester & Syracuse R. Co. v. Budlong* [N. Y.] 6 How. Prac. 467).

"Just compensation," within the provision of the Constitution providing for just compensation for property taken for public use, includes not only the value of the parts of the lot actually taken, but the injury to remaining lots or parts of lots. Just compensation includes more than the mere value of what is taken. *Commissioners' Court of Colbert County v. Treat*, 22 So. 629, 631, 116 Ala. 28.

The "just compensation" to which the owner of land taken in condemnation proceedings is entitled means making the owner good by an equivalent in money for the loss he actually sustains in the value of his property by being deprived of a portion of it. It includes not only the value of the land condemned, but the value of that from which it is severed. *Lafin v. Chicago, W. & N. R. Co.* (U. S.) 83 Fed. 415, 417.

"We understand it to be now well settled in this state that the principle upon which compensation is to be made to the owner of land taken for railroad purposes by proceedings under the general condemnation law is that such owner shall receive not only the value of the land actually taken, but likewise a fair and adequate compensation for all injury to the residue of his land resulting from the construction and operation of the railroad." *Newman v. Metropolitan El. R. Co.*, 118 N. Y. 623, 23 N. E. 901, 7 L. R. A. 289; *Bohm v. Metropolitan R. Co.*, 129 N. Y. 585, 27 N. E. 802, 14 L. R. A. 344; *In re Grade Crossing Com'rs of City of Buffalo*, 6 App. Div. 327, 40 N. Y. Supp. 520; *Id.*, 17 App. Div. 54, 44 N. Y. Supp. 844. The reason for this rule is obvious, for it is just as much a taking of property, within the spirit of the Constitution, to deprive the owner of land of its fair use and to diminish its value by the construction of an embankment, as it is to enter into physical possession and occupation thereof, and, consequently, upon no other principle can the provision of the Constitution forbidding the taking of private property for public purposes without just compensation be satisfied. *Rome, W. & O.*

R. Co. v. Gleason, 59 N. Y. Supp. 647, 649, 42 App. Div. 530.

Under the constitutional provision that private property shall not be taken for public use without "just compensation," where a part of a tract of land is taken for a public street the owner should receive, first, the full value of the land taken, and, second, a fair and adequate compensation for all injury to the residue, sustained or to be sustained by the construction and effect of the improvement upon it. In re Grade Crossing Com'rs of City of Buffalo, 40 N. Y. Supp. 520-531, 6 App. Div. 327.

"Just compensation," within the meaning of the clause of the Constitution forbidding the taking of private property for public purposes without just compensation, is not limited to the value of the property actually taken, but is held to include all consequential injuries which the landowner may sustain by reason of depreciation in value of the residue of the property by reason of the taking of a part and the construction thereon of the public improvement. *Newman v. Metropolitan Elevated R. Co.*, 23 N. E. 901, 903, 118 N. Y. 618, 7 L. R. A. 289. See, also, *Moran v. Ross*, 21 Pac. 958, 959, 79 Cal. 549; *Mangles v. Hudson County Board of Chosen Freeholders*, 25 Atl. 322, 323, 55 N. J. Law (26 Vroom) 88, 17 L. R. A. 785; *Bauman v. Ross*, 17 Sup. Ct. 966, 978, 167 U. S. 548, 42 L. Ed. 270.

**As difference in value before and after taking part.**

The term "just compensation," as used in the rule that just compensation must be paid for property taken or destroyed for public use, is in any given case a mixed question of law and fact. The law provides a general formula, and the jury applies this formula to the facts in each particular case. The just compensation is such a sum as shall equal the difference between the fair market value of the property entered before the entry and after it. *Spring City Gas Light Co. v. Pennsylvania S. V. R. Co.*, 31 Atl. 368, 369, 167 Pa. 6.

The term "just compensation" in the Constitution, requiring payment of just compensation for property taken for public purposes, means, in respect to real estate, part of which is so taken, the difference between the value before the taking and its value thereafter. *Putnam v. Douglas County*, 6 Or. 328, 331, 25 Am. Rep. 527.

**As fair cash value.**

"Just compensation," as used in Const. art. 1, § 21, requiring just compensation to be paid for property taken for public purposes, means "the fair cash value of the land taken for public use, estimated as if the owner were willing to sell, and the corpora-

tion desired to buy, that particular quantity at that place and in that form." *Alloway v. City of Nashville*, 13 S. W. 123, 88 Tenn. (4 Pickle) 510, 8 L. R. A. 123. "It is not in the nature of a wrongful taking for which the damages are to be assessed, nor is it a claim for any wrong or damage done, but the appropriation of the property is legal and rightful, as much so as if the owner had validly sold it to the company, and the only open question was what is a fair price for the property." *Woodfolk v. Nashville & O. R. Co.*, 32 Tenn. (2 Swan) 422, 437.

**As full and exact equivalent.**

"Just compensation," in the clause of the Constitution providing that private property shall not be taken for public use without just compensation, means "a full and perfect equivalent for the property taken. The noun 'compensation,' standing by itself, carries the idea of an equivalent, so that if the adjective 'just' had been omitted, and the provision was simply that the property should not be taken without 'compensation,' the natural import of the language would be that the compensation should be equivalent to the property, and this is made emphatic by the adjective 'just.'" *Monongahela Nav. Co. v. United States*, 13 Sup. Ct. 622, 626, 148 U. S. 312, 37 L. Ed. 463.

"Just compensation," in Const. art. 1, § 8, forbidding the taking of private property without just compensation, means "that the equivalent to be rendered for the property taken shall be real, substantial, full, ample." *Virginia & T. R. Co. v. Henry*, 8 Nev. 165, 171.

"Just compensation" to be paid for land taken or damaged for public purposes means the payment of such sums of money to the owners of property proposed to be taken or damaged as will make them whole, so that, on receipt by such owners of the compensation and damage reward, they will not be poorer by reason of their property being so taken or damaged. *Metropolitan West Side Elevated Ry. Co. v. Stickney*, 37 N. E. 1098, 1104, 150 Ill. 362, 26 L. R. A. 773; *Phillips v. Town of Scales Mound*, 63 N. E. 180, 183, 195 Ill. 353.

The words "just compensation," in the charter of a city and its ordinances in reference to the paying of a just compensation for property taken, has the same meaning which that phrase has when used in the federal and state Constitutions with respect to the exercise of the right of eminent domain, and, when thus used, "means a fair and full equivalent for the loss sustained by the taking for public use." *Grand Ave. Ry. Co. v. People's Ry. Co.*, 33 S. W. 472-475, 132 Mo. 34 (citing *Lewis, Em. Dom. § 462*, and authorities cited).

The term "just compensation," within the rule that a property owner injured by change in grade is entitled to just compensation, means that which will be an exact equivalent for the injury. The injured party is to be made whole, as far as money is a measure of compensation; no more and no less. This is the essential meaning of the term "just compensation," whether reference is had to its use in the constitutional guaranty in favor of those whose property is taken for public uses, or as the recognized basis of all general rules respecting damages. *Chase v. City of Portland*, 29 Atl. 1104, 1107, 86 Me. 367.

The "just compensation" to which one whose land is taken for a public use is entitled should be exactly commensurate with the injury sustained by having the property taken, neither more nor less. *Henry v. Dubuque & P. R. Co.*, 2 Iowa (2 Clarke) 288, 300.

#### As market value.

Under Const. art. 13, § 12, declaring that no man's property shall be taken or applied to public use without just compensation being made to him, commissioners appointed to assess the damages for land taken by a railroad company, in fixing the compensation for the land actually taken, must take into their consideration the market value of the land, which can always be approximated. This value would be the measure of the compensation guaranteed by the Constitution. *Wilson v. Rockford, R. I. & St. L. R. Co.*, 59 Ill. 273, 275.

"Just compensation," as used in the impressment act, requiring a just compensation to be paid for property seized, means an equivalent, a recompense in value for the property taken; what the article would sell for in the market, quality and quantity considered, and not the price which the owner might demand, or which some person for especial reason might be willing to give. *Yulee v. Canova*, 11 Fla. 9, 10, 58.

The "just compensation" which is guaranteed by the Constitution to the owner whose property is to be taken or damaged for public use is its market value, and the market value of land is determined by a consideration of all the uses to which it may be applied, as well as the purposes for which it is adapted. For the purpose of ascertaining this value, it is proper to show its condition and surroundings, the uses to which it has been applied, and its capabilities for other uses, including that for which its condemnation is sought. Its value is not limited either by that of its present use or by the use for which it is sought, since either of these may be less than its market value. The owner is entitled to its highest market value for any use to which it is adapted, and any advan-

tage that the property has, present or prospective, and for which it may be available, constitutes an element in its value which is to be considered by the jury in determining the compensation to be awarded him, and which the owner is entitled to show to the jury by any competent evidence. *Spring Valley Waterworks v. Drinkhouse*, 92 Cal. 528, 536, 28 Pac. 681, 683.

#### As money equivalent.

The term "just compensation," in the Constitution, forbidding the taking of property without just compensation, means a fair price, or the value in money for the property taken. *Woodfolk v. Nashville & C. R. Co.*, 32 Tenn. (2 Swan) 422, 435.

"Just compensation," in Const. art. 1, § 16, providing that where private property is taken for public purposes just compensation shall be made before the property is appropriated, means that compensation shall be made in money, and that a fair valuation of the property taken, and the amount of such valuation in money, shall be paid to the individual before his property can be taken from him. *Carson v. Coleman*, 11 N. J. Eq. (3 Stockt.) 106, 108.

"Just compensation," in the Constitution, prohibiting the taking of property for public use without just compensation, means a fair equivalent in money, a quid pro quo. It is a recompense in value for the property taken. *Bloodgood v. Mohawk & H. R. R. Co.* (N. Y.) 18 Wend. 9, 34, 31 Am. Dec. 313.

"Just compensation," within the fifth amendment of the federal Constitution, declaring that private property shall not be taken for public use without just compensation, means "any appropriate compensation in money or benefits, providing the compensation is a just one, a fair equivalent for the property parted with." *People v. Daniels*, 22 Pac. 159, 162, 6 Utah, 288, 5 L. R. A. 444.

"Just compensation," as used in Const. 1875, art. 2, § 21, declaring that private property shall not be taken for public use without just compensation, means a sum of money which makes the owner whole, and, in respect to general benefits or damages resulting from the improvements, leaves him in as good a situation as his neighbor whose property is not damaged. In *re Wyandotte and Central Sts.*, 23 S. W. 127, 130, 117 Mo. 446 (citing *Lewis*, Em. Dom. § 471).

In the constitutional provision that the property of no person shall be taken for public use without just compensation, "just compensation" means pecuniary recompense to the person whose property is taken, equivalent in value to the property. The restriction is upon the right of eminent domain, not upon the right of taxation. *Chicago, B. & Q. R. Co. v. County of Otoe*, 83 U. S. (16 Wall.) 667, 674, 21 L. Ed. 375.

"Just compensation," as used in a statute requiring railroads to make just compensation for property taken, means that the sum allowed and paid to the owner whose property is taken shall be equivalent to the value of that of which he has been deprived. *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273, 283, 53 Am. Rep. 622.

In *Rev. Const.*, declaring that private property shall not be taken for public use unless just compensation be made therefor, "just compensation" means a recompense in value equal to the property taken, a quid pro quo paid in money. *Alabama & F. R. R. Co. v. Burkett*, 42 Ala. 83, 89.

In *Bigelow v. West Wisconsin R. Co.*, 27 Wis. 478, it is said that just compensation "consists in making the owner good by an equivalent in money for the loss he sustains in the value of his property by being deprived of a portion of it." *Grand Ave. Ry. Co. v. People's Ry. Co.*, 33 S. W. 472-475, 132 Mo. 84.

In *Bill of Rights, § 13*, which declares that no personal property shall be taken for public use without just compensation being first made therefor, "just compensation" means an equivalent in money for the injury or deprivation of right thus inflicted. *Isom v. Mississippi Cent. R. Co.*, 86 Miss. 300, 312.

"Just compensation," within the meaning of *Const. art. 1, § 13*, which provides that private property shall not be taken for public use without just compensation, means that the person whose property is so taken shall have the fair equivalent in money for the injury done by such taking. This just compensation should be exactly commensurate with the injury sustained by having the property taken, neither more nor less. *Henry v. Dubuque & P. R. Co.*, 2 Iowa (2 Clarke) 288, 300. See, also, *Lafin v. Chicago, W. & N. R. Co.* (U. S.) 33 Fed. 415, 417.

#### Necessity of appropriation.

The "just compensation" which a railroad is required to pay for land condemned is not a compensation to be regulated by the necessities which may compel its appropriation for a public use. The actual value in money, to be ascertained by its location, the price at which similar land may be or has been sold in its vicinity, or what it would itself sell at, is the measure of damages. Thus the full value of the land should be given, and in ascertaining such value everything which actually enhances its present value should be taken into consideration, but not the fact that it is necessary or indispensable for the railroad to have it. *Virginia & T. R. Co. v. Elliott*, 5 Nev. 358, 365.

#### Speculative damages.

The "just compensation" to which a railroad company is entitled, on condemna-

tion by a city of its land, right of way, and tracks for the purpose of extending a certain street across the right of way, means compensation for real, and not speculative, damages, and, unless actual damages are shown, only nominal damages can be awarded. *Chicago & A. R. Co. v. City of Pontiac*, 48 N. E. 485, 490, 169 Ill. 155.

#### JUST DAMAGES FOR DELAY.

"Just damages for delay," referred to in *Supreme Court Rule No. 29*, relating to appeals, is a provision for other indemnity than that included in the term "damages and costs," or "costs and interest on appeal." The liability of obligors upon a supersedeas bond given in a suit to foreclose a mortgage was considered elaborately in *Kountze v. Omaha Hotel Co.*, 108 U. S. 378, 2 Sup. Ct. 911, 27 L. Ed. 609, and the true meaning of the term "just damages for delay" defined as those arising from a deterioration of property pending an appeal by waste, want of repair, or the accumulation of taxes or other burdens upon it. *The Sydney* (U. S.) 47 Fed. 260, 263.

#### JUST DEBTS.

The case of *Burke v. Jones*, 2 Ves. & B. 275, referred to with approbation by Chancellor Kent in *Rosvelt v. Mark* (N. Y.) 6 Johns. Ch. 268, 294, and by Chief Justice Savage in *Rogers v. Rogers* (N. Y.) 3 Wend. 503, 518, 20 Am. Dec. 716, decides that the phrase "just debts" in a will did not include demands, as to which the statute of limitations had taken effect at the death of the testator, but must mean to be only such debts as shall turn out to be his just debts. *Martin v. Gage*, 9 N. Y. (5 Seld.) 398, 401; *Rogers v. Rogers* (N. Y.) 3 Wend. 503, 20 Am. Dec. 686.

"Just debts," as used in a will wherein testator directed all his just debts to be paid, is merely an expression of a desire on the part of the testator, expressed to his executor, that his "just debts" shall be paid, which is a matter within the discretion of the administrator, and does not revive a debt barred by the statute of limitations. *Smith v. Porter* (Pa.) 1 Bin. 209, 211.

Where a clause in a will directed that all the just debts of testator be paid, the phrase "after all my just debts are paid" should be construed as used by the testator in compliance with the universal custom, having its origin in the solemnity which attends a final disposition of earthly concerns, and does not mean that any debt barred by the statute of limitations is to be revived. *Peck v. Botsford*, 7 Conn. 172, 176, 18 Am. Dec. 92.

A will requiring that the executor shall "pay the just debts" of the deceased, out of

the estate should not be construed to force the payment of a just debt held by a person who neglected the legal proof of his demand until more than three years had elapsed after the issuance of letters testamentary, and until after the estate has been finally settled according to law, and the administration closed. The words will not strip the estate of a just defense. *Collamore v. Willder*, 19 Kan. 67, 82.

Where a testator directed that his just debts should be paid, it was held that the expression "just debts" only included debts for which the testator was legally liable, so that a promissory note given for a valuable consideration, but not for necessities, before testator became of legal age, and a part of which he paid before coming of age, was not a "just debt" within the meaning of the will. *Smith v. Mayo*, 9 Mass. 62, 63, 6 Am. Dec. 28.

A decree enforcing a secret trust, which provided that complainant should take the property subject to the payment therefrom of "all just debts" against the defendant which might be determined by due process of law, meant debts of bona fide creditors over a secret and hidden equity of which they knew nothing. *Buck v. Webb*, 3 Pac. 211, 212, 7 Colo. 212.

"Just debts," as used in 2 Rev. St. (7th Ed.) p. 991, § 10, providing that an administrator assessed for taxation as to the personal property held in his representative capacity is entitled to have any just debt owing by him in such representative character deducted therefrom, means legal, valid, and incontestable obligations. *People v. Tax Com'rs*, 1 N. E. 401, 402, 99 N. Y. 154.

#### JUST EXCUSE.

It is a "just and legal excuse" within the meaning of How. Ann. St. § 3224, providing a penalty against railroad companies for failing to stop at stations to let off passengers, except for a just and legal excuse, that it was after dark, the snow was deep and drifting, and that, as the engineer and conductor knew, a freight train was close behind, and the only place near the station where the passenger train could stop without danger of being stalled by the snow was on a bridge and elevated track. *Reed v. Duluth, S. S. & A. R. Co.*, 59 N. W. 144, 100 Mich. 507.

#### JUST GROUND.

The word "just" has various meanings, but the connection in which it is used in an instruction in relation to justifiable homicide, where the circumstances were such as to afford the accused "just and reasonable grounds for believing himself to be in dan-

ger of death," seems to be based upon the definition "rightful, legitimate, well founded," given in the Century Dictionary. When so construed, just ground for believing must necessarily be reasonable ground. *Francis v. State*, 70 S. W. 751, 753, 44 Tex. Cr. R. 246.

#### JUST PROVOCATION.

In *State v. Ellis*, 74 Mo. 207, the doctrine is laid down that, in order to reduce what could otherwise be murder in the first degree to manslaughter, there should be a "lawful" or "reasonable" provocation, as, for example, a blow; but that in order to reduce what would otherwise be murder in the first degree, in order to eliminate from it the element of deliberation and bring it down to murder in the second degree, grievous and degrading words of reproach would amount to "just provocation," as contradistinguished from "lawful and reasonable provocation." Under this principle, though it may be difficult to understand how there can be a just provocation which is neither lawful nor reasonable an instruction that the offense of killing willfully, premeditatedly, and with malice aforethought, but without the element of deliberation, will constitute murder in the second degree, and that the use of offensive, insulting, or degrading language addressed to the defendant by the deceased would rob the homicide of deliberation, and by reason of so doing amount to just provocation, did not contain any error of which the defendant could complain. *State v. Stephens*, 10 S. W. 172, 177, 96 Mo. 637.

#### JUST TITLE.

Within the law of Spain providing that prescription should be based on "good faith, just title and capacity of the thing for the purpose and of the person who prescribes," "just title" consists in the cause or consideration by which possession of the thing is obtained being one of those by reason of which dominion is acquired, as purchase, gift, inheritance, etc. *Kennedy's Ex'rs v. Townsley's Heirs*, 16 Ala. 239, 248.

The term "just title," within the meaning of the Louisiana rule of law that to entitle a person to claim the benefit of any prescription he must have acquired the immovable in good faith and by a just title, is not meant that which has been derived from the true owner, but that which has been received from any person whom the possessor honestly believed to be the true owner, provided it was such as to transfer the ownership of the property; that is, such as by its nature would have been sufficient to transfer the ownership if it had been derived from the real owner, such as a sale, exchange, legacy, or donation. Civ. Code



arts. 3484, 3485; *Davis v. Gaines*, 104 U. S. 386, 400, 28 L. Ed. 757. And where a sheriff has authority to sell under execution, and does sell, and executes a deed to the purchaser, the latter, if a purchaser in good faith, has a just title, authorizing the setting up of prescription of five years under the statute, though there might have been good grounds for annulling the sale. *Pike v. Evans*, 94 U. S. 6, 9, 24 L. Ed. 40. One in possession of land under a pre-emption entry and patent from the United States is in possession under a "just title," and is not charged with notice that the lands were swamp lands 20 years prior to the patent, and as such had passed under a prior act of Congress granting swamp lands to the state, nor with notice that the land was within the territorial limits of a town. *Texas & P. R. Co. v. Smith*, 15 Sup. Ct. 994, 995, 159 U. S. 68, 40 L. Ed. 77.

In the meaning of the Mexican law, a possessor in good faith is he who by a "just title," such as sale, gift, or legacy, has acquired a thing from one whom he believed to be the owner or to have the right to sell it (*Escrache*, Dic. de Leg., art. "Poseedor de Buena Fe;" 1 Feb. Tapla, 232), and believing at the same time that he who sold it had the power or faculty of selling (*Escrache*, as last cited). The possessor in bad faith is he who has under his control a thing which belongs to another, with the intention of appropriating it to himself, without a title which is translativo of dominion, and he who holds a thing by virtue of a regular title (*titulo legitimo*), but derived from a person who he knew had not the power to sell (*Escrache*, Dic. de Leg. art. "Poseedor de Mala Fe"). The amount of this is that, if the title be regular and fair on its face, and the purchaser had no reason to suppose that the vendor had not the capacity to convey, the possession is under just title and in good faith; but if the title be defective on its face, or the purchaser knew that the vendor lacked the capacity to sell, the possession is not in good faith, nor under just title; or, to express the result in common-law language, if the title be colorable, it may be adduced to show possession of land beyond the actual occupation, and to the extent of the boundaries mentioned in the deed. *Sunol v. Hepburn*, 1 Cal. 254, 272, 273.

By the term "just title," in Private Land Act, § 13, subd. 2, providing that no claim shall be allowed that shall interfere or overthrow any just and unextinguishable Indian title or right, is meant only a title which is good upon its face or not manifestly frivolous, not one which will ultimately turn out to be valid. It applies to an Indiana claim or title which has been confirmed by Congress. *United States v. De la Paz Valdez de Conway*, 20 Sup. Ct. 18, 17, 175 U. S. 60, 44 L. Ed. 72.

## JUST VALUATION.

The word "just," in Const. art. 10, § 10, requiring the General Assembly to provide such regulations as shall secure a just valuation for taxation of all property, real and personal, is used as the equivalent of "correct," "honest," and "true." Its use requires the valuation of all property of the same kind in the same taxing district by a uniform and equal standard. *State v. Smith*, 63 N. E. 214, 216, 158 Ind. 543, 63 L. R. A. 116.

## JUST VALUE.

The "just value" at which selectmen shall appraise taxable property is the market value of the property. *Winnipiseogee Lake Cotton & Woollen Mfg. Co. v. Town of Gifford*, 35 Atl. 945, 946, 67 N. H. 514.

## JUSTLY.

"Justly," as used in Laws 1880, c. 557, § 1, requiring that, as to work done on certain streets by a municipal corporation, certain specified officers thereof shall certify that the expense was justly and actually incurred, should be construed to have no special significance so far as the property owners are concerned. There is no suggestion that the certificate of these officers as to the justice of the expenditure is to be conclusive in a judicial sense, any more than their certificate as to the actual expenditure, and the word "justly" should not be construed as conferring any judicial power or privilege. *In re Cullen*, 6 N. Y. Supp. 625, 627, 53 Hun. 534.

Section 1, c. 106, Code, among other things, prescribes that the affidavit made for the purpose of having an order of attachment shall state the nature of the plaintiff's claim, and the amount, at the least, which the affiant believes the plaintiff is "justly entitled to recover." Held, the term "justly" is not superfluous or insignificant, but is a material qualification of the rest of the phrase "entitled to recover," and it or its equivalent must be used in order to constitute a substantial compliance with the statute. *Reed v. McCloud*, 18 S. E. 924, 925, 38 W. Va. 701.

The term "justly," as used in the consideration of what a plaintiff in attachment is "justly entitled to recover," includes not only what in good faith to the debtor he is entitled to recover, but also what he is entitled to recover in good faith and justice to other creditors. *Crim v. Harmon*, 18 S. E. 753, 755, 38 W. Va. 596.

The term "justly indebted" means no more than indebted, as, according to the common legal acceptance, the latter term means legally indebted; therefore the emis-

sion of the word "justly" in an attachment affidavit stating that defendant is indebted, etc., does not invalidate the verification. *Livengood v. Shaw*, 10 Mo. 274, 276.

### JUSTLY DUE AND OWING.

"Justly due," as used in Gen. St. c. 123, § 67, authorizing the determination of the amount justly due on a mortgage in attachment, is such a sum as will fully secure the mortgagee against all contingent future liabilities covered by the mortgage. *Rogers v. Abbott*, 128 Mass. 102.

"Justly due" does not necessarily mean "justly due and presently payable," but only means that there is a just indebtedness; but it may be this and yet it may be debitum in presenti solvendum in futuro, and, as used in the statute relating to proving claims against an estate, refers to the validity of the claim, not to the time of its payment. *Cassatt v. Vogel*, 12 Mo. App. 323, 326.

The words "justly due and owing," in a statement in a claim against the decedent's estate that a certain sum is justly due and owing, is but another mode of saying that it is justly due and wholly unpaid. *Taggart v. Tevanny*, 27 N. E. 511, 513, 1 Ind. App. 339.

### JUSTICE.

See "Fleeing from Justice"; "Natural Justice"; "Right and Justice"; "Substantial Justice."  
See, also, "Injustice."

"Justice" is the dictate of right, according to the consent of mankind generally, or of that portion of mankind who may be associated in one government, or who may be governed by the same principles and morals. *Duncan v. Magette*, 25 Tex. 245, 253.

"Justice," says Vattel: "Is the basis of a state; a sure bond of all commerce. Human society, far from being an intercourse of assistance and good offices, would be no longer anything but a vast scene of robbery, if there were no respect of this virtue, which secures to every one his own. It is still more necessary between nations than between individuals, because injustice produces more dreadful consequences in the quarrels of these powerful bodies politic, and it is still more difficult to obtain redress." Charge to Grand Jury, Neutrality Laws (U. S.) 30 Fed. Cas. 1021, 1022.

"Justice," the establishment and enforcement of which is the object of all law, is a comprehensive term, in which are included the three great objects for which, according to our Declaration of Independence, governments among men are instituted.

Whatever rule of the unwritten law, therefore, is at variance with this great purpose of justice—the security of life, liberty, and the pursuit of happiness—is one not suited to our condition and circumstances. *State v. Williams* (Del.) 18 Atl. 949, 950, 9 Houst. 508.

In a judicial sense, justice is nothing more or less than exact conformity to some obligatory law; and all human actions are either just or unjust as they are in conformity to or in opposition to law. *Borden v. State*, 11 Ark. (6 Eng.) 519, 523, 44 Am. Dec. 217 (citing *Burlamqui*).

Code, § 3121, provided that on an appeal from a justice of the peace the case shall be tried "according to equity and justice." Held, that the term "equity and justice," as there used, meant that a mere technical objection not affecting the merits, such as defects in the summons or other process before the justice, should not be regarded as material on the appeal. *Abrams v. Johnson*, 65 Ala. 465, 470.

#### Question of jurisdiction.

The word "justice," as used in the rule that habeas corpus is not available to inquire into the mere legality or justice of a judgment or mandate, is not deemed to include questions of jurisdiction or power, and the want of jurisdiction of the tribunal to pronounce the judgment or mandate by which the person is placed and detained in custody furnishes to him the right to resort to the writ for relief. *People v. Stout*, 30 N. Y. Supp. 898, 902, 81 Hun. 336.

#### Law distinguished.

The term "justice," in Supreme Court Rules in Admiralty No. 43, under Act Cong. 1844, requiring the court to proceed summarily to hear and decide the claims of any person to an interest in any fund in the registry of the court, and to decree therein according to law and justice, must be construed to mean something beyond mere technical legal rights covered by the word "law." They are intended to embrace all recognized equitable rights as well as mere demands at law, and hence, where one who makes a claim to a part of the fund derived from a sale of the vessel in the registry of the court was a managing part owner, an account of the vessel's earnings in his hands will be required as an incident to the principal cause, when justice requires such an account in order to make a just distribution of the fund in the registry of the court. *The John E. Mulford*, 18 Fed. 455, 458.

#### As hearing and decision free from prejudice.

In a statute directing a removal of a cause begun in a state court to a federal

court when it shall be made to appear that from prejudice or local influence the defendant will not be able to obtain justice in the court in which the action was brought, etc., the word "justice" does not mean a judgment or decree in his favor. The word does not refer to any particular result in the case, but rather to the influence which will operate on the tribunal in deciding it. The "justice" which the defendant has the right to obtain is a hearing and decision by a court wholly free from and not exposed to the effect of prejudice and local influence. *City of Detroit v. Detroit City Ry. Co.* (U. S.) 54 Fed. 1, 18; *Montgomery County v. Cochran* (U. S.) 116 Fed. 985, 992.

#### JUSTICE (An Officer).

See "Presiding Judge—Presiding Justice."

Any justice, see "Any."

A justice is a person duly commissioned to hold court, and to try and decide controversies and administer justice. The word "justice" is used interchangeably with "judge," so that, under Civ. Code, § 2744, providing that a mortgage may be attested by a notary public or justice of any court in the state, the word "justice" is used interchangeably with "judge," and a judge of the superior court is authorized to attest mortgages. *Stranus v. Maddox*, 34 S. E. 355, 109 Ga. 223.

"Justice," as used in the Code, is synonymous with "judge." Hence a justice of the Supreme Court is included in the term "judge," as used in Code, § 362, providing that no order to stay proceedings for a longer time than 10 days shall be granted by a judge out of court, except on previous notice to the adverse party. *Lowe v. Cheney* (N. Y.) 1 Code Rep. 29, 39.

The word "justice" means officer of the county in which the action is brought or is pending, or in which the proceeding is had, or to whom the process is directed. *Sand. & H. Dig. Ark.* 1893, § 7212.

#### Court commissioner.

"Justice or magistrate," in Rev. St. § 4809, giving an accused person the right to have his case removed, on proper affidavit of prejudice, from a magistrate before whom he has been brought for preliminary examination to the nearest justice or magistrate, means what the words ordinarily import, as including all who come under the classification "justice or magistrate," and hence the statute is not sufficiently complied with by an order moving the case merely to the nearest court commissioner, the latter being one only of a class of magistrates having jurisdiction. Such order gives the accused only a part of the right to which he is entitled,

since a court commissioner is merely one class of persons who comes under the words "justice or magistrate." *State v. Sorrenson*, 53 N. W. 1124, 1125, 84 Wis. 27.

#### Justice of the peace.

The word "justice," when applied to a magistrate, means "justice of the peace." Civ. Code Ala. 1896, § 4; Rev. St. Tex. 1895, art. 3270; Ky. St. 1903, § 447; Code W. Va. 1899, p. 133, c. 13, § 17; Pen. Code Ga. 1895, § 2; Code Va. 1887, § 5; Code Supp. Va. 1898, § 5.

The word "justice," as used in statutes, when applied to a magistrate shall mean the justice of a police court or justice of the peace having jurisdiction over the subject-matter. Pub. St. N. H. 1901, p. 63, c. 2, § 12.

The word "justice," when applied to a magistrate, shall mean a justice of the peace for the county for which he is appointed. V. S. 6.

The word "justice," in Rev. Laws, § 1402, providing that, where an action is brought against a nonresident defendant, he may be notified of its pendency by delivering to him copies of the process and pleading and of an order for such delivery, stating the time and place when and where he is required to appear, all under the hand of the clerk of court or of a judge or "justice" thereof, should be construed to include a justice of the peace, there being no judicial officer known to the law as a "justice," except the justice of the peace. *Hogle v. Mott*, 20 Atl. 276, 277, 62 Vt. 255, 22 Am. St. Rep. 106.

#### Mayor.

The word "justice" is not a general term applicable alike to all courts having jurisdiction of minor offenses, but is used throughout the statutes as applicable to justices of the peace, and not to mayors or judges of police courts or other officers. So that, under a statute permitting a change of venue from one justice to the next nearest justice in the township, an order changing the venue to the mayor of a town is erroneous. *State v. Jamison*, 69 N. W. 529, 530, 100 Iowa, 342.

#### JUSTICE COURT.

As court of record, see "Court of Record."

Justice courts in North Dakota, both under the Constitution and the Code of the state, are courts of limited jurisdiction. The jurisdiction of these courts is limited not only with respect to the subject-matter of their jurisdiction, but with respect to the amount in controversy, and also with respect to the territory over which their jurisdiction may be exercised and their processes served. *Seari v. Shanka*, 82 N. W. 734, 735, 9 N. D. 204.

A "justice court" is not only a court of limited jurisdiction, but its powers are limited within its jurisdiction. It can only do such acts, where it has jurisdiction, as the Legislature has provided it may. The manner of exercising its jurisdiction is limited by the same law that created it. *Brownfield v. Thompson*, 70 S. W. 378, 96 Mo. App. 340.

A "justice's court" is a court held by a justice of the peace, within the precinct for which he may be chosen. *Ann. Codes & St. Or.* 1901, § 924.

The words "justice court" may be construed to include warden's court. *Pub. St. R. I.* 1882, p. 77, c. 24, § 13.

### JUSTICE OF A CIRCUIT.

The words "justice of a circuit," when used in the title relating to the judiciary, shall be understood to designate the justice of the Supreme Court who is allotted to any circuit. *U. S. Comp. St.* 1901, p. 483.

### JUSTICE OF THE PEACE.

A "justice of the peace" is defined to be a public officer invested with judicial powers for the purpose of preventing breaches of the peace and bringing to punishment those who have violated the law. *Wenzler v. People* (N. Y.) 2 Cow. Cr. R. 72, 83 (citing *Bouv. Law Dict.*). Their common-law powers relate exclusively to matters affecting the public peace, and to the arrest and punishment of wrongdoers. They are technically and legally justices of the peace, in the common-law sense, so long as they have and exercise the common-law powers of that class of magistrates in respect to breaches of the peace and criminal offenses. *Commonwealth v. Frank*, 21 Pa. Co. Ct. R. 120, 123 (citing *Wenzler v. People*, 58 N. Y. 516, 530).

The original of the office of justice of the peace is stated by Blackstone, in 1 Comm. 349: "The common law hath ever had a special care and regard for the conservation of the peace, for peace is the very end and foundation of civil society; and therefore, before the present constitution of justices was invented, there were peculiar officers appointed by the common law for the maintenance of the public peace. Of these some had and still have this power annexed to other offices which they hold; others had it merely by itself, and were thence named 'keepers of the peace.' Those that were so virtute officii, still continue; but the latter sort are superseded by the modern justices." Blackstone refers to Lamb. Eir. 15, as his authority, and in 15 Vin. Abr. 4, Viner, showing the origin of the office of justice of the peace, quotes the interesting passage in the quaint language of Lambard to which Blackstone alludes. 1 Steph. Cr. Law, 190, says: "Justices of the peace were first instituted in 1828. Their duties were described in the

most general terms. They were in 1 Edw. III, c. 16, 'assigned to keep the peace.' By 34 Edw. III, c. 1 (1360), they were empowered 'to take and arrest all those they may find by indictment or suspicion and put them in prison.' \* \* \* By degrees the issuing of warrants came into use. The general authority of the justices in all matters relating to crime, and indeed to the whole internal government of the country, was firmly established by a great variety of statutes, and it would be natural that their direction would be taken when a crime was committed." *Commonwealth v. Frank*, 21 Pa. Co. Ct. R. 120, 122, 123.

A justice of the peace is a creature of statute and of limited jurisdiction. To authorize him to act in any given matter or particular manner an act of assembly must authorize it. Without such specific authority his actions are unwarranted and void. *Moore v. Bundy*, 22 Pa. Co. Ct. R. 583, 584.

The words "justice of the peace" may be construed to include trial justice, assistant trial justice, or warden of the peace. *Pub. St. R. I.* 1882, p. 77, c. 24, § 13.

#### As conservators of the peace.

"At common law 'justices of the peace' were merely conservators or keepers of the peace." *Weikel v. Cate*, 58 Md. 105, 110.

"A justice of the peace is not, and never was, an officer at the common law, strictly. They were first created by St. 1 Ed. III, c. 16. This statute provides that, 'for the better keeping and maintenance of the peace, the King willeth that in every county good men and lawful, which be no maintainers on evil, or barrators in the county, shall be assigned to keep the peace.' Prior to this act conservators of the peace had been elected by the people. They were common-law officers, and their duties as such were to prevent and arrest for breaches of the peace in their presence, but not to arraign and try for them. 2 Burn, J. P. p. 577. The statute referred to gave to justices of the peace the common-law powers which conservators had exercised, and subsequent acts greatly enlarged them, but they have not, as is held in the English books, any jurisdiction save that which statutes give them." *Smith v. Abbott*, 17 N. J. Law (2 Har.) 358, 366.

"Justices of the peace have been known to the common law of England for a century and a half before America was discovered. They were in their original institution mere conservators of the peace, exercising no judicial function. It is said in 3 Burn, J. P. (19th Ed.) p. 4, that by the statute of 1 Edw. III, which is the first statute that ordains the assignment of justices of the peace by the King's commission, they had no other power but only to keep the peace. But from time to time their powers were enlarged, and they came to con-

stitute a very important agency in the administration of local government in England. They discharged a great variety of duties connected with the support of the poor, the reparation of the highways, the imposition and levying of parochial rates, and other local affairs. They were invested with judicial powers for the first time, it seems, by the statute of 34 Edw. III, c. 1, which gave them power to try felonies, but then only when two or more acted together, and not singly; and it is said by Blackstone (volume 1, p. 349) they then acquired the more honorable appellation of 'justices.' I do not find that they ever exercise in England jurisdiction of civil cases. The office of justice of the peace was brought here by the English colonists. From the earliest colonial period it has existed in this country. Justices of the peace here, as in England, have been invested with various and important functions connected with local administration, quite independent of their judicial authority. It is important to notice that the judicial function exercised by justices of the peace was a graft upon their original authority, and that the enlargement of their powers has not been in this direction alone, but that by gradual accretion they have come to constitute a most important factor in the corporate administrative life in towns and counties." *People v. Mann*, 97 N. Y. 530, 533, 49 Am. Rep. 556.

The original understanding of the official designation "justices of the peace" seems to have been that they were conservators of the peace. Before they had justices of the peace in England there were a class of officers known as "conservators of the peace." In the reign of Edward the Third an act of Parliament ordained "that every shire of the realm good men and lawful, which were no maintainers of evil nor barators on the county, should be assigned to keep the peace, to repress all intention of uproar and force even in the first seed thereof and before it should grow up to any offer of danger." 1 Lambard, c. 4; 2 Hale, P. C. c. 7, note 1. The real purpose of this act seems to have been to enable King Edward the Third to appoint men upon whom he could rely, in the different counties, to repress any effort of the people to release his father, Edward the Second, from prison. *In re Barker*, 56 Vt. 14, 20.

**As county officer.**

See "County Officer."

**As court.**

See "Court."

**As judge.**

See, also, "Judge."

Justices of the peace are "judges," in the legal sense of the word, having power

to decide on the rights of others by authority of law. *People ex rel. Burgess v. Wilson*, 15 Ill. 388, 391. See, also, *Scott v. Spiegel*, 35 Atl. 262, 263, 67 Conn. 349.

**As judicial or ministerial officer.**

The office of justice of the peace is a judicial office. *Vogel v. State*, 8 N. E. 164, 165, 107 Ind. 374.

A justice of the peace is a judicial officer. *McGregor v. Balch*, 14 Vt. 423, 434, 39 Am. Dec. 231.

"A justice of the peace is a judicial and ministerial officer. He performs judicial duty in the trial of causes, and ministerial duty in recording his judgments. He is both judge and clerk of his courts. His duties as recording officer are similar in every respect to those performed by clerks of the higher courts. The only difference in the cases consists in the sources of knowledge that they have of the judgments that have been rendered, which they are required to record. \* \* \* But differences in the sources of knowledge, in this respect, make no difference in the character of the duties they perform." *Scott v. Spiegel*, 35 Atl. 262, 263, 67 Conn. 349.

A justice of the peace, in this state, is a judicial officer of special and limited jurisdiction, both civil and criminal, and it is a settled principle of law that for a judicial act no action lies against such an officer; but, as the refusal of a justice to approve of an appeal bond is a ministerial act, an action will lie against him if he acts corruptly or maliciously in refusing to approve of such a bond. *Legates v. Lingo* (Del.) 32 Atl. 80, 81, 8 Houst. 154.

**As local court.**

See "Local Court."

**As magistrate.**

See "Magistrate."

**Police justice.**

The term "justices of the peace," as used in Const. art. 6, § 18, providing that justices of the peace and district court justices shall be elected with such powers and for such terms respectively as shall be prescribed by law, is the name of a particular office, and is not descriptive of function. This is made clear by a provision leaving their functions to be defined by the Legislature. At the time of the adoption of the Constitution, the office of police justice had existed for many years under that name, as had also justices of the district courts, while the office of justice of the peace had always existed in the state, and been possessed of both civil and criminal jurisdiction. It therefore follows that the term "justices of the peace," as used in the Constitution,

did not refer to police justices, who had only the criminal jurisdiction accorded to the justices of the peace, but to the particular office corresponding to such term. Church, C. J., and Allen, J., dissenting, quoted Bouvier's definition of a justice of the peace as "a public officer invested with judicial powers for the purpose of preventing breaches of the peace and bringing to punishment those who violated the law," and were of the opinion that the police justice by his duties was peculiarly within the definition, and was therefore embraced in the constitutional provision. *Wenzler v. People*, 58 N. Y. 516, 522.

### JUSTICE'S DISTRICT.

A justice's district, or "magisterial precinct," is a local subdivision of a county, and has no corporate autonomy. Its boundaries are fixed by the county court, and serve to define the territorial jurisdiction of justices of the peace and constables. It generally constitutes an election district, and the county assessment rolls are made out by precincts, as is the case with the wards of cities. The relation of such a precinct to the county, under the law of Kentucky, is substantially that of a ward to a city. While not an autonomous self-governing body, it is a geographical and semipolitical entity. *Breckinridge County v. McCracken* (U. S.) 61 Fed. 191, 194. 9 C. C. A. 442

### JUSTICE'S DOCKET.

As record, see "Record.

### JUSTICE'S JUDGMENTS.

Justices' judgments are not records, and do not prove themselves. They resemble records in that their merits are not examinable in an original suit, but they must be established nevertheless by parol evidence. *Hamilton v. Wright*, 11 N. C. 283, 286.

### JUSTICIARIJ ITINERANTES.

"Justiciarii itinerantes" was the name used in the ancient common law to designate the justices in eyre who were sent throughout the realm to try causes, in contradistinction to the resident judges. *Ex parte Fernandez*, 10 J. Scott (N. S.) 3, 27, 28.

### JUSTICIARIJ RESIDENTES.

"Justiciarii residentes" was a name used in the ancient common law to designate the justices who resided at Westminster. *Ex parte Fernandez*, 10 J. Scott (N. S.) 3, 27, 28.

### JUSTIFIABLE.

In a prosecution for murder the court instructed the jury that the defendant ad-

mits that he shot and killed the deceased, but insists that he did so shoot and kill him in justifiable self-defense. It was contended that the word "justifiable" implies a higher degree of right conduct than the word "excusable," and hence its use in place of "excusable self-defense" and "excusable killing in self-defense" was erroneous. But it was held that as the act of self-defense is one that the law will justify or excuse, and that such justification or excuse is an attribute of self-defense, understood but not expressed, yet self-defense in its ordinary is quite different from its legal acceptation, as, if a person would slay his assailant because assailed by him and to avoid the assault, he would, in the ordinary acceptation of the term, act in "self-defense," although he might not have observed the requirements which under the law would justify or excuse his conduct. Self-defense in such a case would not be justifiable or excusable, while with the law observed it would be; hence there is a propriety in the use of such terms as "justifiable" and "excusable," but this is not so in the claim of prejudice, for in the use of the word "justifiable," instead of the word "excusable," the words are synonymous, but perhaps not always of like meaning. There is, however, no practical difference in the use of the words in this connection. What would excuse a killing would amount to a justification, and the reverse would be equally true. *State v. Row*, 46 N. W. 872, 875, 81 Iowa, 138.

### JUSTIFIABLE CAUSE.

After charging that, if the jury find that the disease was caused by lack of vegetable food furnished by the officer of the vessel, the next inquiry will be whether the vegetable food was withheld without justifiable cause, the court said: "What is justifiable cause? It might be from some unexpected contingency or situation that deprived the master or owner, or officer who may be in command, of the power to supply the necessary food. If a vessel sail on her voyage well provisioned with all that is required, and by stress of weather she is delayed long beyond her usual passage, and there are no ports where any food can be procured, so that the allowance must be shortened in order to enable the vessel to reach her port, it is very clear that the shortening of the allowance is necessary, and the crew, therefore, be on what is termed 'short allowance'—that is, shorter than is prescribed—that is justifiable cause." *United States v. Reed* (U. S.) 86 Fed. 308, 311.

As used in Act 1825, c. 276, § 10, providing that no master of a vessel shall, during his being abroad, maliciously and without justifiable cause force any officer or mariner of such vessel on shore, or leave him

behind in any foreign port or place, or refuse to bring home again such of the officers and mariners of the ship as he carried out with him who are able and willing to return, the words "justifiable cause" cannot be construed to mean whatever misbehavior would, by the general principles of the maritime law, constitute a sufficient cause to discharge a seaman in a foreign port. Justifiable cause arises only under extraordinary emergencies, and in extreme cases, where otherwise the safety of the officers or crew, the due performance of the voyage, or the regular enforcement of the ship's discipline would be put in jeopardy. The mere convenience of the master would not justify a discharge, much less such offenses as could be ordinarily suppressed by the modern punishments administered in the sea service. *United States v. Coffin* (U. S.) 25 Fed. Cas. 485, 486.

### JUSTIFIABLE CONDUCT.

The defenses known in the books as "justifiable conduct" and "recrimination" are peculiarly applicable to the case at bar. "Recrimination" is defined to be a "countercharge by the defendant in a case of divorce against the complainant." Many authorities lay down the rule that, when each party has a cause of divorce, neither can obtain relief. The authorities differ as to whether, when the complainant alleges one cause of action as a ground of divorce, the defendant can set up another. Some authorities held that any cause for divorce is generally a good defense against any other, even though they be cause for different kinds of divorce, but other authorities hold that the offense set up in defense must be of the same statutory kind as the offense charged in the bill. In the case at bar both parties were guilty of a like offense—cruelty—and the defense of "justifiable conduct" or "recrimination" was therefore sufficient. *Dubenstein v. Dubenstein*, 49 N. E. 316, 319, 171 Ill. 133.

### JUSTIFIABLE HOMICIDE.

Justifiable homicide is the taking of human life in the necessary defense of one's person against violence, or in defense of his property or habitation against those endeavoring to commit a felony or to enter the habitation in a violent, riotous, or tumultuous manner with intent to commit violence to persons therein. *Hopkinson v. People*, 18 Ill. (8 Peck) 264, 265.

Justifiable homicide is the killing of a human being in necessary self-defense, or in the defense of habitation, property, or person against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony upon either person or property, or against any person or persons who mani-

festly intend to endeavor in a violent, riotous, or tumultuous manner to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein. *Moran v. People*, 163 Ill. 372, 382, 45 N. E. 230.

Justifiable homicide is of three classes or kinds: First, when a proper officer executes a criminal in conformity with his sentence; second, where an officer of justice, in the exercise of a duty, kills a person who resists his doing it; third, when the homicide is committed in prevention of a forcible crime. *Kilpatrick v. Commonwealth* (Pa.) 3 Phila. 237, 238.

Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person, or property against one who manifests, intends, or endeavors, by violence or surprise, to commit a known felony. *Harris v. State*, 34 Ark. 469, 477.

Homicide is permitted by law, and is justifiable, when inflicted for the purpose of preventing the offense of murder, maiming, disfiguring, or other serious bodily injury, when the killing takes place under the following circumstances: (1) It must reasonably appear by the acts, or by words coupled with the acts, of the person killed, that it was the purpose and intent of such person to commit one of the offenses named. (2) The killing must take place while the person killed was in the act of committing the offense, or after some act done by him showing evidently an intent to commit such offense. *Matthews v. State*, 58 S. W. 86, 88, 42 Tex. Cr. R. 31.

Homicide is justifiable when committed in resisting any attempt to murder such person, or to commit any violence upon him or her, or upon or in any dwelling house in which such person shall be. *Richard v. State*, 29 South. 413, 417, 42 Fla. 523.

"Justifiable homicide" is the killing of a human being in necessary self-defense, or in defense of habitation, property, or person, against one who manifestly intends or endeavors by violence or surprise to commit a felony, or against any person or persons who manifestly intend and endeavor, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein. Comp. St. div. 4, § 32. A mere trespass against the property of another is not sufficient to justify a homicide. *State v. Smith*, 30 Pac. 679, 682, 12 Mont. 378.

The taking of human life is held to be justifiable when done in the execution of public justice, as where the proper public officer duly executes a criminal under law-

ful sentence of death. It is also justifiable when done in the advancement of public justice, or for the prevention of any atrocious crime attempted to be committed with force, *State v. Miller* (Del.) 32 Atl. 137, 138, 9 Houst. 564.

Homicide is justifiable when committed by any one in a sudden heat of passion caused by the attempt of any such offender to commit rape upon his wife, daughter, sister, mother, or other family relation of the defendant, or to defile the same, or when the defilement has actually been committed. Comp. Laws 1876, § 1925. Under such definition the law will not permit a husband to say that he slew the defiler of his wife in a sudden heat of passion after deliberating upon the defilement 24 hours. *People v. Halliday*, 17 Pac. 118, 122, 5 Utah, 467.

#### Apprehension of danger.

To constitute justifiable homicide, there must be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and imminent danger of such design being accomplished. *State v. Yokum*, 79 N. W. 835, 11 S. D. 544; *Richard v. State*, 29 South. 413, 417, 42 Fla. 528; *Territory v. Baker*, 18 Pac. 30, 40, 4 N. M. (Gild.) 236.

There is no positive rule for the definition of "justifiable homicide." It must depend upon the circumstances and surroundings of each particular case, and a mere declaration or enunciation of the rules prescribed in the statute will in many instances fall short of filling the measure of the law as it has been interpreted and thoroughly established by precedents and authority of long and recognized standing. A defendant is always justifiable in acting for his defense, or the defense of his family or property, according to the circumstances as they reasonably appear to him, and it is but just and right that his action should be judged in the light of the circumstances as they appear to him at the time. Such is our understanding of the law, and such the rule of decision in this state. It is not necessary that there should have been actual danger, provided the party acted on a reasonable apprehension of danger. *Richardson v. State*, 7 Tex. App. 486, 493 (citing *Munden v. State*, 37 Tex. 353; *Horbach v. State*, 43 Tex. 242; *Cheek v. State*, 4 Tex. App. 444; *Blake v. State*, 3 Tex. App. 581; *May v. State*, 6 Tex. App. 191; *Marnoch v. State*, 7 Tex. App. 269).

An instruction that justifiable homicide is the killing of a human being in necessary self-defense, or under circumstances sufficient to excite the fears of a reasonable person, and induce him, as a reasonable person, to believe that in order to save his own life, or prevent his receiving great bodily harm, it was necessary to take the life of the person killed, is correct. For while actual dan-

ger is not necessary to justify a resort to self-defense, yet the circumstances must be such as to induce a reasonable and well-grounded belief of danger of actual loss of life or great bodily harm. *Kota v. People*, 27 N. E. 53, 54, 136 Ill. 655.

A homicide is justifiable, under the laws of Florida, when committed in the lawful defense of a person, when there shall be a reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury, and there shall be imminent danger of such design being accomplished. The danger need not be actual, and the slayer is to judge from the circumstances by which he is surrounded and as they appear to him. If he acts upon appearances he does so at his peril, and can justify the killing only where the circumstances are such as to induce a reasonably cautious man to believe the killing was necessary to save his own life or to protect him from great personal injury; but unless a reasonably cautious man would entertain the same belief from the same appearances, of which the jury are the ultimate judges, it will be no defense, even though the belief of danger was honest. *Lane v. State* (Fla.) 32 South. 896, 898.

A bare fear of any of the offenses justifying homicide, and to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to incite the fears of a reasonable mind. *Thompson v. State*, 55 Ga. 47, 50.

#### Arrest or service of process.

Where an officer has legal authority to arrest, and while using proper means is resisted, he may repel force with force, and need not give back an inch, though he must not use excessive violence beyond the emergencies of the occasion, and, if the person resisting is necessarily killed in the struggle, the homicide is justifiable. *State of North Carolina v. Gosnell* (U. S.) 74 Fed. 734, 738.

The taking of human life is held to be justifiable when a public officer of necessity, in the due execution of his office, kills a person who assaults and resists him. *State v. Lodge* (Del.) 33 Atl. 312, 314, 9 Houst. 542.

"Justifiable homicide" is defined by Pen. Code, §§ 202, 205, as where a person is deprived of his life in resisting or fleeing from a public officer in the administration of justice. *People v. Fitzsimmons*, 34 N. Y. Supp. 1102, 1105.

"Justifiable homicide" is defined to be when committed by public officers, or those acting by their command in their aid and assistance, either in obedience to any judgment of a competent court, or when necessarily committed in overcoming actual resistance to



the execution of some legal process or the discharge of any other duty, or when necessarily committed in retaking felons who have been rescued or who have escaped, or when necessarily committed when arresting felons fleeing from justice. *Richard v. State*, 29 South. 413, 417, 42 Fla. 528.

By Comp. Laws, § 692, it is provided that homicide is justifiable when necessarily committed by lawful ways and means to apprehend any person for any felony committed. *Territory v. Baker*, 13 Pac. 30, 40, 4 N. M. (Gild.) 236; *Richard v. State*, 29 South. 413, 417, 42 Fla. 528.

#### Defense of relative.

It is not necessary in order to render a homicide justifiable, where the person guilty endeavored by violence to commit a felony on the person of the son of the slayer, that the felony intended or endeavored should have been any particular character or grade of felony; but if such homicide was committed by the father in the defense of the person of his son, of one who manifestly endeavored by violence to commit any offense on the person of his son, which would have subjected the person intending or endeavoring such felony to punishment by confinement in the penitentiary if such homicide had been committed, then such homicide would be justifiable, providing that the killing was done by the father in order to prevent commission of the felony, and that the circumstances at the time of the killing were sufficient to excite the fears of a reasonable man that such felony would be committed, and that the father really acted under the influence of those fears, and not in the spirit of revenge. *Hinkle v. State*, 21 S. E. 595, 602, 94 Ga. 595.

By Comp. Laws, § 692, it is provided that homicide is justifiable when committed by any person in the lawful defense of his or her husband, wife, parent, brother, child, master, mistress, or servant, and there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished. *Territory v. Baker*, 13 Pac. 30, 40, 4 N. M. (Gild.) 236; *State v. Yokum*, 79 N. W. 835, 11 S. D. 544. A brother is not included among the domestic relations in behalf of whom a person may defend, not only when absolutely necessary to protect life, but when there shall be a reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished. A brother may interfere in behalf of a brother to the extent of taking life only when the homicide is necessarily committed in lawfully keeping and preserving the peace. *Richard v. State*, 29 South. 413, 417, 42 Fla. 528.

#### Legal execution.

"Justifiable homicides" are such as are authorized by law, a familiar example of which is the execution of a prisoner by a sheriff under legal sentence. *State v. Walker* (Del.) 33 Atl. 227, 9 Houst. 464.

The term "justifiable homicide" includes the taking of human life when done in the execution of public justice, as where the proper officer duly executes a criminal under lawful sentence of death. *State v. Miller*, 32 Atl. 137, 138, 9 Houst. 564, 1 Del. Term R. 183, 186; *State v. Lodge* (Del.) 33 Atl. 312, 314, 9 Houst. 542.

#### Prevention of larceny.

Blackstone says: "Such homicide as is committed for the prevention of a forcible or atrocious crime is justifiable by the laws of nature, and also by the law of England as it stood as early as the time of Bracton, and as it is since declared by statute. If any person attempts a robbery or murder of another, or attempts to break open a house in the nighttime, which extends also to the attempt to burn it, and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to any crime unaccompanied with force, as picking pockets, or the breaking open of any house in the daytime, unless it carries with it an attempt of robbery also." Under these principles it does not constitute justifiable homicide to shoot and kill one who is attempting to rob a chicken roost, it not appearing that any attempt was made to arrest the thief, and that the poultry could not have been protected by any other means. An attempt to commit a larceny is not a felony under section 4670, Pol. Code. *Marks v. Borum*, 60 Tenn. (1 Baxt.) 87, 93, 25 Am. Rep. 764.

#### Resistance or prevention of felony.

Homicide committed in the resistance of felonies is defined as justifiable homicide. 1 Bish. Cr. Law (5th Ed.) § 850. See *Kennedy's Case*, *Horre. & T. Cas. Self-Def.* 137.

Under Code, §§ 4330, 4331, a "justifiable homicide" is defined as the killing of a human being in self-defense, or in defense of habitation, or in defense of property, or in defense of person, against one who wantonly intends or seeks by violence or surprise to commit a felony on either. A bare fear of any of these offenses to prevent which the homicide is alleged to have been committed shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable mind, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge. Accordingly, where the only felony which deceased could have been about to commit was one on the person of

the prisoner charged with his murder, a requested instruction was properly refused which charged that the killing was justified if it was to prevent the commission of a serious bodily harm or the commission of a felony, but made no mention of any manifest intention on the part of the deceased, by violence or fury, to commit a felony on the person of the defendant. *Thompson v. State*, 55 Ga. 47, 50.

The term "justifiable homicide" includes the taking of human life, when done in the advancement of public justice, or for the prevention of any atrocious crime attempted to be committed with force. *State v. Miller* (Del.) 32 Atl. 137, 138, 9 Houst. 564, 1 Del. Term R. 183, 186.

The taking of human life is held to be justifiable when a public officer kills a person for the prevention of any atrocious crime attempted to be committed with force, such as murder, robbery, housebreaking in the nighttime, rape, mayhem, or any other act of felony against the person. *State v. Lodge* (Del.) 33 Atl. 312, 314, 9 Houst. 542. See, also, *Territory v. Baker*, 13 Pac. 80, 40, 4 N. M. (Gild.) 236.

#### Suppression of riot.

Homicide is justifiable when necessarily committed in suppressing any riot. *Territory v. Baker*, 13 Pac. 30, 40, 4 N. M. (Gild.) 236; *State v. Walker* (Del.) 33 Atl. 227, 9 Houst. 464; *Richard v. State*, 29 South. 413, 417, 42 Fla. 528.

## JUSTIFICATION.

See "Plea of Justification."

Under a statute providing that when the defendant shall, as a justification, plead title to any real estate in himself or another under whom he acted or entered, he shall commit the plea to writing and give bond, it is held that the word "justification" might be held to mean defense if the statute had provided that when the defendant shall as a justification plead title he should give bond, but that the superadded words of the act give it a different signification by limiting its application to those cases wherein the defendant pleads title to justify some act or entry on the land by himself. *Messler v. Fleming*, 41 N. J. Law (12 Vroom) 108, 114.

## JUVENILE DISORDERLY PERSON.

Every child between the ages of eight and fourteen years, and every child between the ages of fourteen and sixteen years unable to read and write the English language or not engaged in some regular employment, who is an habitual truant from school, or who absents itself habitually from school, or who, while in attendance at any public, private, or parochial school, is incorrigible, vicious, or immoral in conduct, or who wanders about the streets and public places during school hours, having no business or lawful occupation, shall be deemed a juvenile disorderly person. *Bates' Ann. St. Ohio 1904*, §§ 4022-4024

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## KEEL.

"Keel" is defined in the Century Dictionary as the principal timber of a ship or boat, extending from stem to stern at the bottom, supporting the whole frame, and consisting of a number of pieces scarfed together; in iron vessels, the combination of plates corresponding to the keel of a wooden vessel. *Stetson v. Herreshoff Mfg. Co.* (U. S.) 113 Fed. 952, 953.

## KEELSON.

"Keelson" is defined by the Century Dictionary as a line of jointed timbers in a ship, laid on the middle of the floor timbers over the keel, fastened with long bolts and clinched, thus binding the floor timbers to the keel; in iron ships, a combination of plates corresponding to the keelson timber of a wooden vessel. *Stetson v. Herreshoff Mfg. Co.* (U. S.) 113 Fed. 952, 953.

## KEEP.

See "Securely Keep."

Keeping a disorderly house, see "Disorderly House."

"Keep" is defined to mean primarily to hold, to retain in one's power or possession, not to lose or part with; to preserve; to retain. *Benson v. City of New York* (N. Y.) 10 Barb. 223, 235.

To "keep" is to "maintain, carry on, conduct, or manage." *State v. Irvin*, 91 N. W. 760, 117 Iowa, 469 (citing 4 Cent. Dict. p. 3270, par. 11).

An indictment alleging that the defendant did "keep" a tenpin alley without a license is not equivalent to saying that he was engaged in the business or employment of keeping a tenpin alley. One may keep a tenpin alley for the amusement of himself or his family without being engaged in keeping it as a business or avocation. *Eubanks v. State*, 17 Ala. 181, 183.

"Keeping," as used in Civ. Code, § 5463, designating as a class of personal property which may be brought to speedy sale "that liable to deteriorate from the keeping," means properly keeping. *Jolley v. Harde-man*, 36 S. E. 952, 953, 111 Ga. 749.

In a mortgage authorizing the mortgagee to take possession of the property and sell the same, or so much thereof as shall be sufficient to pay the amount due and the reasonable costs pertaining to the taking, keeping, advertising, and selling of such property, "keeping" means the "keeping of

the property after the taking, and pending the advertising, before sale." *State Bank v. Lowe*, 33 N. W. 482, 484, 22 Neb. 68.

"Keeping," within the meaning of 2 Starr & C. Ann. St. c. 75, § 24, providing that the cost of "keeping" the jail shall be paid by the county, has reference to the necessary manual acts of mechanics or laborers to preserve the jail in the proper condition, and the statute does not entitle the sheriff, who, by sections 2 and 3, is made the keeper of the jail, with right to appoint an assistant jailer, to compensation for the latter, but such compensation must be paid by the sheriff from his fees. *Goff v. Douglas County*, 24 N. E. 60, 132 Ill. 323.

St. 1867, c. 130, § 1, requires the owner or keeper of a dog to cause it to be registered and licensed for one year in the office of the clerk of the city or town wherein such dog is kept, and section 5 provides that a license from the clerk of any city or town shall be valid in any part of the commonwealth and may be transferred with the dog, provided said license be recorded by the clerk of the city or town wherein such dog is kept. Held, that a dog is "kept," within the meaning of the statute, where the owner takes it to a town other than that in which it is registered and licensed, and keeps it there for four months, although he goes there for no definite period, and with the intention only of remaining there temporarily for rest and recreation, and leaves his home ready for occupancy on his return, and comes to the place in which it is situated, every day, to his business. The owner's residence does not control the place where the dog is kept. *Commonwealth v. Palmer*, 134 Mass. 537, 542.

To "keep" is to retain in one's power and possession, as, "If we lose the field, we cannot keep the town;" and to "keep for the benefit of" is to keep for the use, enjoyment, and support; and the term "to be kept" for the benefit of a legatee's children means to be kept for the use and support and enjoyment of such children, and creates a trust in their behalf. *Deans v. Gay*, 43 S. E. 643, 644, 132 N. C. 227.

A reservation, to the grantor in a deed, of the right to keep and maintain a dam, cannot be construed to give him a right to remove such dam. *Shelby v. Chicago & E. I. R. Co.*, 32 N. E. 438, 439, 143 Ill. 385.

## As control or management.

Under a statute making it unlawful for any person to sell or keep a place where intoxicating liquors are sold, the language "keep a place" involves a control and man-

agement of the place, and a clerk left temporarily in charge will not be held chargeable as a keeper of the place. Persons having the general charge, control, management, and supervision have been held liable as for keeping. *People v. Rice*, 61 N. W. 540, 541, 103 Mich. 350 (citing *State v. Dowe*, 21 Vt. 484; *Stevens v. People*, 67 Ill. 587).

The words "keeping and maintaining," as used in Rev. St. tit. 6, § 89, which provides that every justice of the peace may, on the complaint of an informing officer, require sureties of the peace and good behavior from any person who shall be guilty of frequenting, "keeping, or maintaining" houses reputed to be houses of bawdy and ill fame, imply much more than to live in such a house, as to "keep" a hotel implies more than to live in one. The controlling head of the hotel "keeps" it, while the individuals who take their meals and lodge in such hotel, and have no other domicile, "live" therein; so the controlling head of a house of ill fame, or a house reputed to be a house of ill fame, "keeps" such house. *State v. Main*, 31 Conn. 572, 574.

To "keep" a place in which any sports or games of chance are carried on or allowed is an appropriation of the place by the person in control for the conduct of his business therein. *State v. Miller*, 36 Atl. 795, 796, 68 Conn. 378.

Gen. St. c. 87, § 7, which declares that "whoever keeps or maintains" a common nuisance shall be liable to punishment, etc., applies either to one who controls the occupation and procures or permits the illegal use, or to one who engages in the illegal use and thus maintains or aids in maintaining the public nuisance; hence a clerk or servant who was employed to run a place for the selling of liquors is liable under this section on an indictment for "keeping" a liquor nuisance. *Commonwealth v. Kimball*, 105 Mass. 465, 467.

"Keeping," as used in St. 1893, c. 25, art. 33, § 5, providing that any one keeping a bawdyhouse shall be guilty of crime, means having the government of, and exercising control and direction over, the house and the conduct of the inmates thereof. *Nelson v. Territory*, 49 Pac. 920, 921, 5 Okl. 512.

St. 1876, No. 33, prohibiting the "keeping and maintaining" of a public resort for the unlawful sale of liquor, is applicable to persons who are co-operating in the process of instituting and administering the establishment, whatever may be the peculiar relation they sustain to it and to each other in rendering such co-operation. *State v. Cox*, 52 Vt. 471, 474.

It is said in *Reg. v. Williams*, 1 Salk. 384, when speaking of the keeping of a bawdyhouse: "The keeping is not to be un-

derstood of having or renting in point of property, but the keeping here is the governing or managing a house in such a disorderly manner as to be a nuisance." *Village of St. Johnsbury v. Thompson*, 9 Atl. 571, 576, 59 Vt. 800, 59 Am. Rep. 731.

Code 1876, § 4207, providing that "any person who keeps, exhibits or is interested or concerned in copying or exhibiting" any table for gaming, should be construed to include one who had the possession or custody of the table, authority over its use, and supervision of the gaming. *Bibb v. State*, 4 South. 275, 276, 84 Ala. 13.

A complaint charging that the defendant "kept" a billiard table sufficiently charges the defendant with being a keeper of the billiard table, which is the language used by the statute, punishing the keeper of a billiard table who permits a minor to play thereon. *Gallagher v. State*, 26 Wis. 423, 425.

#### Display distinguished.

"Keeping a table for gaming" and displaying it for the purpose of obtaining bettors are different and distinct acts, and, though the punishment may be the same, certainly the acts are not the same. The "keeping of a gaming table" in its elements does not include all of the elements of displaying the table for the purpose of obtaining bettors. The keeping of a gaming table for the purpose of gaming may be an offense continuous in its nature, while the act of displaying such table may not be continuous. *Kain v. State*, 16 Tex. App. 282, 309.

#### Duration or permanence implied.

"The word 'keeping,' when applied to time, implies duration. Standing alone, without limitation either by express words or by the nature of the act or thing which it governs, it implies indefinite duration." Its meaning may be limited or extended by the nature of the subject to which it is applied. If the thing to be kept is temporary, the duration intended by the word "keeping" will be temporary also. 4 Stat. 448 prohibits the "keeping" of a faro bank or other common gaming table within the District of Columbia. Held, that "keeping," as used in the statute above cited, is not to be construed so as to prohibit operating of a gaming table called "sweatcloth" for a single day. It would seem that it means a permanent keeping, and not such a temporary keeping as above described. *United States v. Smith* (U. S.) 27 Fed. Cas. 1155.

A fire policy providing that gunpowder, saltpeter, etc., are positively prohibited from being deposited, stored, or "kept" in the insured building, construed not to mean such explosives incidentally present in the insured structure, but to only mean the act of

knowingly keeping the explosives in the building. *Washburn v. Miami Valley Ins. Co.* (U. S.) 2 Fed. 633, 636.

In an ordinance declaring it a nuisance for one to "keep" within the city, for the purpose of feeding for the market, more than a certain number of chickens, the word "keep" does not mean the mere transient or temporary custody within the limits of the city, as while awaiting a car for shipment, or while in a car awaiting a train which shall carry them to a distant market, etc.; and hence a dealer who on Saturday takes in a large number of chickens, and retains them in a building, on the ground of a railroad company, occupied by him, and near which ran a side track, and ships them on Monday, in the meantime feeding them, does not "keep" the chickens, within the meaning of the word as used in the ordinance. *Long v. City of Portland*, 51 N. E. 917, 918, 151 Ind. 442.

Where a policy of insurance permitted the insured to "keep" 75 pounds of gunpowder for sale, the mere casual or accidental presence at the store of more than 75 pounds is not such a "keeping" of powder, within the meaning of the policy, as would avoid it. *State Ins. Co. of Nashville v. Hughes*, 78 Tenn. (10 Lea) 461, 469.

The proprietor of a building cannot be said to "keep or maintain" a common nuisance, within the meaning of Pub. St. c. 101, §§ 6, 7, making a building used for the sale of intoxicating liquors a nuisance, on the strength of a single casual sale, made without premeditation, in the course of a lawful business. The words "keep or maintain" import a certain degree of permanence. *Commonwealth v. Patterson*, 138 Mass. 498, 500.

Where a fire insurance policy contained a warranty that gasoline should not be "kept, used, or allowed" on the premises, and a gallon was brought on the premises during an afternoon for use thereon, and a fire resulted therefrom during the night of the same day, the warranty was not broken, as the term "kept, used, or allowed" did not include a temporary keeping and use. "It is not enough," says the court, "according to this phraseology, that hazardous articles are upon the premises; they must be there for the purpose of being kept or stored." *Springfield Fire & Marine Ins. Co. v. Wade*, 68 S. W. 977, 95 Tex. 598, 58 L. R. A. 714, 93 Am. St. Rep. 870.

A fire policy providing that it should be void if assured should "keep" certain enumerated combustible articles on the premises should be regarded only as prohibiting the permanent and habitual storage of the prohibited articles, and taking them on the premises to clean machinery is not embraced within the meaning of the words.

*American Cent. Ins. Co. v. Green*, 41 S. W. 76, 77, 16 Tex. Civ. App. 531 (citing *Mears v. Humbolt Ins. Co.*, 92 Pa. 15, 37 Am. Rep. 647; *Fraim v. National Fire Ins. Co.*, 32 Atl. 613, 170 Pa. 151, 50 Am. St. Rep. 753; *Hall v. Insurance Co. of North America*, 58 N. Y. 292, 17 Am. Rep. 255).

A fire insurance policy prohibiting the "keeping and storing" on the premises of articles denominated "hazardous" was not violated by such articles being temporarily on the premises, but they must be there for the purpose of being stored or kept before the company could be exempted from liability. *Hynds v. Schenectady County Mut. Ins. Co.*, 11 N. Y. (1 Kern.) 554, 561.

The words, "keep and have" in a policy of fire insurance forbidding the insured to "keep or have" benzine on the premises, were intended to prevent the permanent and habitual storage of the prohibited articles on the premises. The mere taking of the prohibited articles on the premises for temporary purposes is not prohibited by this clause of the policy. *Mears v. Humbolt Ins. Co.*, 92 Pa. 15, 19, 37 Am. Rep. 647 (cited and approved in *Krug v. German Fire Ins. Co.*, 23 Atl. 572, 573, 147 Pa. 272, 30 Am. St. Rep. 729).

The word "kept," as used in an insurance policy providing that it shall be void if certain substances are kept on the premises, implies a use of the premises as a place of deposit for the prohibited articles for a considerable period of time. *First Congregational Church of Rockland v. Holyoke Mut. Fire Ins. Co.*, 83 N. E. 572, 573, 158 Mass. 475, 19 L. R. A. 587, 35 Am. St. Rep. 508.

The expression "keeping" in possession of contraband liquors, as used in the dispensary law, involves the idea of continuity or habit, the words meaning to have habitually in possession, the word "keeping" being defined as to maintain habitually, to have habitually in stock or for sale, and implies more than the mere having in possession. *Easley Town Council v. Pegg*, 41 S. E. 18, 19, 63 S. C. 98.

A "keeping" of benzine, in violation of a clause of a fire insurance policy prohibiting the "keeping" of benzine on the insured premises except in tin cans, is not shown by bringing the benzine on the premises in a wooden barrel and transferring it into tin cans. *Maryland Fire Ins. Co. v. Whiteford*, 31 Md. 219, 224, 100 Am. Rep. 45.

#### Enjoyment and use implied.

In construing a will drawn in the following language, viz., "I want my wife to 'keep' and manage all of my estate, both real and personal, during her lifetime, and be allowed to sell any of the land for not less than the appraisement, and I appoint my

wife administrator," the court said: "We are bound to hold that the testator intended to give the usufruct of his estate to his wife. The plaintiff's counsel contends that the words 'keep' and 'manage' only convey the idea of administration or agency. The second definition of the word given by Worcester is, 'to have in possession, use, care, or custody.' 'Keep' is a very general term, and is variously applied. A person 'keeps' what is his own, and 'retains' what is not taken from him. He 'keeps' his farm or property, and 'retains' an office. When Paul tells Peter he can 'keep' his gun, or cart, or farm during a certain period, he will be understood to give Peter the use and enjoyment of the property. And such we think was the meaning in which the word was used by the testator." *Hasley v. Hasley*, 25 La. Ann. 602, 604.

#### Gift imported.

Where a will requested certain persons to pay testatrix's debts and deliver portions of her property to persons named, and the remainder to "keep" and dispose of as they think best, it is equivalent to saying that they may hold and enjoy the residue or remainder absolutely as their own property. The word "keep" is often used by the common people to express a gift. To "keep" is simply to have by one at one's pleasure. The durability of having is the leading idea in the word. *Cheney v. Plumb*, 48 N. W. 668, 79 Wis. 602.

#### As determined by intent or purpose.

"Keep," as used in Cr. Code, art. 412, providing for the punishment of any person who shall keep, for the purpose of gaming, any gaming table or bank, means to hold in readiness for the purpose of obtaining bettors. Whenever it is evident that the keeping of a table is not for this purpose, since a person can keep a billiard table or table for dominoes, backgammon, or chess for amusement solely, there is not a "keeping" within the meaning of the statute. *Wolz v. State*, 88 Tex. 331, 335.

"Kept and used," as used in *Wagner's St. p. 503*, art. 8, § 24, providing that whenever any justice of the peace shall know or shall receive satisfactory information that there is any prohibited gaming table or gambling device kept or used within his county, etc., means that the gambling device must be kept and used for gaming purposes and set up with a view to attract people to risk their money on it, and that such attractions are offered for the purposes of gain on the part of the keeper, and not merely that the party has such device in his possession, since gaming devices are of infinite variety, and many of them may be kept or used for beneficial, or at least harmless, purposes. *Ordina-*

*ry playing cards* have long since been held to be gambling devices, but may be kept for harmless purposes. *McCoy v. Zane*, 65 Mo. 11, 15.

In an insurance policy providing that it should be void if gasoline was kept on the premises insured, which consisted of a retail store, "kept" should not be construed to include a use of gasoline for illuminating purposes, but only to forbid the keeping of that article for sale. *Putnam v. Commonwealth Ins. Co. (U. S.)* 4 Fed. 753, 763 (cited and approved in *American Cent. Ins. Co. v. Green*, 41 S. W. 74, 76, 16 Tex. Civ. App. 530).

Where a fire policy on a stock of drugs and merchandise contained a stipulation that the policy should be void if the insured should keep gunpowder, fireworks, "saltpe-ter," etc., the prohibition did not mean that saltpeter should not be kept as a drug, but merely its being kept in such amount or quantity or for such purpose as would increase the risk. *Collins v. Farmville Ins. & Banking Co.*, 79 N. C. 279, 288, 28 Am. Rep. 322.

Act April 26, 1894 (1 Gen. St. p. 1102), providing that if any person shall "keep a place to which persons may resort for betting" upon the event of any horse race, or for gambling in any form, does not import the keeping of a place to which it is possible for persons to resort for betting, nor the keeping of a place to which persons do in fact resort for betting; their fair import is the keeping of a place with the intent that persons shall resort thither for betting. *State v. Ackerman*, 41 Atl. 697, 62 N. J. Law, 456.

Where an insurance policy prohibited certain articles from being deposited, stored, or kept in the insured building, the mere temporary presence of the articles was not a violation of the terms of the policy, a keeping of such goods permanently and for purposes of sale or storage being contemplated. *Phoenix Ins. Co. v. Lawrence*, 61 Ky. (4 Metc.) 9, 11, 12, 81 Am. Dec. 521.

Act 1824, c. 64, and Act 1826, c. 219, imposing a tax on persons keeping or exhibiting for use a billiard table or tables, is to be construed distributively, and means keeping for use or exhibiting for use, and a table is liable to the tax, whether a charge is made for the use or not. *Germania v. State*, 7 Md. 1, 6.

The words "storing or keeping," in a fire policy prohibiting the storing or keeping of petroleum oil, was construed to refer only to the storing or keeping in a mercantile sense, in considerable quantities, with a view to commercial traffic, and not to prohibit the storing or keeping of oil for use as medicine. *Williams v. Fireman's Fund Ins. Co.*, 54 N. Y. 569, 572, 13 Am. Rep. 620.

**Intent and knowledge implied.**

The word "keep," in a statute making it criminal to keep a gambling house, implies intent and knowledge of the purpose for which the house is kept, and the use of the term in an indictment is a sufficient description of the manner of the keeping of the house. *State v. Cure*, 7 Iowa (7 Clarke) 479, 481.

The term "keeping," when used to characterize the keeping of places for the sale of intoxicating liquor in violation of law, "imports knowledge of the manner or condition in which it is kept, and a continuing purpose to keep it." *Nicholson v. People*, 29 Ill. App. 57, 65.

**Interest in or ownership implied.**

*Ky. St. c. 47, art. 1, § 6*, providing that any one who shall "set up or keep a gaming table," etc., shall be punished, etc., should be construed to include only those interested in such gaming table, or having an agency in it, etc., and not to include a mere spectator who renders a momentary or occasional assistance to the dealer in taking in or paying bets or such other act. *Vowells v. Commonwealth*, 83 Ky. 193, 197.

As used in a life insurance policy providing that insured should not, without the consent of the company, keep a liquor saloon, the phrase "keep a liquor saloon" refers only to the personal occupation of deceased at the time of his death, and not to the ownership of property used for liquor purposes; as, where insured owned a half interest in a saloon at the time of his death, he was not "keeping a saloon" within the meaning of the policy, where six months prior to his death he had been unable to actually attend to the business in person. *Union Cent. Life Ins. Co. v. Hughes' Adm'r*, 60 S. W. 850, 851, 110 Ky. 26.

**As invest.**

A direction in a will for the trustee to "keep" the principal sum securely invested in good bonds and mortgages on real estate does not indicate that the principal was to be invested by the trustee. In the same kind of securities it was invested in at the time of the testator's death. The use of the word "keep" may mean the preservation of a certain condition in the future. Direction to a person to keep his money invested does not necessarily mean that it is still or has been invested. It may mean that it is to be invested and the investment is to be continued as uninterrupted as possible. *Hammell v. Swan*, 47 Atl. 801, 802, 61 N. J. Eq. 179.

**As maintain or repair.**

In an indictment under a statute making it an offense to "keep" a house of ill fame, the indictment alleging that the de-

fendant had kept and maintained a house of ill fame, etc., the word "keep" is synonymous with "maintain." *State v. Hanchett*, 38 Conn. 35, 38.

The duty of the "care and keeping" of the schoolhouse, or other property belonging to the district, imposed by statute on the school board, not merely authorizes, but requires, the board to preserve and care for the schoolhouse. This duty is not like that of a janitor, one of personal attention and manual labor, but like that of trustee, one of supervision. They are not personally to sweep and dust and clean, or bring wood and make fires, but to see that it is done, and to that end may employ assistants and bind the district for their pay. "Care and keeping," when used in connection with a trust like this, imply the right to preserve the building in the condition in which it is placed in their custody, and make good the waste and injury to which all buildings, and especially public buildings like a schoolhouse, are subject; in other words, to repair. It may not imply the right to remodel and improve, but it implies the right to do all that may come fairly and strictly within the term "repair." *Conklin v. School Dist. No. 37*, 22 Kan. 521, 525.

**As maintenance or support.**

As used in Laws 1872, c. 3, § 1, requiring the sheriff to supply proper board, meat, drink, and fuel for prisoners at his own expense, and everything else necessary for keeping such prisoners, etc., the term "keeping" refers to the maintenance of the prisoners, but not to the protection of the prisoners from escaping, but only to their safe custody. It does not require him to employ any guard to watch the jail or aid in securing the prisoners confined therein. *Mitchell v. Leavenworth County Com'rs*, 18 Kan. 188, 191.

An unpaid helper in a hospital, with permission to use it as an asylum, who received his board and lodging for the work he is required to do, is "kept" therein within the meaning of Const. art. 2, § 3, declaring that no person shall be deemed to have gained or lost a residence by reason of his absence or presence while kept in any almshouse or other asylum or institution wholly or partly supported at the public expense or by charity. *People v. Hagan*, 62 N. Y. Supp. 816, 817, 48 App. Div. 203.

**As make.**

Within the rule of law which declares that a city is bound "to keep" its streets, sidewalks, and bridges in a reasonably safe condition for travel, "to keep" includes the idea expressed by the words "to construct," "to make," especially when coupled with the words "in a reasonably safe condition for travel." To keep a street in such safe condition is to have it so, to make and remake

it so. *City of Atlanta v. Buchanan*, 76 Ga. 585, 589.

A condition in a lease of a farm, requiring the tenant to keep the place in good fence, does not require the tenant to fence land not inclosed at the time of the execution of the lease. *Hazelwood v. Pennybacker* (Tex.) 50 S. W. 199, 202.

#### **As possess or occupy.**

The phrase "keeping a house," in its ordinary acceptance, is equivalent to "having had in possession or occupying it." *Stoltz v. People*, 5 Ill. (4 Scam.) 168, 169.

#### **Keep and bear arms.**

See, also, "Bear."

"Keep and bear arms," as used in Const. U. S. Amend. 2, providing that the right of the people to keep and bear arms shall not be infringed, means "to keep and bear arms of every description, and not such merely as are used by the militia." The right pertains to "the whole people, old and young, men, women, and boys, and not militia only." A law prohibiting the carriage of concealed weapons is not a violation of the provision, though a prohibition of carrying visible weapons would be a violation thereof. *Nunn v. State*, 1 Ga. (1 Kelly) 243, 251; *State v. Jumel*, 13 La. Ann. 399.

#### **Keep animals.**

The word "keep," as applied to animals, has a peculiar signification. "Keep, v. t., to tend; to feed; to pasture; to board; to maintain; to supply with necessities of life." Webster's Dict. In an action to establish a lien for keeping a horse, under a statute giving such lien for food or shelter furnished it, the allegation that plaintiff "kept" the animal was sufficient. *Allen v. Ham*, 63 Me. 532, 536.

"Keep," as used in Gen. Laws 1889, c. 199, providing that any person who pastures or keeps horses at the request of the owner shall have a lien for his charges, the word "keep," being used in connection with the word "pasture," is evidently used in the sense of keeping or boarding.—*Skinner v. Caughy*, 67 N. W. 203, 204, 64 Minn. 375.

#### **Keep company.**

"Keeping company," is a phrase commonly and generally understood as having a definite signification as applied to the relations of unmarried people. It imports attentions on the part of the young man toward a lady. *State v. Brown*, 53 N. W. 92, 93, 86 Iowa, 121.

Where in a prosecution for seduction the prosecutrix on cross-examination testified that no one had kept company with her other than defendant, testimony that another

person had frequently been seen going home with her was not competent to impeach her testimony, as she may have understood "keeping company" as something materially different from walking home with a gentleman. *State v. Payson*, 32 N. W. 484, 485, 71 Iowa, 542.

Where in a prosecution for bastardy the complaining witness testified that she was unmarried at the time of the trial, and that the defendant "kept company" with her for a year and a half, the jury would properly understand her to mean by such phrase that he had been paying his addresses to her with a view to marriage, thus implying she was an unmarried woman. *Durham v. People*, 49 Ill. 233.

#### **Keep false books.**

A statement that a merchant "kept false books," and that the party so stating could prove it, conveys the imputation of a deliberate falsity, and not an incidental one arising from mistake, and is actionable, for it is undoubtedly calculated to impair a confidence in his integrity and injure his credit, which chiefly arises from his being reputed a fair dealer. *Backus v. Richardson* (N. Y.) 5 Johns. 476, 483.

A statement relating to a blacksmith, in relation to his business and trade, that "he keeps false books," is slanderous, for it imputes a want of moral honesty to the blacksmith in relation to his trade, since a book of accounts appertains to his business, and is necessary as well to him as to the merchant and professional man. *Burtch v. Nickerson* (N. Y.) 17 Johns. 217, 8 Am. Dec. 390.

#### **Keep for sale and delivery.**

An allegation that a person did "keep for sale" one pint of cider is equivalent to an allegation that he kept one pint of cider with intent to sell the same, and it was unnecessary to allege further the intent. *State v. Prescott*, 30 Atl. 342, 343, 67 N. H. 203.

"Keeping for sale and delivery," as used in Pub. Laws, c. 596, § 1, prohibiting the keeping for sale and delivery of any intoxicating liquors, etc., should be construed as meaning keeping for sale. The words "and delivery" do not create the offense one other than mere keeping for sale. *State v. Kane*, 6 Atl. 783, 786, 15 R. I. 395.

Pub. St. c. 87, § 26, provides that all liquors kept for the purpose of sale, etc., shall be forfeited, etc. Held, that the words "kept for sale," as used in an indictment under the act, should be construed as synonymous with the words "kept for the purpose of sale," as used in the statute, and as being sufficient to charge the offense, etc. In re *Liquors of Hoxsle*, 3 Atl. 1, 3, 15 R. I. 241.



In a statute providing that no person shall keep or suffer to be kept on his premises, for the purposes of sale and delivery within the state, any intoxicating liquor, etc., the words "and delivery" must be held to have been inserted by way of limitation, so as to make the keeping of the prohibited liquors for sale within the state, to be used as a beverage, inimical only when the keeper intends not only to sell, but also to deliver as well as to sell, within the state. *State v. Murphy*, 10 Atl. 585, 587, 15 R. I. 543.

Keeping spirituous liquor for sale is having possession and control of it with intent and readiness to make a sale or sales, a combination of the means and purpose of being a vendor. It may be a long-continued practice or occupation; it may be instantaneous. It may be proved by evidence of a series of sales or other acts. Like the possession of counterfeit money with fraudulent intent, it is a physical and mental condition that may cease when it has existed in violation of law but for a moment. As there may be a sale without an offer to sell, so there may be a keeping for sale without a sale or offer to sell. *State v. Havey*, 58 N. H. 377, 379.

#### Keep her course.

The words "keep her course," in navigation rule 23, providing that under certain conditions one of two meeting vessels shall keep out of the way and the other shall keep her course, means not only that the vessel shall not depart from the course in which she is going, but also imports that she must not voluntarily stop. A vessel which voluntarily becomes motionless cannot properly be said to keep her course. The word "course," both from its etymology and the primary meaning given to it by lexicographers, signifies a running or moving forward, a continuous progression or advance. *The Britannia*, 14 Sup. Ct. 795, 799, 153 U. S. 180, 38 L. Ed. 660.

#### Keep in repair.

"Keep in repair," as used in Const. § 31, authorizing the organization of drainage districts, and vesting the corporate authorities thereof with power to construct and to maintain levees, drains, and ditches, and to "keep in repair" all drains, ditches, and levees heretofore constructed under the laws of this state, etc., should be construed as synonymous with the word "maintain," as used in the section, there being a mere change of diction in the use of the expressions, and not a difference in meaning. *McChesney v. Village of Hyde Park*, 87 N. E. 858, 862, 151 Ill. 634.

"To keep in repair," as used in a lease by which the lessee covenanted to keep in repair during the continuance of his term,

means to have them in repair at all times during the term. *Luxmore v. Robson*, 1 Barn. & Ald. 584, 585.

To "keep the streets in good repair," as used in a charter of a street railway requiring it to keep the streets occupied by it in good repair, means to uphold, to maintain, or preserve them in good condition. It presupposes that they are in some fair degree of repair when the obligation to keep them so begins to operate. *City of Philadelphia v. Hestonville, M. & F. P. R. Co.*, 35 Atl. 718, 719, 177 Pa. 371.

A lease by which the lessor covenanted to "keep" the premises "in good repair," requires him to put it in good repair where at the execution of the lease it was out of repair. To "keep in good repair" presupposes the putting into it, and means that during the whole term the premises shall be in good repair. *Miller v. McCardell*, 33 Atl. 445, 446, 19 R. I. 304, 30 L. R. A. 682; *Payne v. Haine*, 18 Mees. & W. 541, 545.

A devise of a house, conditioned that the devisee should "keep it in good repair," requires a rebuilding of the house if destroyed by fire. *Tilden v. Tilden*, 79 Mass. (13 Gray) 103, 109.

To "keep the street in repair," as used in a contract requiring a street railway company to keep the street in repair, means "to have it in such state that the ordinary and expected travel of the locality may pass with reasonable ease and safety." *McMahon v. Second Ave. Ry. Co.*, 75 N. Y. 231, 236.

An ordinance requiring a street railway company to keep in repair so many feet of all streets on which their tracks are laid, only requires the company to repair the streets, and does not make it liable for curbing, grading and paving with an entirely new pavement. *City of Chicago v. Sheldon*, 76 U. S. (9 Wall.) 50, 54, 19 L. Ed. 594.

The words "make, alter, and keep in repair," in Act 1878, authorizing commissioners to make, alter, and keep in repair private paths, etc., were held to mean a making, alteration, and preservation of such roads as were at the time, or should be established or ordered to be laid out by legislative authority, and did not vest discretionary power in the commissioners to lay out, make, alter, and keep in repair any roads which they should conceive to be necessary or proper, without regard to legislative action. *Ex parte Withers* (S. C.) 3 Brev. 83, 85, 87.

Rev. St. c. 15, § 9, declares that after a public drain is constructed, and any person has paid for connecting with it, it shall be constantly maintained and kept in repair by the town, so as to afford sufficient and suitable flow for all drainage entitled

to pass through it; and the same section further declares that, if the town does not so maintain and keep it in repair, any person entitled to drainage through it may have an action against the town for the damage thereby sustained. 1 Rev. St. § 14, cl. 17. It will be noticed that the duty here imposed is imperative, and the liability for its nonperformance equivalent to that of an insurer. The statute admits of no excuse; the drain must not only be constantly maintained and kept in repair, but it must be so maintained and kept in repair that it will at all times afford a sufficient flow for all drainage entitled to pass through it, or the town or city must pay the damage. To this extent the statute makes the town or city an insurer. *Blood v. City of Bangor*, 66 Me. 154, 155.

A covenant in a lease to "repair, uphold, and support," or "to well and sufficiently repair," or "to keep in repair and have as found," or "to repair and keep in repair," or "to keep in good repair, natural wear and tear excepted," or "to make all necessary repairs," or "to deliver up in tenantable repair," or "to deliver up the premises in as good a condition as they now are," all impose upon the covenantor the duty of rebuilding or restoring the premises destroyed or injured by the elements. *Armstrong v. Maybee*, 48 Pac. 787, 738, 17 Wash. 24, 61 Am. St. Rep. 898.

#### Keep in reserve.

A will directing that "the residue of my estate be kept in reserve" by my executors for certain charitable purposes is to be construed to mean "held in trust," and hence such residuary estate is held in trust by her executors. *Claypool v. Norcross*, 9 Atl. 112, 42 N. J. Eq. (15 Stew.) 545.

#### Keep a man or woman.

The word "kept" has many significations, according to the subjects to which it is applied. But it is a common and well-established sense of it, when used in reference to connections between the sexes, to denote habitual and criminal carnal conversation amounting to cohabitation. Every one knows at once what is meant by the terms "kept mistress," or what is laid to the charge of a man who is said "to keep a mistress." It is not the meritorious act of providing for or maintaining a virtuous lady in her innocence, but it is the vicious one of having a wanton at his command for carnal gratification, and of keeping her for sensual uses. This is the natural import of the words in themselves, as the people in the country would universally understand them. To say that a man "kept" a woman amounts to a charge of incontinency against her, and is actionable. *McBrayer v. Hill*, 26 N. C. 130, 138.

Where, in an action for defamation, it appeared that defendant said that plaintiff

was keeping a woman not his wife, the court said: "It is difficult to conceive how the charge that the plaintiff 'was keeping Mrs. B.,' when taken in connection with the other words spoken, or considered by themselves, could have been understood by the hearers in any other sense than that the plaintiff was guilty of criminal intercourse with her. If they did not mean that, what did they mean? The words 'keep' and 'keeping' have no doubt several meanings, but their signification in a particular case depends upon the context, the words with which or circumstances under which they are used. But when it is said, in reference to a woman, that a man is 'keeping her,' or of a man that he is 'keeping a woman,' the ordinary and popular construction of that language is that the relation between the parties is one which involves criminal intercourse." *Payne v. Tancil*, 35 S. E. 725, 726, 98 Va. 262.

A charge that a married woman "keeps" a man not her husband would be understood by the ordinary hearer as imputing the crime of adultery. *Henicke v. Griffith*, 29 Kan. 516, 518.

#### Keep open.

A reservation in a deed of 33 feet for a street to be "kept open" gives to the owners of the easement an unobstructed 33 feet for the street, and the owners of the servient estate cannot place a fence across the street, with a gate 10 feet wide, through which the owners of the easement may pass. *Patton v. Western Carolina Educational Co.*, 8 S. E. 140, 101 N. C. 408.

Closing the front door of a saloon on Sunday, and leaving unfastened a back door, through which persons entered and bought drinks, was "keeping open a dramshop," within the meaning of a prohibitory statute. *Blahut v. State*, 34 Ark. 447, 448.

"Keeping open," as used in Rev. St. c. 50, § 1, prohibiting "keeping open" a shop on the Lord's day, should be construed to include permitting general access to a shop through the owner's dwelling house to any one that may please to enter for the purposes of traffic, though the outer entrances were closed. *Commonwealth v. Harrison*, 77 Mass. (11 Gray) 308, 309.

#### Same—As do business.

"Keep open," in a city ordinance providing that no person licensed to keep open a restaurant and beer saloon should keep open a restaurant or saloon on the Christian Sabbath, means that the proprietors of public houses shall temporarily cease to entertain the public. To keep open, as applied to places of business and public houses, is a familiar expression constantly in use. It does not refer to the closing of shutters or barring of doors. These may be done in

order that the place may keep open. It is not met by the mere refusal to sell intoxicating liquors. It means more. As to keep open is a standing invitation that gives the public a right of access and of entertainment, so not to keep open means that this invitation is withdrawn, and that all public entertainment has ceased. *Richards v. City of Bayonne*, 39 Atl. 708, 81 N. J. Law, 496.

The opening of a shop on Sunday, and the sale of food and ice cream to be eaten upon the premises, or furnishing similar entertainment, is a "keeping open of the place for the reception of company," within the meaning of Pub. St. c. 271, § 5, providing that no person shall keep his shop or restaurant open for the reception of company on the Lord's day. *State v. Jacques*, 40 Atl. 398, 69 N. H. 220.

Within the meaning of an ordinance of the city of Detroit "as to quiet and good order," section 1 of which provides that no person shall keep open his or her store, ordinary saloon, barroom, ball alley, beer hall, etc., on the first day of the week, called Sunday, "keep open" implies a readiness to carry on the usual business therein. *Lynch v. People*, 16 Mich. 472, 477.

#### Same—Determined by purpose.

A statute making it criminal to keep open any room on Sunday in which it is reputed that intoxicating liquors are kept for sale will not be construed to include keeping open a room for the purpose of furnishing meals to the regular boarders of accused, where it is not kept open for the purpose of selling intoxicants, though intoxicants are ordinarily sold in such room. *State v. Gregory*, 47 Conn. 276, 277.

Gen. St. § 3097, providing for the punishment of every person who on Sunday shall keep open any place in which any sports or games of chance are at any time carried on or allowed, means providing some way of coming and going sufficient to enable any portion of the public to gather there and take part in the usual business of the place. It does not mean opening the place solely for a proper purpose, unconnected with that business. *State v. Miller*, 36 Atl. 795, 796, 68 Conn. 373.

A statute making it an offense to keep a store open on the Sabbath day means such a keeping open as would induce customers to enter for the purpose of trade or traffic; and hence the mere fact that defendant's door was open for a few moments, but not kept open for any length of time, or for the purpose of inducing trade or traffic, was insufficient to warrant conviction under the statute. *Seelig v. State*, 43 Ark. 96, 98.

#### Keep records.

When it is said that the clerk of a court shall keep a record, or that a record

shall be kept by such clerk, reference is not made to the mere possession and control of the book in which matters are recorded, but rather to the work itself in writing up the record. *Fuller v. United States* (U. S.) 58 Fed. 329, 333.

"Keep," as used in Code, § 1974, declaring that the Secretary of State shall "keep" the records of the state and records and papers belonging to the General Assembly, might be construed in its broadest sense to include the duty to preserve, the duty to prevent spoliation, the duty to prevent interlineation, the duty to prevent entries of any kind upon the record, to bring back the record when it is wrongfully taken from his office, and to replace leaves that have been torn from it, if he can recover them, but does not authorize or require that officer to erase or strike from the records any entry that convinces of its falsity. *State v. Wilson*, 26 South. 482, 489, 123 Ala. 259, 45 L. R. A. 772.

The term "to keep a record," as used in reference to legislative proceedings, means to make a permanent record of the whole proceedings. *Oakland Paving Co. v. Hilton*, 11 Pac. 8, 9, 69 Cal. 479.

#### Keep the old stock good.

The expression "keep the old stock good," as used in the lease of a flock of sheep, means that the same number and quality and ages are to be returned as has been taken out, but not necessarily the same sheep or their increase. *Turnbow v. Beckstead*, 71 Pac. 1062, 1063, 25 Utah, 468.

#### Kept for team work.

In Acts 1866, No. 39, exempting from attachment a horse "kept and used for team work," future intended use is as controlling on the question of exemption as any past use. "Kept and used" signifies that the animal must be kept for team work, or it must be kept with the honest intention and purpose of the owner, within a reasonable time thereafter, to use him for team work, as occasion may require, to enable him with the aid of the animal to procure a livelihood. *Rowell v. Powell*, 53 Vt. 302, 304.

"Kept and used," as the same appears in Rev. Laws, § 1556, exempting from attachment "two horses kept and used for team work," means that the animals must be kept and have been actually used for team work, or be kept with an honest intention of so using them within a reasonable time, in the alternative. Present use is not necessary, but past use may be controlling; but the intention of future use is as controlling as past actual use. *Steele v. Lyford*, 8 Atl. 736, 737, 59 Vt. 230.

The phrase "kept and used for team work," in a statute exempting horses kept

and used for team work, was held not to include a colt about two years old, which a boy who worked out kept at his father's place, although the colt was nearly two years old, and had been used to draw wood a short distance and certain other work, and though it was intended to use the colt for team work. *Sullivan v. Davis*, 50 Vt. 648.

The requirement that a horse, to be exempt from execution, must be "kept and used for team work," does not require that he be exclusively kept for such purpose, as such statutes are to be construed liberally. *Webster v. Orne*, 45 Vt. 40, 42.

#### **Kept in gold and silver.**

The words "to be kept in gold and silver," in a clause in a will by which testator directs that a certain sum shall go to his children, "to be kept for them in gold and silver," does not operate to render the bequest specific, when the money to be paid does not constitute a distinct fund. *Mathis v. Mathis*, 18 N. J. Law (3 Har.) 59, 62.

#### **Kept in operation.**

An agreement by a third person to pay a landowner interest on a sum fixed by him and a railroad company as damages for his land, taken for the construction of the road, contained a condition that the railroad should "be kept in operation." Held that the words "kept in operation," as so used, should not be construed in a loose or popular sense, as signifying that the interest was to be paid so long as the road was not disused or abandoned, nor as relating solely to the nature and extent of the franchise which the railroad had acquired in the plaintiff's land, but that they were intended by the parties as stipulating for the payment of the interest while the road was beneficially operated for the reasonable accommodation of the plaintiff and those for whom he acted in negotiating the contract. *Jepherson v. Hunt*, 84 Mass. (2 Allen) 417, 423.

#### **Kept up.**

A town law that all hogs should be "kept up" intended that "no hogs should go at large," which meant that they should not be free commoners on the highway, and did not intend to interfere with the interior economy or management of every man's farm, so as to compel every farmer to keep his swine in a close pen. *Shepherd v. Hees* (N. Y.) 12 Johns. 433.

#### **KEEPER.**

See "Barkeeper"; "Boarding House Keeper"; "Cow Keeper"; "Dramshop Keeper"; "Hotel Keeper"; "Innkeeper"; "Lodging House Keeper"; "Restaurant Keeper"; "Storekeeper"; "Tavern Keeper."

The word "keeper" is defined to be one who has the care, custody, or superintending of anything, as the "keeper" of a park. *Schultz v. State*, 32 Ohio St. 276, 281.

A keeper is one who has the care, custody, or superintendence of anything. When a husband lives in a house, and exercises acts of control and management, he is the "keeper," notwithstanding the wife may own the building, and carry on the business therein, and receive all the profits. *State v. Rozum*, 80 N. W. 477, 481, 8 N. D. 548.

#### **Of animal.**

"Keeper," as used in Gen. St. 3047, giving a lien for the price of keeping livestock in favor of the keeper until paid, means the one in possession of the animals. *Fishell v. Morris*, 18 Atl. 717, 57 Conn. 547, 6 L. R. A. 82.

When a vicious animal is used in the business of a corporation, the president or manager, who controls and conducts the business and hires or discharges the animal is the keeper, and is responsible for any injuries it may inflict. *Lawlor v. French*, 35 N. Y. Supp. 1077, 1078, 14 Misc. Rep. 497.

The head of a family who has possession and control of a house or premises, and permits a dog to be kept on the premises, is to be regarded as the "keeper" of the dog. *Plummer v. Ricker*, 41 Atl. 1045, 1046, 71 Vt. 114, 76 Am. St. Rep. 757.

How. Ann. St. § 2119 declares that if any dog shall assault or bite, or otherwise injure, any person while traveling the highway, or out of the inclosure of the owner or keeper of such dog, such owner or keeper shall be liable to the person injured in double damages. Held, that the term "keeper," as there used, meant the person having possession of the dog, whether as owner or otherwise, and therefore, where a declaration under the statute alleged that defendant was the keeper of the dog, a recovery could not be had on proof that the dog had been enticed away from defendant by the plaintiff's father and was being kept on the father's premises at his home at the time the injury was done. *Burnham v. Strother*, 33 N. W. 410, 411, 66 Mich. 519.

#### **Same—Harboring.**

One who harbors dogs is liable as their "keeper" for injuries caused by them, though he be not the owner of them. *Bundschuh v. Mayer*, 81 Hun. 111, 30 N. Y. Supp. 622.

The term "keeper" of a dog, in Rev. St. 1889, § 4512, authorizing the recovery of damages against the owner or keeper of a dog for stock killed or damaged by such dog, includes a person who knowingly harbors or

permits his servant to keep a dog on his premises. *Jacobsmeyer v. Foggemoeller*, 47 Mo. App. 560, 563.

The term "keeper," in Pub. St. c. 102, § 93, making the keeper of a dog liable for injuries done by it, does not include a person allowing a dog to be on his premises, occasionally feeding and petting it, and calling and commanding its obedience. The fact that a dog is kept on premises by the owner's nephew, with the consent of the owner, does not conclusively show the owner to be the keeper of the dog. *Baylan v. Everett*, 52 N. E. 541, 172 Mass. 453.

In an action brought against the defendant as keeper of a dog to recover for injuries sustained by the plaintiff from its bite, the court said: "The evidence undoubtedly shows that, though the defendant was not the owner of the dog, it was kept on his premises, with his knowledge and acquiescence. But while it is true that a person, not the owner of a dog, may be liable as its keeper, the mere fact that a dog is kept by its owner on the premises of another, with the knowledge or acquiescence or permission of the owner of such premises, does not of itself make the owner of said premises the keeper of the dog. If the contrary were true, then a landowner might be liable as the keeper of a dog which belonged to, and was at all times in the possession and control of, a tenant or boarder, or even of a guest of a tenant or boarder. The law does not require the owner or occupant of premises to eject every dog that may be or may come upon them, at the risk, unless he does so, of being adjudged its keeper. *Whittemore v. Thomas*, 153 Mass. 347, 26 N. E. 875, 876.

The term "keeper of a dog," within the meaning of a statute making the keeper of a dog liable for damages sustained from the bite of the dog, does not as a matter of law include a city, by reason of the fact that the superintendent of the poor farm of a city keeps a dog at the farm, with the knowledge of one of the overseers of the poor, without objection, and is fed with food furnished by the city for common use of the farm, and during a portion of the time is allowed the run of the farm. *Collingill v. City of Haverhill*, 128 Mass. 218, 219.

Gen. St. c. 105, § 8, providing that the owner or keeper of a dog was liable in double damages for an injury inflicted on the plaintiff by such dog, would include one who, having the possession and control of a house or premises, suffers and permits a dog to be kept on the premises in the way such domestic animals are usually kept. In *Barrett v. Malden & M. R. Co.*, 85 Mass. (3 Allen) 101, in which the court construed a similar statute, it treated the word "keeper" as equivalent to the expression "person who harbors." *Cummings v. Riley*, 52 N. E. 368, 369.

If a dog persisted in returning to his former mistress, and she allowed him to remain, she would become his "keeper" for the time being. One may be in the wrongful possession of a dog, and still be his keeper. A person might even steal a dog, and become his keeper. *Mitchell v. Chase*, 32 Atl. 867, 868, 87 Me. 172.

The term "keeper of a dog" does not include one who harbors a dog temporarily, and thereafter such person is not liable as keeper for injuries inflicted by the dog. *O'Donnell v. Pollock*, 49 N. E. 745, 746, 170 Mass. 441.

**Same—Physical control unnecessary.**

Rev. St. c. 23, § 2, providing that it shall be unlawful to allow any animals to run "at large without a keeper," means to be without the charge of any one having the right of control or not under the care of the keeper, and does not in all cases imply direct physical power to control the actions of the animals; but in some cases moral means will be sufficient, as where the owner was in such proximity to the animals as to control them by his voice, gestures, or the like; and whether in a given case physical or moral power over the animals is necessary depends on their nature, age, character, etc. It is sufficient to constitute the owner of animals their keeper in a given case if it appears that he possesses the means on which a person in the exercise of ordinary care, judgment, and intelligence on these matters would rely to control their actions. *Jennings v. Inhabitants of Wayne*, 63 Me. 468, 470.

**Same—Sole charge unnecessary.**

"Keeper," as used in Rev. St. c. 30, § 1, which provides that double the amount of damage which a dog has done to person or property may be recovered of his owner or keeper in an action of trespass, includes not only the one who has the sole charge of the dog, but also one who has some part in taking charge of him. *Grant v. Ricker*, 74 Me. 487, 488.

**Same—Mother or wife of owner.**

Where defendant owned a house and farm, and was the head of the family, and her son, 28 years old, who was the owner of a dog, worked for her on the farm, which she managed for a portion of the crops grown thereon, she was the keeper of the dog, within Comp. Laws 1897, § 5593, providing that the owner or keeper of a dog assaulting or injuring one traveling on the highway shall be liable therefor. *Jenkinson v. Coggins*, 123 Mich. 7, 81 N. W. 974.

The defendant owned and occupied property on which she and her husband lived. Her husband owned and kept a dog, which bit the plaintiff, who sued defendant for dam-

ages. Held, that the wife was liable for the damage. *Valentine v. Cole*, 1 N. Y. St. Rep. 719, 723.

The term "keeper," in a rule that the keeper of a dog is liable to any one bit thereby, cannot be said, as a matter of law, to include a wife owning premises on which she and her husband reside, and on which she conducts a separate business, by her act in allowing a dog owned by the husband to stay on the premises, and whether she is a keeper of the dog is for the jury. If they were her husband's dogs, and he kept them there against her consent, and she did nothing to maintain or keep them, did not give them food, or protect them, or provide for them in any way, she would not, in the sense of the law, be a keeper of the dogs. *McLaughlin v. Kemp*, 25 N. E. 18, 19, 152 Mass. 7.

The term "keeper of a dog," within the meaning of the rule that a keeper of a dog which is vicious is liable for injuries resulting therefrom, does not apply to a wife living with her husband upon premises owned by her, notwithstanding Code, § 2345, providing that a married woman shall be alone liable for her torts, as the husband is the head of the family, and the keeping of a dog his continuous act, which cannot be classed as the tort of the wife in which the husband did not participate. *Strouse v. Leipf*, 14 South. 667, 668, 101 Ala. 433, 23 L. R. A. 622, 46 Am. St. Rep. 122.

#### Of asylum.

In the chapter relating to insane persons, other than paupers and indigents, the words "keeper of an asylum" mean any person, body of persons, or corporation which has the immediate superintendence, management, and control of an asylum and the patients therein. *Gen. St. Conn. 1902*, § 2735.

If a person keeps or domiciles upon premises owned or occupied by him two or more insane persons for care and treatment, he shall be deemed the keeper of a private asylum. *V. S. 1894*, 3278.

#### Of disorderly house.

"Keeper of a disorderly house," in a penal statute, means the proprietor, and not prostitutes who occupy rooms in such house. *Moore v. State*, 4 Tex. App. 127, 128.

Within the meaning of the New York statute which prohibits the keeping of houses of ill fame, "keeper" would include one who leases a house with the intention that it is to be kept, and which is accordingly kept, for the purposes of public prostitution, and who derives a profit from that mode of using the property. *People v. Erwin* (N. Y.) 4 Denio, 129, 130.

#### Of ferry.

"Keeper of a ferry," as used in Act 1820, which imposed a penalty on any keeper of a ferry who shall take slaves over the Ohio river, means a grantee or lessee having a beneficial interest in and control over the ferry, and does not refer to the ferryman. *Covington Ferry Co. v. Moore*, 38 Ky. (8 Dana) 158, 159.

#### Of gaming device.

A keeper of a gaming device is one who has the management of a device, when used for gaming purposes, or when it is set up with a view to attract people to risk their money on it, and when such attractions are offered for the purpose of gain on the part of the keeper, and does not include one who has a gaming device in his possession for harmless purposes. *McCoy v. Zane*, 65 Mo. 11, 15.

#### Of gaming house.

"Keeper," as used in Laws 1872, p. 462, providing for the punishment of a keeper of a common gaming house, does not mean only one who is the proprietor or lessee thereof, or directly interested in the profits of the business or house. If one has the general superintendence or charge, though simply an employé of the house, he is a keeper thereof. One of the definitions which Webster gives of "keeper" is: "One who has the care, custody, or superintendence of anything." The word "keeper" does not necessarily imply either ownership or the right to participate in the profits of the thing kept. *Stevens v. People*, 67 Ill. 587, 590.

The occupant of a house commonly resorted to for gambling may be the keeper thereof, within the meaning of a statute prohibiting the keeping of such houses, even though there is nothing to show an actual hiring or paying of rent by him. If circumstances exist to satisfy the jury that the room was actually occupied and used for the alleged unlawful purpose, they are to be considered within the intent of the law. *Commonwealth v. Hyde* (Mass.) *Thatcher*, Cr. Cas. 19, 23.

#### Of saloon.

The word "keeper," as used in Act May 1, 1854, § 4, providing for the punishment of the unlawful sale of intoxicating liquors by the keeper of a room or place of public resort, does not exclusively mean the owner of the room, nor of the liquors sold; but, while such owner may be included, it also embraces any one who, though not the owner, has possession of both the room and the liquors, which, together with the unlawful business, are under his care and subject to his management and control. *Schultz v. State*, 32 Ohio St. 276, 281.

A clerk, left temporarily in charge of a place where intoxicating liquors are sold, will not be held chargeable as a keeper of the place. *People v. Rice*, 61 N. W. 540, 541, 103 Mich. 350.

The words "dealer" and "keeper" of a barroom are synonymous, and mean the same thing, as used in an indictment charging defendant with being a dealer or keeper of a barroom. *Hofheints v. State (Tex.)* 74 S. W. 310, 311.

**Of shop.**

A person who was keeping a victualing shop in the name of his wife as her manager and superintendent, without her presence and personal attention, and who had the control over the place and the business done there, and was selling victuals therein without a license, was the "keeper" of the place. *Village of St. Johnsbury v. Thompson*, 9 Atl. 571, 576, 59 Vt. 300, 59 Am. Rep. 731.

**KENO.**

"Keno" is a game at which money or property may be lost or won, and is played by a device containing figures; the players paying an equal amount for the cards which are numbered and registered, and the first number registered completing a line of figures getting all the money paid for the cards bought, except commission of the keno keeper. *Trimble v. The State*, 27 Ark. 355, 359; *Overby v. State*, 18 Fla. 178, 181.

"Keno" is a game in which there are 200 cards, with 15 numbers on each card, 5 numbers in a row; each player buying such a card, for which he pays the keeper of the game 50 cents, and others doing likewise, until several cards are sold. The keeper of the game has a globe, in which are put 90 balls, each numbered from 1 to 90. The "roller," as he is called, turns the globe over and takes out one of the balls, calling out the number of such ball, and if any one of the players have a number on his card corresponding to the number so called out he puts a check on such number on his card, and so on, at each call by the roller, until one of the players has five checks in a row on his card, and he has made what is called

keno, and the game stops, and the money paid for the cards sold is paid over to the holder of the lucky card. It is purely a game of chance, for each person putting up money in effect bets that the card he has selected contains the numbers which will entitle him to the money of the others engaged in the game, and this bet is determined by the device exhibited. It is gaming, and the means used to determine the result is a gambling device. *Portis v. State*, 27 Ark. 360, 363; *Miller v. State*, 48 Ala. 122, 126.

"Keno" is a gambling game, carried on by means of a number of balls, with numbers on them, being placed in an urn-like receptacle or globe swung in the air, from which these balls are drawn. Combinations of corresponding numbers are placed on boards, usually kept in the laps of parties, who choose one or more of such boards. Checks kept for the convenience of change are paid for a combination of numbers, and if this combination is drawn out the successful party holding it receives the pot, containing all the checks put in by the parties, as well as 15 per cent., which is kept by the owner of the keno. Keno resembles a lottery, and in some respects a raffle. Keno does not resemble faro or roulette. *Brown v. State*, 40 Ga. 689, 690.

**KENO BANK.**

A "keno bank" is a device for gambling. *Commonwealth v. Kammerer (Ky.)* 18 S. W. 108.

**KENTUCKY CURRENCY.**

See "Currency of the State."

**KENTUCKY DRAWING.**

Judicial notice will not be taken that the words "drawing," or "Kentucky drawing," designate a game of chance. *State v. Bruner*, 17 Mo. App. 274, 276.

**KEPT.**

See "Keep."

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